**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 3, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**

**NOTICE**



**Appeal No. 2016AP1571** **Cir. Ct. No. 2014CV267**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT III**

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**ETHAN M. HILBERT,**

**PLAINTIFF-APPELLANT,**

**DEAN HEALTHCARE, INC.,**

**INVOLUNTARY-PLAINTIFF,**

**V.**

**WISCONSIN COUNTY MUTUAL INS. CORP., DUNN COUNTY HIGHWAY DEPARTMENT AND COUNTY OF DUNN,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Ethan Hilbert appeals a summary judgment dismissing his personal injury claim against Dunn County and its insurer on the grounds of governmental immunity. Hilbert argues the ministerial duty and known and compelling danger exceptions to immunity apply in this case. We reject his arguments and affirm.

## BACKGROUND

¶2 The facts are undisputed. Hilbert was a passenger in a vehicle that struck a deer at night on a state highway. After the vehicle was parked on the side of the highway, Hilbert got out and inspected the deer as it lay on the road's gravel shoulder. As Hilbert returned to the vehicle, he turned to take a look back at the deer and stepped into an open cement culvert. The culvert measured seven feet deep and three-and-a-half feet wide and was located adjacent to the vehicle and slightly below the road's shoulder.

¶3 Under an annual Routine Maintenance Agreement (the Agreement) with the State, the County was responsible for maintaining the stretch of highway on which the culvert was located. In past years, the County placed certain types of markers near the culvert. According to Thomas Bauer, a County employee assigned to inspect and maintain this stretch of highway, the purpose of the markers was to alert maintenance personnel of the culvert's presence. No marker existed at the time of Hilbert's injury.

¶4 Hilbert sued the County and its insurer claiming the County was negligent in failing to ensure a warning marker was in place near the culvert on the

night he was injured. The County moved for summary judgment, arguing that it was entitled to governmental immunity under WIS. STAT. § 893.80(4) (2015-16),[1] on the basis there was neither a ministerial duty to mark the culvert, nor that the culvert presented a known and compelling danger. In response, Hilbert argued the Agreement and several traffic manuals established the County's ministerial duty to mark the culvert and that the culvert presented a known and compelling danger, preventing dismissal on governmental immunity grounds. The circuit court granted summary judgment and dismissed the case. Hilbert now appeals.

## DISCUSSION

¶5 We independently review a grant or denial of a motion for summary judgment, applying the same method as the circuit court. ***American Family Mut. Ins. Co. v. Outagamie Cty.***, 2012 WI App 60, ¶8, 341 Wis. 2d 413, 816 N.W.2d 340. Summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08.

[1] WISCONSIN STAT. § 893.80(4) (2015-16), provides:

> No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶6 WISCONSIN STAT. § 893.80(4) has been interpreted to "provide[] immunity for the government and its employees for discretionary acts." ***D.B. v. County of Green Lake***, 2016 WI App 33, ¶13, 368 Wis. 2d 282, 879 N.W.2d 131. This statutory grant of immunity, however, is subject to several judicially crafted limitations, *see* ***Lister v. Board of Regents of the Univ. of Wis. Sys.***, 72 Wis. 2d 282, 299-300, 240 N.W.2d 610 (1976), two of which are relevant here—the exceptions for a "ministerial duty" and a "known and compelling danger," *see* ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶24, 253 Wis. 2d 323, 646 N.W.2d 314. When governmental immunity is invoked as a defense, we assume negligence and decide as a matter of law whether § 893.80(4) applies and whether any exceptions to immunity exist. ***Lodl***, 253 Wis. 2d 323, ¶17.

