COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1825

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

ALMA BICKNESE, M.D.,

PLAINTIFF-APPELLANT,

V.

THOMAS B. SUTULA AND THE BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN SYSTEM,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: ROBERT DeCHAMBEAU, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 DYKMAN, J. Alma Bicknese appeals from a post-verdict judgment dismissing her claims against Thomas Sutula for promissory estoppel and intentional misrepresentation. After the jury found in favor of Bicknese on the

estoppel claim, the trial court entered judgment notwithstanding the verdict and dismissed Bicknese's claims, agreeing with Sutula that he was immune from personal liability as a public employee. Bicknese argues that Sutula was not entitled to immunity either because (1) he was carrying out ministerial rather than discretionary duties, or (2) he acted knowingly and intentionally.[1] We disagree with Bicknese and conclude that neither of the exceptions to immunity on which she relies apply to Sutula. We therefore affirm the judgment.

I. Background

¶2 Bicknese was an assistant professor at the State University of New York at Stony Brook (Stony Brook), but in 1996 she decided to leave Stony Brook and seek a position elsewhere.[2] She applied for a positions in Buffalo, New York, and also at the University of Wisconsin in Madison (UW). Bicknese received a job offer in Buffalo, but told her contact there that she could not accept until she could compare it with an offer from UW.

¶3 During a trip to Madison, Bicknese met with Sutula, Chair of the UW Medical School's Department of Neurology, and other members of the department. Sutula indicated that he was very interested in recruiting her. Because he was the department chair, Sutula was ultimately responsible for recruitment of new faculty. Two or three months later, Bicknese returned to

[1] These are the only issues Bicknese raises. Sutula and the Board of Regents respond to these issues and do not raise as additional defenses the misrepresentation and promissory estoppel issues discussed in the concurring opinion. "One of the rules of well nigh universal application established by courts in the administration of the law is that questions not raised and properly presented for review in the trial court will not be reviewed on appeal." ***Vollmer v. Luety***, 156 Wis. 2d 1, 10, 456 N.W.2d 797 (1990).

[2] We take the factual background in this case primarily from the trial testimony of Bicknese and Sutula.

Madison and met with Sutula several times. Bicknese eventually indicated to Sutula that she needed to make a decision with regard to the Buffalo position.

¶4 At trial, the parties disputed whether Sutula offered Bicknese a job. Bicknese testified as follows:

> Q And could you, please, describe your conversation with Dr. Sutula …?
>
> A I again reiterated that I needed to make a decision. He said that the job [in Madison] was mine for the taking … except for it had been posted incorrectly initially so that they had to go through this set amount of time before they could actually give me a letter of offer.
>
> ….
>
> Q Was there anything else that Dr. Sutula said to you during this conversation?
>
> A Um, he told me I should go ahead and turn down Buffalo.

¶5 Sutula testified that he never made a job offer to Bicknese, and that UW Medical School had no procedure for verbal job offers. He also testified that he did not tell her to turn down the Buffalo offer, but suggested that she let Stony Brook know she might be accepting a position elsewhere. Sutula also conceded that he "did repeat to her throughout that [he] was committed to continuing to work out the details to eventually offer her a job." The trial evidence also contains a letter from Sutula to Bicknese in which he states: "[W]e remain firmly committed to the offer of a position, and we are all determined to do whatever is necessary to bring you to Madison …."

¶6 Bicknese rejected the Buffalo offer, and eventually gave Stony Brook notice of her departure. As it turned out, there was a problem with the proposed tenure clock for Bicknese at UW: a UW committee denied Sutula's

request to extend Bicknese's tenure clock from three to five years. Sutula and the UW Executive Committee subsequently determined that a three-year tenure clock would be insufficient for Bicknese to meet her tenure requirements. Sutula contacted Bicknese to inform her of UW's decision that it was "unreasonable to proceed with a formal job offer …."

¶7 Bicknese sued Sutula and the UW Board of Regents, alleging promissory estoppel, intentional misrepresentation, and strict liability misrepresentation.[3] Sutula and the Board of Regents asserted as an affirmative defense that Sutula was immune from liability because his acts were discretionary. When the case went to trial, the jury was instructed on the promissory estoppel and intentional misrepresentation claims.[4] The jury found in favor of Bicknese on the promissory estoppel claim, but not on the intentional misrepresentation claim. Specifically, the jury answered "no" to the following question: "Did defendant make representations with the intent to deceive and induce plaintiff to act upon such representations?"[5]

[3] Bicknese's complaint also named as defendants the State of Wisconsin, UW Executive Committee, and UW Medical School, including its Department of Neurology. The trial court dismissed all the parties except for Sutula and the Board of Regents, but with respect to the board, the court concluded that its only liability would be to pay the judgment if Sutula were found liable to Bicknese.

