

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 26, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP995

Cir. Ct. No. 2007CV319

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

PHILLIP K. SAEGER,

PLAINTIFF-APPELLANT,

V.

COUNTY OF ROCK,

DEFENDANT-RESPONDENT,

HEALTH PROFESSIONALS, LTD.,

DEFENDANT.

APPEAL from an order of the circuit court for Rock County:
DANIEL T. DILLON, Judge. *Affirmed.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Phillip Saeger appeals an order dismissing his complaint against Rock County. We conclude the County is immune from suit, and we affirm.

¶2 Saeger asserts that the County failed to perform a duty to keep him separate from a fellow jail inmate who he alleges attacked him and was previously known by jail staff to be dangerous. He asserts that the other inmate had previously fought with or attacked other inmates and staff; had stated that he suffered from schizophrenia; had been institutionalized for mental problems; and had displayed various bizarre or threatening behaviors. He asserts that the County failed to take various measures to examine, separate, and observe this inmate, and to protect Saeger from being attacked by him.

¶3 On the County's motion for summary judgment, the circuit court held that the County was immune from suit. Whether summary judgment is proper presents a question of law which we review de novo, using the same methodology as the circuit court. *Ottinger v. Pinel*, 215 Wis. 2d 266, 272-73, 572 N.W.2d 519 (Ct. App. 1997), *abrogated on other grounds by Bicknese v. Sutula*, 2003 WI 31, ¶19, 260 Wis. 2d 713, 660 N.W.2d 289.¹

¹ In *Ottinger v. Pinel*, 215 Wis. 2d 266, 273, 572 N.W.2d 519 (Ct. App. 1997), we articulated the exception to public employee immunity for actions that are malicious, willful, and intentional in the disjunctive, stating that the exception was for “willful, malicious *or* intentional conduct.” (Emphasis added.) *Bicknese v. Sutula*, 2003 Wis. 31, ¶19, 260 Wis. 2d 713, 660 N.W.2d 289, abrogated our statement in *Ottinger*, holding that the terms “malicious,” “willful,” and “intentional” should be read in the conjunctive. However, in *Ottinger* we were not asked to apply that exception but instead two other exceptions, the ministerial duty and the known and present danger” exceptions. *See infra* paragraphs 5-8.

¶4 With certain exceptions governmental actors are immune by operation of WIS. STAT. § 893.80(4) (2007-08)² from suits “for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.” Saeger first argues that the exception for ministerial duties applies. Under that exception defendants can be sued for negligent performance of ministerial duties, which are those that are “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.” *Kimps v. Hill*, 200 Wis. 2d 1, 10-11, 546 N.W.2d 151 (1996) (citation omitted).

¶5 Saeger argues that protecting him from the other inmate was a ministerial duty. We disagree. Saeger does not point to any rule or statute that expressly imposes this duty or sets forth the manner of performing it such that nothing remains for judgment or discretion. The County directs our attention to *Ottinger*. The plaintiff in that case was allegedly injured by an escaped prison inmate, and the defendants were prison guards whose negligence allegedly permitted the escape. *Ottinger*, 215 Wis. 2d at 271-72. The plaintiff argued that the guards should not be immune because their duty to prevent an escape was ministerial. *Id.* at 273.

¶6 In that case the plaintiff was able to point to a rule that imposed on the guards a duty to prevent escape. *See id.* at 275. The rule did not specify the methods for doing that, but an applicable policies and procedures manual was

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

written in discretionary terms. *Id.* at 275-76. Reviewing those procedures, we wrote:

Despite the general duty to prevent an escape, correctional officers are given wide latitude in determining how to handle an escape, how much force, if permitted, is necessary to prevent an escape and at what point to stop the pursuit. Not only do the guards have a duty to prevent and/or pursue an escapee, they have a specific and competing duty to maintain order in the facility by supervising the remaining, nonescaping inmates. Such duties require quick judgment by the guards on the appropriate action to take and, therefore, are not ministerial.

Id. at 276.

¶7 While *Ottinger* is not directly analogous to the current case, it is instructive. Even if we were to agree that the County had a general duty to protect Saeger from other inmates, he has not pointed to anything that specifies the manner in which this must be done. Instead, the very nature of monitoring and housing a jail population calls for exercise of judgment and discretion in ensuring safety of inmates and guards. Saeger describes several signs that he believes should have led to various possible actions by the County, but in doing so he inadvertently highlights why the duty here was not ministerial. As with the guards in *Ottinger*, evaluating the threats posed by inmates and implementing procedures to reduce those threats requires balancing multiple objectives and limited resources. No single, nondiscretionary response is required to an inmate who presents a troubled history.

¶8 Saeger also argues that we should apply the “known and present danger” exception. Under that exception a public officer may face liability when he or she is aware of a danger that is of such quality that the public officer’s duty to act becomes absolute, certain, and imperative. *Id.* at 277. A dangerous

situation gives rise to a ministerial duty “only 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 v. Progressive N. Ins. Co.*, 2002 WI 71, ¶38, 253 Wis. 2d 323, 646 N.W.2d 314 (citation omitted).

¶9 Saeger argues that the other inmate was a known and present danger to him. Without attempting to exhaustively review the case law, we conclude the facts in this case do not show the level or immediacy of danger that has warranted a finding of a known and present danger. *See id.*, ¶¶32-48 (reviewing prior case law and holding police officer did not have duty to direct traffic). We are satisfied that the potential for danger was not of sufficient force, and that the manner of response to that potential danger required judgment and discretion.

¶10 We also address comments contained in the County’s brief. That brief describes as “delusional” an argument made by Saeger’s counsel. The brief further asserts that a particular exhibit presented on behalf of Saeger is “frivolous” and states that “[o]ne can rightly question Saeger’s counsel’s motives for submitting such a document. Indeed, it seems to be an effort to improperly influence the court.” These statements are plainly inappropriate. Counsel for the County has a professional obligation to express his disagreement with opposing counsel’s position with factual and legal arguments, rather than pejorative adjectives and assertions.

By the Court.—Order affirmed.

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