*I. Ministerial duty exception*

¶7 We first address Hilbert's argument that the County had a ministerial duty to place and maintain a culvert marker.[2] The ministerial duty exception is a recognition of the difference "between discretionary and ministerial acts, immunizing the performance of the former but not the latter." ***Id.***, ¶25. A duty is ministerial when "it is absolute, certain and imperative" to the point that "nothing remains for judgment or discretion" when it is performed. ***Lister***, 72 Wis. 2d at 300-01. A ministerial duty must be "positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated." ***Lodl***, 253 Wis. 2d 323, ¶26 (citation omitted).

[2] Both Hilbert and the County cite unpublished per curiam opinions (without identifying them as such) in their briefing, in violation of WIS. STAT. RULE 809.23(3). We caution the parties that future violations of the Rules of Appellate Procedure may result in sanctions. WIS. STAT. RULE 809.83(2).

¶8 The first step in the ministerial duty analysis is to identify a source of law or policy that imposes the alleged duty. ***American Family Mut. Ins.***, 341 Wis. 2d 413, ¶13. Hilbert cites four authorities that he argues required the County to place and maintain culvert markers: the Agreement, the Manual on Uniform Traffic Control Devices (the MUTCD),[3] the Wisconsin Department of Transportation Facilities Development Manual (the Facilities Manual), and the Wisconsin Department of Transportation Highway Maintenance Manual (the Maintenance Manual).

¶9 Hilbert first argues that the Agreement created a ministerial duty by requiring the County "to maintain roadside safety appurtenances and signs" on the highway. Hilbert observes that the culvert in question was marked in prior years, and he cites several Wisconsin cases involving "sign maintenance" that he argues show "a clear preference for liability … when a sign or marker was previously placed but not properly maintained." *See, e.g.*, ***Foss v. Town of Kronenwetter***, 87 Wis. 2d 91, 102-03, 273 N.W.2d 801 (Ct. App. 1978) (town was not immune from liability in its failure to maintain a barricade and sign on a dead-end road, despite that initial decision to place both was discretionary); ***Firkus v. Rombalski***, 25 Wis. 2d 352, 130 N.W.2d 835 (1964) (municipality was liable for failure to maintain a stop sign once a decision was made to place one at an intersection).

[3] All local authorities in Wisconsin are required to comply with the specifications set forth in the MUTCD for maintaining or placing traffic control devices. *See* WIS. STAT. § 349.065; *see also* ***American Family Mut. Ins. Co. v. Outagamie Cty.***, 2012 WI App 60, ¶¶18-19, 341 Wis. 2d 413, 816 N.W.2d 340.

All references to the MUTCD are to the December 2009 version, which may be found at https://mutcd.fhwa.dot.gov/pdfs/2009r1r2/pdf_index.htm (last visited Sept. 20, 2017).

¶10 This argument is flawed in several respects. The preamble of the Agreement broadly states that the "maintenance services authorized under this agreement shall be accomplished in compliance with state and federal law and under the general direction" of the State. However, the portions of the Agreement Hilbert cites do not impose an absolute, certain and imperative duty to place a marker over this or any culvert along the highway. Hilbert insists the Agreement contains two specific requirements to place and maintain the markers, but those provisions indicate only that the County shall be reimbursed for "maintain[ing] safety appurtenances" and performing "permanent sign repair." Nothing in the Agreement directed the County to maintain any specific roadside markers at any culverts.

¶11 Hilbert's reliance on the "sign maintenance" cases is misplaced for two reasons. First, Hilbert fails to prove the State ever directed the County to place culvert markers such that "maintaining" them was transformed into a mandatory duty. Second, we agree with the County the marker is not a "sign" as understood in those cases. We have held that a metal barricade qualified as a "sign" because its purpose was "to warn highway users of a hazardous condition," specifically a sharp drop-off on a dead-end road. ***Foss***, 87 Wis. 2d at 97, 102; *see also* ***Firkus***, 25 Wis. 2d at 358-59 (failure to maintain stop sign actionable). Similarly, under MUTCD § 1A.13(193), a "sign" is "any traffic control device that is intended to communicate specific information to road users through a word, symbol, and/or arrow legend." The missing culvert markers here offered no caution or direction to traffic. As Hilbert acknowledges, Bauer explained the function of the markers was not to alert motorists, but to remind County employees of the culvert's presence while they maintained the highway.