[4] The trial transcript in the record is only a partial one, and it does not show the court's instructions to the jury. However, the record contains a list of "Final Jury Instructions" filed with the circuit court on one of the trial days. We assume that these were the instructions the jury heard.

[5] One of the elements of a claim for intentional misrepresentation is that the defendant must have made the false representation of fact with intent to defraud and for the purpose of inducing the plaintiff to act upon it. *See* ***Lundin v. Shimanski***, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985).

¶8 Sutula moved for judgment notwithstanding the verdict, renewing his argument that he was entitled to immunity from liability. The trial court granted Sutula's motion and entered a judgment dismissing Bicknese's claims against him. Bicknese appeals.

II. Analysis

¶9 As a general rule, public officers and employees enjoy immunity from personal liability for injuries resulting from the performance of any discretionary act within the scope of their governmental employment. ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 88, 596 N.W.2d 417 (1999); ***Walker v. Univ. of Wis. Hosps.***, 198 Wis. 2d 237, 249, 542 N.W.2d 207 (Ct. App. 1995). This is a common law substantive limitation on personal liability for damages. ***Ibrahim v. Samore***, 118 Wis. 2d 720, 727, 348 N.W.2d 554 (1984).[6] A determination of the proper scope of official immunity presents a question of law that we review de novo. ***Kimps v. Hill***, 200 Wis. 2d 1, 8, 546 N.W.2d 151 (1996).

¶10 The supreme court has recognized four exceptions to public officer immunity, ***Kierstyn***, 228 Wis. 2d at 90, two of which are relevant here. First, the employee will be liable where she or he engaged in "malicious, willful and

[6] Immunity from personal liability for government employees goes by different names, including "public employee immunity," "public officer immunity," and "official immunity." *See* ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 84, 596 N.W.2d 417 (1999); ***Kimps v. Hill***, 200 Wis. 2d 1, 8, 546 N.W.2d 151 (1996) ("public officer immunity"); ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 514 N.W.2d 48 (Ct. App. 1994) ("public employee immunity"); ***Walker v. University of Wis. Hosps.***, 198 Wis. 2d 237, 249, 542 N.W.2d 207 (Ct. App. 1995) ("official immunity"). It is a doctrine that traces its origins to the common law, ***Kierstyn***, 228 Wis. 2d at 89, although there are corresponding statutory provisions for certain governmental bodies and their officers, agents, and employees, *see* ***C.L. v. Olson***, 143 Wis. 2d 701, 716 n.9, 422 N.W.2d 614 (1988). In any event, immunity from personal liability for public officers and employees should not be confused with sovereign immunity. *See* ***Kierstyn***, 228 Wis. 2d at 89 & n.7. The latter shields the state itself, as well as its "arms and agencies," and has its underpinnings in the constitution. *See* WIS. CONST. art. IV, § 27; ***Walker***, 198 Wis. 2d at 242.

intentional conduct." ***Id.*** at 90-91 n.8. Second, if the public employee's act was ministerial rather than discretionary, then that employee will not be immune from liability. ***Id.*** at 91.

A. Ministerial or Discretionary

¶11 A public employee's duty is ministerial "only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." ***Kierstyn***, 228 Wis. 2d at 91 (quoting ***Lister v. Board of Regents***, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976)). In contrast, a discretionary act is one that involves choice or judgment. ***Ottinger v. Pinel***, 215 Wis. 2d 266, 274-75, 572 N.W.2d 519 (Ct. App. 1997).

¶12 Bicknese argues that Sutula had a ministerial duty to comply with his promise of a job offer. Before we address her argument further, we summarize several relevant cases, beginning with the case Bicknese relies on, ***Major v. County of Milwaukee***, 196 Wis. 2d 939, 539 N.W.2d 472 (Ct. App. 1995). In ***Major***, the plaintiff purchased some property from Milwaukee County. ***Id.*** at 941. The parties made a contract, which stated that the county had "no notice or knowledge of … the presence of any dangerous or toxic materials or conditions affecting the property." ***Id.*** at 941-42. But in fact, the county's files contained a report indicating that the property was filled in with "foundry sand," which was known to contain "dangerous and toxic material." ***Id.*** at 942-43. We concluded as follows: "Milwaukee County and its officers had discretion whether to sell property [the county] owned, and to determine terms of sale that were agreeable to it. Once those terms of sale were set and reified in the contract, however, the

County was under a ministerial duty to comply." ***Major***, 196 Wis. 2d at 944-45 (citation omitted).

