COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP543 **Cir. Ct. No. 2008SC1745**

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

JEFF VOIGT,

PLAINTIFF-APPELLANT,

V.

MATTHEW FRANK, MICHAEL THURMER, DON STRAHOTA, SGT. WALLER AND CO MUELLER,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] This is a small claims action in which Jeff Voigt, an inmate at Waupun Correctional Institution, seeks to recover damages

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

from five state officers and employees for the severing of his television cord in his cell by another inmate. The circuit court concluded the complaint failed to state a claim for relief and ordered it dismissed. Voigt appeals, contending that the circuit court failed to give a liberal construction to his complaint and erred in concluding that he could have amended his complaint to cure the deficiencies under WIS. STAT. ch. 799, which governs small claims actions. For the reasons we explain below, we reject Voigt's arguments and affirm the order of dismissal and the order denying Voigt's motion for reconsideration.

¶2 Liberally construed, Voigt's complaint alleged as follows. While he was on library detail pass on March 29, 2007, between 5:45 p.m. and 7:15 p.m., the television cord in his cell was severed. He was required by Waupun Correctional Institution policy to leave his cell door open. The defendants—Secretary of the Department of Corrections Matthew Frank, Warden Michael Thurmer, Security Director Don Strahota, Sgt. Waller, and CO Mueller—were contributorily negligent. They had a ministerial duty to make rounds every one-half hour, they knew there was a danger that this incident could occur because they knew there was ongoing theft, and they knew about the requirement that the cell doors be open. They were contributorily negligent because they failed to make the rounds and failed to prevent the danger. They failed to replace the cord. Voigt requested $107.50 for the replacement of the television, $17.25 in shipping and handling, and $3,000 from each defendant.

¶3 Accompanying the complaint was a memorandum that discussed the doctrine of immunity for state officers and employees and the exceptions for a ministerial duty and for a known danger, which Voigt asserted were applicable.

¶4 The circuit court reviewed the summons and complaint and accompanying documents and concluded that Voigt had provided all the documentation required under WIS. STAT. § 801.02(7)(c) and (d).[2] The court also reviewed the complaint as it is required to do under WIS. STAT. § 802.05(4)(b)4.[3] to determine whether it stated a claim upon which relief might be granted and

[2] WISCONSIN STAT. § 801.02(7)(c) and (d) provides:

> (c) At the time of filing the initial pleading to commence an action or special proceeding, including a petition for a common law writ of certiorari, related to prison or jail conditions, a prisoner shall include, as part of the initial pleading, documentation showing that he or she has exhausted all available administrative remedies….
>
> (d) If the prisoner seeks leave to proceed without giving security for costs or without the payment of any service or fee under s. 814.29, the court shall dismiss any action or special proceeding, including a petition for a common law writ of certiorari, commenced by any prisoner if that prisoner has, on 3 or more prior occasions, while he or she was incarcerated, imprisoned, confined or detained in a jail or prison, brought an appeal, writ of error, action or special proceeding, including a petition for a common law writ of certiorari, that was dismissed by a state or federal court for any of the reasons listed in s. 802.05 (4) (b) 1. to 4….

[3] WISCONSIN STAT. § 802.05(4)(a) and (b) provide in part:

> (a) A court shall review the initial pleading as soon as practicable after the action or special proceeding is filed with the court if the action or special proceeding is commenced by a prisoner, as defined in s. 801.02 (7) (a) 2.
>
> (b) The court may dismiss the action or special proceeding under par. (a) without requiring the defendant to answer the pleading if the court determines that the action or special proceeding meets any of the following conditions:
>
> ….
>
> 4. The action or proceeding fails to state a claim upon which relief may be granted.

concluded it did not. The court notified Voigt of these two conclusions in a letter dated January 16, 2008. Accompanying the letter was a draft decision that dismissed the complaint without prejudice for failure to state a claim for relief. The court's letter to Voigt stated that he would have until January 31, 2008, to "respond to the proposed dismissal. I will then take the appropriate action without any additional hearing."