¶12 Hilbert next contends MUTCD § 2C.65, entitled "Object Markers for Obstructions Adjacent to the Roadway," imposed a mandatory duty upon the County to place and maintain hazard markers creating a "standard," for marking "culvert headwalls." MUTCD § 2C.65 discusses both a "standard" and a "support," but contrary to Hilbert's assertion, the decision to place an object marker under that section is not a ministerial duty. With regard to a "support," § 2C.65 states in relevant part:

> [o]bstructions not actually within the roadway are *sometimes* so close to the edge of the road that *they need a marker*. … *In other cases* there *might not be a physical object* involved, but other roadside conditions exist, … *that might make it undesirable* for a road user to leave the roadway, and therefore would create a need for a marker.

(Emphasis added.) Clearly, the wording in § 2C.65, including "sometimes" and "might," creates a discretionary, not mandatory, decision whether and where to place a support. With regard to a "standard," § 2C.65 states in relevant part:

> *If a Type 2 or Type 3 object marker is used* to mark an obstruction adjacent to the roadway, the edge of the object marker that is closest to the road user shall be installed in line with the closest edge of the obstruction.
>
> *Where Type 3 object markers are applied* to the approach ends of guardrail and other roadside appurtances [sic], sheeting without a substrate shall be directly affixed to the approach end of the guardrail in a rectangular shape conforming to the size of the approach end of the guardrail with alternating black and retroreflective yellow stripes sloping downward at a angle of 45 degrees toward the side of the obstruction on which traffic is to pass.

(Emphasis added.) Again, the wording under § 2C.65, "[i]f a Type 2 or Type 3 object marker is used …[,]" creates a discretionary, not mandatory, decision on whether, where and how to place a marker. The MUTCD may be relevant to whether the County was negligent in failing to place or replace a culvert marker,

but as previously indicated, the question of the County's potential negligence is irrelevant to our analysis of ministerial duty versus discretionary action. *See* ***Lodl***, 253 Wis. 2d 323, ¶17.

¶13 Hilbert next argues the Facilities Manual "provide[d] guidance on the location and minimum type of object marker" required at the culvert. "Guidance" alone is not enough to establish a ministerial duty. *See* ***id.***, ¶30 (traffic control manual establishing "guidelines" to act contemplates exercise of discretion). Moreover, Hilbert fails to respond to the County's contention that the Facilities Manual is not applicable here because it only governs road construction and improvement, so we shall not address this issue further. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (unrefuted arguments deemed conceded).

¶14 Finally, Hilbert contends the Maintenance Manual required the County to maintain all object markers along its section of the highway. He points to Chapter 8, § 15(30) of the Maintenance Manual, which provides a "General Maintenance Checklist" for marker posts and states, "Check for missing posts. Check Posts for leaning and rot. Straighten, repair, repaint, restain or replace as necessary." Even if we were to assume this section of the Maintenance Manual applies to markers for culverts, which the County disputes, Hilbert's argument fails. Nothing in § 15(30) of the Maintenance Manual requires the County to place culvert markers in the first instance, and Hilbert has failed to identify any other provision requiring such placement. Moreover, the use of the phrase "as necessary" at the end of the quoted provision denotes the person assigned to replace the posts may exercise discretion on the time, place and manner of doing so. *See* ***Lister***, 72 Wis. 2d at 301.

¶15 Hilbert also seems to argue the County should have placed safety crossbars over the open culvert rather than simply marking it. He specifically asserts § 9.5 of the Maintenance Manual requires crossbars for culvert endwalls measuring over twenty-four inches in diameter. The County responds that § 9.5 of the Maintenance Manual is inapplicable because that section of the Manual only governs driveway permits. Hilbert again does not respond to this assertion in his reply brief, and we deem his silence a concession. *See* ***Schlieper***, 188 Wis. 2d at 322. Accordingly, the circuit court properly determined upon the undisputed facts that the County had no "ministerial duty" to place or replace the culvert marker or a safety crossbar.