¶13 In some contrast to ***Major*** is ***Barillari v. City of Milwaukee***, 194 Wis. 2d 247, 533 N.W.2d 759 (1995). In ***Barillari***, police officers had assured a sexual assault victim that they would apprehend and arrest the assailant, her ex-boyfriend. ***Id.*** at 250, 257. Specifically, the police promised to send officers to the victim's house at a specific time on a specific date to arrest the ex-boyfriend. ***Id.*** at 257. However, the police did not do so, and the district attorney decided to give the ex-boyfriend a few days to turn himself in. ***Id.*** at 253. When the ex-boyfriend instead returned to the victim's home and killed her, the victim's parents sued the city based on the officer's failure to act. ***Id.*** at 250. The supreme court concluded that the police officers' "promise" did not transform their discretionary acts during the investigation into ministerial duties. ***Id.*** at 255-56. In so concluding, the court relied heavily on the unique role police discretion plays in effective law enforcement:

> [T]he nature of law enforcement requires moment-to-moment decision making and crisis management which, in turn, requires that the police department have the latitude to decide how best to utilize law enforcement resources. Unlike those professionals who have a set daily calendar they follow, police officers have no such luxury. For these reasons, it is clear that law enforcement officials must retain the discretion to determine, at all times, how best to carry out their responsibilities.

Id. at 260.

¶14 Less than a year after ***Barillari***, the supreme court again addressed the issue of official immunity and ministerial duties in ***Kimps***. There, the plaintiff was a student teacher who was injured by a volleyball net pole while instructing

young children. ***Id.*** at 5-6. One of the defendants was the professor overseeing Kimps' class. ***Id.*** at 5, 7. The plaintiff argued that once the professor had decided to use the volleyball equipment at issue, he assumed a ministerial duty to assure the equipment was safe. ***Id.*** at 12. Relying on ***Barillari***, the court rejected that argument:

> We held [in ***Barillari***] that any "promise" that was made by the police "did not transform the character of their discretionary acts during the investigation of the case to ministerial duties." Similarly, we find that Professor Hill's decision to allow his students to teach a section on volleyball in a class devoted to teaching physical education did not transform his exercise of discretion in how to conduct that class into a ministerial duty.

Kimps, 200 Wis. 2d at 13-14 (citation omitted).

¶15 Finally, there is ***Kierstyn***. In ***Kierstyn***, 228 Wis. 2d at 85, a school district benefits specialist misinformed one of the district's teachers with regard to her disability benefits. As a result, the employee's spouse eventually received a survivor benefit of only $400 per month rather than $1,100 per month. ***Id.*** at 100 (BABLITCH, J., dissenting). The supreme court acknowledged that the statute may have been clear and that the benefits specialist may have negligently applied it. ***Id.*** at 95. Nevertheless, the court concluded, the statute did not direct the benefits specialist to act in any particular manner, and thus, he was not carrying out a ministerial duty. ***Id.*** In reaching its conclusion, the court reasoned: "In the end, Kierstyn's argument really is not that the statute imposed any duty on [the benefits specialist] to provide information, only that [he] negligently interpreted the clear provisions of the statute. … [T]o argue that the statute is clear is to miss the point of immunity." ***Id.*** at 94. Citing the circuit court's decision, the court

held that "[t]he fact that certain conduct may have been negligent does not transform that conduct into a breach of a ministerial duty." ***Id.*** at 94-95.

¶16 Turning to the facts of Bicknese's case, we first address her argument that her case is controlled by ***Major***. In ***Major***, there was a contract that could be complied with or not complied with. Here, there is no contract; instead, there is promissory estoppel, so we do not view ***Major*** as controlling. Were we to ignore the distinction between breach of contract and promissory estoppel, the ***Major*** case might be more compelling. However, a contract is clearly not the same thing as a promise underlying a promissory estoppel claim. "[T]he promissory estoppel theory applies only when no contract exists, oral or otherwise, or the contract fails to address the essential elements of the parties' total business relationship." ***Spensely Feeds, Inc. v. Livingston Feed & Lumber, Inc.***, 128 Wis. 2d 279, 291 n.8, 381 N.W.2d 601 (Ct. App. 1985); *see also* ***Kramer v. Alpine Valley Resort, Inc.***, 108 Wis. 2d 417, 425, 321 N.W.2d 293 (1982) (noting that, generally, "the existence of a contractual relationship will bar a claim based on promissory estoppel"). We cannot adopt Bicknese's interpretation of ***Major*** because that interpretation conflicts with ***Kierstyn***, ***Kimps***, and ***Barillari***. "The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶17 The rule from ***Barillari*** is clear: a promise does not by itself transform a discretionary act into a ministerial duty. While it is true that the supreme court's decision in ***Barillari*** was specifically based on law enforcement's need for wide discretion, in ***Kimps*** the court readily applied ***Barillari*** outside the law enforcement context. In our view, ***Kimps*** illustrates that the ***Barillari*** rule is broadly applicable and that in turn, the definition of what is "ministerial" for