¶5 The circuit court's draft decision stated that the complaint was devoid of facts relating to the conduct of the named defendants and there were insufficient factual allegations relating to a duty of care that any of the defendants might have had with respect to his personal property. The court noted that there were no factual allegations explaining how or why the named defendants had the knowledge Voigt attributed to them or describing how they performed roles in which they were required to or could have taken action to prevent the damage to his property.

¶6 In response to the court's letter and draft decision, Voigt submitted a second memorandum. In this memorandum he argued that the court was to give a liberal construction to his allegations and that he had sufficiently alleged the defendants had a ministerial duty. He also elaborated on his position that they had a ministerial duty to make rounds and prevent the damage to his property and that they knew there was a danger of that happening. There were assertions of fact in the second memorandum that were not included in the complaint. Voigt asserted that CO Mueller said he did not have time to do the rounds and he failed to make the three scheduled rounds at 6:00 p.m., 6:30 p.m., and 7:00 p.m. Voigt also asserted that Bradley said, in the presence of defendants Waller and Mueller, that "there are a lot of thefts around here." He also asserted that Waller's conduct was "passively contributory for his failure to conduct room searches for objects

capable of severing a t.v. cord ….” Finally, he also asserted that defendants Frank, Thurmer, and Strahota “[bore] the same contributory negligence” as the other defendants.

¶7 The circuit court concluded that Voigt had not cured the deficiencies in the complaint because he had not filed an amended complaint, and it dismissed the complaint.

¶8 Voigt moved the court to reconsider, arguing that WIS. STAT. ch. 799 does not provide procedural rules for amending a complaint. The circuit court denied the motion. It stated that, although ch. 799 did not have a specific section regarding the contents of an amended complaint, the required contents of the complaint were clearly set forth in WIS. STAT. § 799.06(3). The court also stated that, even if it did construe the second memorandum decision as an amended complaint, that document did not remedy the flaws in the initial complaint. The court referred to WIS. ADMIN. CODE § DOC 309.20(3)(g) (Sept. 1998), which Voigt had cited in his second memorandum. That regulation provides:

> Repair of inmate property shall be at the inmate’s expense. Loss or damage to property caused by another inmate is not the responsibility of the institution. Repair or replacement of loss or damage caused by institution staff shall be at the expense of the institution. Value of property shall be determined in accordance with sub. (5).

The court reasoned that this regulation expressly provides that the staff is not liable for damage to property caused by another inmate, and neither the complaint nor the second memorandum alleged any facts showing the staff caused the damage to the property.

¶9 Although our analysis is somewhat different from that of the circuit court, we conclude that the circuit court correctly concluded that the complaint,

even adding the factual assertions from the second memorandum, did not state a claim for relief. Because we treat the factual assertions in the second memorandum as supplementing the factual allegations in the complaint, it is unnecessary to address Voigt's assertion that WIS. STAT. ch. 799 does not establish a procedure for amending a complaint.

¶10 The general rule is that state officers and employees are immune from personal liability for injuries resulting from acts performed within the scope of their official duties. ***Kimps v. Hill***, 200 Wis. 2d 1, 10, 546 N.W.2d 151 (1996). When a complaint alleges a negligence claim against a state officer or employee, it does not state a claim for relief unless it alleges circumstances that warrant an exception to the general rule of immunity. ***C.L. v. Olson***, 143 Wis. 2d 701, 706-07, 725, 422 N.W.2d 614 (1988). The defense of discretionary act immunity focuses on whether the action or inaction upon which liability is premised is entitled to immunity. ***Lodl v. Progressive Northern Ins. Co.***, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314.

¶11 While immunity is the rule, it is subject to certain exceptions. The two that Voigt invokes in his complaint are the ministerial duty exception and the known danger exception.