*II. Known and compelling danger exception*

¶16 We next address Hilbert's argument that the culvert was a "known and compelling danger." The known danger exception applies to situations where an obviously hazardous situation exists and the nature of the danger is compelling and known to the officer and is of such force that the public officer has no discretion not to act. ***Pries v. McMillon***, 2010 WI 63, ¶23, 326 Wis. 2d 37, 784 N.W.2d 648. In essence, a "ministerial duty" arises under this exception by virtue of the high level of danger and the "self-evident, particularized, and non-discretionary" nature of the desired response. ***Lodl***, 253 Wis. 2d 323, ¶¶38-40. This "narrow" exception is applied on a "case-by-case" basis with the recognition that not every dangerous situation will create a duty to act. ***Id.***, ¶¶4, 38, 40. A danger may be compelling if it entails "conditions that are nearly certain to cause injury if not corrected" or is truly an "accident[] waiting to happen." ***Voss ex rel. Harrison v. Elkhorn Area Sch. Dist.***, 2006 WI App 234, ¶19, 297 Wis. 2d 389, 724 N.W.2d 420.

¶17 Hilbert argues the open culvert was "dangerous," but he does not come to grips with case law applying the "known and compelling danger" exception. In ***Cords v. Anderson***, 80 Wis. 2d 525, 259 N.W.2d 672 (1977), the seminal case on the exception, our supreme court concluded a park manager was liable for failing to correct dangerous conditions posed by nighttime hiking on a path located inches away from a ninety-foot deep gorge. ***Id.*** at 536-37, 541-42. The court noted the park manager's need to erect a barrier or a sign was "on the facts here, a duty so clear and so absolute that it falls within the definition of a ministerial duty." ***Id.*** at 542. The exception was again applied where a dispatch reporter failed to call for a response to a fallen tree that blocked a road, ***Domino v. Walworth County***, 118 Wis. 2d 488, 490-91, 347 N.W.2d 917 (Ct. App. 1984), and where authorities did not attempt a timely rescue of persons trapped in a submerged vehicle, ***Linville v. City of Janesville***, 174 Wis. 2d 571, 587-88, 497 N.W.2d 465 (Ct. App. 1993), *aff'd*, 184 Wis. 2d 705, 516 N.W.2d 427 (1994). By contrast, the exception was not applied where an improperly assembled volleyball pole caused injury as the pole malfunctioned only once in a period of at least fifteen years and an employee had previously investigated the matter. ***Kimps v. Hill***, 200 Wis. 2d 1, 6-7, 16, 546 N.W.2d 151 (1996).

¶18 Hilbert's argument is based on the simple facts that the culvert was uncovered and near the highway's shoulder. But as the above cases demonstrate, more is required. The culvert was a seven-foot drop adjacent to the shoulder of a highway. County officials would not expect pedestrians to walk on the shoulder near the culvert, and the culvert was not near a pedestrian path. *See* ***Cords***, 80 Wis. 2d at 541-42. The culvert also did not infringe upon or disrupt traffic on the highway. *See* ***Domino***, 118 Wis. 2d at 490-91. Again, Bauer explained the former markers were not placed in response to any injury risks to the public, but

rather to remind county employees of the culvert's location while at work. To whatever extent Hilbert argues Bauer knew of any "danger" and should have replaced a prior culvert marker, we again note that is a negligence question immaterial to our analysis. *See* ***Lodl***, 253 Wis. 2d 323, ¶¶17, 42. We conclude the circuit court properly determined upon the undisputed facts the culvert also was not a "known and compelling danger" to the degree required for the immunity exception to apply.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)(5).