purposes of official immunity remains narrow. We thus apply the rule from ***Barillari*** here, and conclude that though Sutula may have promised Bicknese a job, that promise did not transform Sutula's discretionary acts into ministerial ones. Neither did his promise create a ministerial duty to fulfill that promise, as might a specific term of a contract.

¶18 At times, Bicknese's arguments meld or mix the concepts of the duty of care with the concept of a ministerial duty. In her brief, she asserts that "Sutula breached a ministerial duty to prevent (or not cause) reasonably foreseeable harmful reliance," and that "all government officials engaged in business negotiations … have a ministerial duty that is absolute, certain, and imperative to not make representations upon which an innocent party will rely …." We think that these are the sorts of statements that the supreme court was addressing in ***Kierstyn***, 228 Wis. 2d at 95, when it explained that negligence does not transform otherwise discretionary conduct into the "breach of a ministerial duty." We assume negligence when we consider official immunity. *See* ***Kimps***, 200 Wis. 2d at 12. We are satisfied that Sutula did not breach any ministerial duties by promising Bicknese a job and then failing to follow through on that promise.

B. Malicious, Willful, and Intentional

¶19 Bicknese also argues that Sutula's conduct was knowing and intentional, thereby excepting him from the general rule of immunity even though his acts were discretionary. The parties dispute whether the proper standard with regard to this exception to immunity is to be read in the conjunctive or disjunctive, that is, whether the employee's conduct must be "malicious, willful, *and* intentional" or simply "malicious, willful, *or* intentional."

¶20 We conclude that this exception to immunity is properly stated as requiring conduct that is malicious, willful, *and* intentional. Although ***Ottinger***, 215 Wis. 2d at 273, and ***Walker***, 198 Wis. 2d at 249, use the disjunctive "or," the bulk of the case law favors the conjunctive "and," *see* ***Willow Creek Ranch, LLC v. Town of Shelby***, 2000 WI 56, ¶26, 235 Wis. 2d 409, 611 N.W.2d 693; ***Kierstyn***, 228 Wis. 2d at 90-91 n.8; ***Kimps***, 200 Wis. 2d at 10 n.7; ***Barillari***, 194 Wis. 2d at 257, ***C.L. v. Olson***, 143 Wis. 2d 701, 711, 422 N.W.2d 614 (1988); ***Ibrahim***, 118 Wis. 2d at 728; ***Lister***, 72 Wis. 2d at 302; ***Spencer v. Brown County***, 215 Wis. 2d 641, 647, 573 N.W.2d 222 (Ct. App. 1997); ***Deegan v. Jefferson County***, 188 Wis. 2d 544, 554 n.5, 525 N.W.2d 149 (Ct. App. 1994); ***Wagner v. DHSS***, 163 Wis. 2d 318, 322, 471 N.W.2d 269 (Ct. App. 1991); *but see* ***Protic v. Castle Co.***, 132 Wis. 2d 364, 369, 392 N.W.2d 119 (Ct. App. 1986) (referring to the standard as "willful or malicious"). Moreover, ***Ottinger*** and ***Walker*** rely on ***Barillari*** for their disjunctive phrasing, even though ***Barillari*** states the standard in the conjunctive.

¶21 In addition, the most recent supreme court case discussing the exception uses the conjunctive. *See* ***Willow Creek***, 2000 WI 56 at ¶26. Where decisions of the supreme court are inconsistent, we will follow whichever is the most recent. ***Fritsche v. Ford Motor Credit Co.***, 171 Wis. 2d 280, 301, 491 N.W.2d 119 (Ct. App. 1992).