¶12 The ministerial duty exception applies when a duty 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." ***Scott v. Savers Prop. and Cas. Ins. Co.***, 2003 WI 60, ¶27, 262 Wis. 2d 127, 663 N.W.2d 715 (citation omitted). The known danger exception applies when "there exists a known present danger of such force that the time, mode and occasion for

performance is evident with such certainty that nothing remains for the exercise of judgment and discretion." ***Lodl***, 253 Wis. 2d 323, ¶38 (citation omitted).

> In this context, the ministerial duty arises not by operation of law, regulation or government policy, but by virtue of particularly hazardous circumstances—circumstances that are both known to the [employer] and sufficiently dangerous to require an explicit non-discretionary … response….
>
> For the known danger exception to apply, the danger must be compelling enough that a self-evident, particularized, and non-discretionary … action is required. The focus is on the specific act the [employee] is alleged to have negligently performed or omitted.

Id., ¶¶39-40.

¶13 Liberally construing Voigt's complaint and the factual assertions in the second memorandum, he is alleging that Mueller and Waller were negligent in two respects: failing to prevent the damage to his property while he was at library detail and failing to make half-hour rounds.

¶14 Considering the known danger first, we concluded there are no factual allegations in the complaint or the second memorandum, or reasonable inferences from those allegations, that show the type of compelling danger that would require Mueller and Waller to take a particularized and non-discretionary action. The possibility that an inmate might destroy or take the property of another inmate is very far from the facts of those few cases that have found the known danger exception applicable. *See* ***Cords v. Anderson***, 80 Wis. 2d 525, 541-42, 259 N.W.2d 672 (1977) (danger to hikers of a trial alongside a ninety-foot unguarded gorge); ***Domino v. Walworth County***, 118 Wis. 2d 488, 490-92, 347 N.W.2d 917 (Ct. App. 1984) (a downed tree across a road at night); ***Linville v.***

City of Janesville, 174 Wis. 2d 571, 576-77, 497 N.W.2d 465 (Ct. App. 1993) (a submerged van with occupants).

¶15 Turning next to the ministerial exception, even if we assume for purposes of our immunity analysis that Mueller and Waller had a duty to prevent inmates from damaging another inmate's property in the circumstances Voigt alleges, it is not a ministerial duty. It is, rather, an excellent example of a duty that involves discretion and judgment.

¶16 With respect to the alleged failure to make rounds every half hour, we cannot understand from Voigt's complaint or second memorandum the source of this requirement. A ministerial duty must be imposed "by law." ***Meyers v. Schultz***, 2004 WI App 234, ¶¶14, 19, 277 Wis. 2d 845, 690 N.W.2d 873. Whether a statute or a regulation or policy imposes a ministerial duty requires an analysis of the precise wording to determine whether it does impose a duty that is "absolute, certain and imperative, involving merely the performance of a specific task[.]" *See* ***Scott***, 262 Wis. 2d 127, ¶27 (citation omitted). We cannot undertake that analysis without a citation to the statute or regulation or policy on which Voigt is relying.

¶17 We note that, even if we were to assume that some statute, regulation or policy imposed a ministerial duty on Mueller and Waller to make rounds of Voigt's cell every half hour and assumed they were therefore not immune from a suit alleging negligence for the failure to do so, the complaint supplemented by the factual assertions in the second memorandum still does not state a claim for relief. There are no allegations that, reasonably construed, show a causal connection between the alleged failure of these two defendants to make the half-hour rounds and Voigt's injury. Without more details about when the

incident occurred with reference to the required time for the rounds, it is not reasonable to infer that the defendants' looking into his cell at half-hour intervals while he was in the library would have prevented an inmate from entering his cell and severing the cord.

¶18 The only assertions in the second memorandum regarding defendants Frank, Thurmer, and Strahota are that they were contributorily negligent because of the conduct of Mueller and Waller. Because we have concluded the complaint does not state a claim for relief against these last two defendants, it does not a state a claim for relief against the other three defendants.

¶19 Because the complaint, even supplemented by the factual assertions in the second memorandum, does not state a claim for relief against any defendant, we affirm the circuit court's order of dismissal and its order denying Voigt's motion for reconsideration.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.