¶22 Having concluded that the proper phrasing of the immunity exception is that the public employee's conduct must be malicious, willful, *and* intentional, we turn to the question of whether Sutula's conduct met this standard and conclude that it did not. Bicknese has not asserted that Sutula acted maliciously, and the jury found that he did not act with the intent to deceive Bicknese. Bicknese relies on the jury's determination that Sutula made

representations "knowing they were untrue or recklessly without caring whether they were true or untrue," but this finding does not support a conclusion that Sutula's conduct was malicious, willful, and intentional.

¶23 While Sutula's conduct may have been negligent, if not irresponsible and unprofessional, unfortunately for Bicknese this does not preclude his immunity. Any time immunity from liability is granted, the result may seem harsh in an individual case. *See* ***Meyer v. School Dist. of Colby***, 226 Wis. 2d 704, 709, 595 N.W.2d 339 (1999). But the very nature of immunity is that it denies plaintiffs a legal remedy where they would otherwise have one. *See* ***Kierstyn***, 228 Wis. 2d at 100. We affirm the trial court's judgment dismissing Bicknese's claims.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶24 ROGGENSACK, J. (*concurring*). I concur in the court's conclusion that the circuit court did not err in dismissing Bicknese's claim, for intentional misrepresentation and promissory estoppel against Sutula. However, I do not join in the majority opinion because I do not agree with its discussion of discretionary act immunity.

¶25 To abrogate discretionary immunity for acts Sutula committed within the scope of his employment by the University, Bicknese would have to prove either that Sutula made an intentional misrepresentation or that Sutula negligently performed ministerial rather than discretionary acts during his negotiations with Bicknese. ***Ibrahim v. Samore***, 118 Wis. 2d 720, 728, 348 N.W.2d 554, 558 (1984). In order to establish a claim for intentional misrepresentation against Sutula, Bicknese had to prove: (1) that Sutula made a factual representation; (2) that the representation was untrue; (3) that Bicknese believed the representation to be true and relied on it to her detriment; (4) that Sutula either knew the representation was untrue when he made it or made it recklessly without caring whether it was true or false; and (5) that Sutula made the representation with the intent to defraud and to induce her to act upon it. ***Grube v. Daun***, 173 Wis. 2d 30, 53-54, 496 N.W.2d 106, 114 (Ct. App. 1992). Here, the jury found that Sutula did not make representations with the intent to deceive Bicknese and induce her to act on the representations. Therefore, I conclude that Bicknese simply did not prove her intentional misrepresentation claim.

¶26 In regard to whether Sutula's acts were discretionary or ministerial, Bicknese would have to have proved that Sutula's acts were "absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." ***Lister v. Board of Regents***, 72 Wis. 2d 282, 301, 240 N.W.2d 610, 622 (1976); ***Kimps v. Hill***, 200 Wis. 2d 1, 10-11, 546 N.W.2d 151, 156 (1996) (quoting ***Lister***). Sutula raises the argument that his acts involved judgment and decision-making and therefore, were discretionary. However, this argument is never addressed in Bicknese's reply brief. She identifies no act that was ministerial. Instead, she ably describes the policy underpinnings of discretionary act immunity. Accordingly, I would take that omission as a concession that no liability is being asserted based on the contention that Sutula's acts were ministerial. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994). Furthermore, a promise made by a state employee during the scope of his employment does not turn an otherwise discretionary act into a ministerial duty. *See* ***Barillari v. City of Milwaukee***, 194 Wis. 2d 247, 255-56, 533 N.W.2d 759, 762 (1995).

¶27 Additionally, we can resolve Bicknese's appeal of her promissory estoppel claim without analyzing discretionary act immunity. If the requisite criteria are present, promissory estoppel allows the court to create an equitable contract between the parties when no contract-in-fact exists. *See*, *e.g.*, ***Kramer v. Alpine Valley Resort, Inc.***, 108 Wis. 2d 417, 425, 321 N.W.2d 293, 297 (1982). However, Sutula was not dealing with Bicknese to be employed by him. She was seeking to enforce a claim for employment by the University. Therefore, if the court were to create an equitable contract of employment under a promissory

estoppel theory, it could not create it between Bicknese and Sutula.[7] Accordingly, it is unnecessary to determine whether discretionary act immunity shields Sutula from the promissory estoppel claim. And finally, in my view, discretionary act immunity applies to torts. It does not apply to contract actions, such as an action for breach of contract damages based on promissory estoppel. *See* ***Energy Complexes, Inc. v. Eau Claire County***, 152 Wis. 2d 453, 464, 449 N.W.2d 35, 39 (1989). For these reasons, I respectfully concur.

[7] The University is not a party to this appeal. From the record, I cannot determine whether that is because of a pending decision on its sovereign immunity defense or some other factor.