COURT OF APPEALS
DECISION
DATED AND FILED

April 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1946-FT **Cir. Ct. No. 00-CV-110**

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

LILLIE M. JONES AND EUGENE JONES,

PLAINTIFFS-RESPONDENTS,

V.

WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION AND SHAWANO COUNTY,

DEFENDANTS-APPELLANTS,

AARP HEALTH CARE OPTIONS,

DEFENDANT.

APPEAL from an order of the circuit court for Shawano County: THOMAS G. GROVER, Judge. *Reversed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Shawano County and Wisconsin County Mutual Insurance Corporation petitioned for leave to appeal an order denying their

summary judgment motion.[1] We granted leave. Lillie Jones brought this action to recover for injuries sustained when she fell down steps at the entrance to Evergreen Group Home, owned by Shawano County. The court determined that the County was not immune from Jones's personal injury suit and accordingly denied its summary judgment motion.

¶2 The County and its insurers argue that the trial court erroneously concluded that Wisconsin's safe-place statute, WIS. STAT. §101.11, creates a ministerial duty to construct and maintain a safe stairway and landing at the group home. They also contend that neither the "known and present danger" rule nor the Wisconsin Administrative Code creates a ministerial duty under the circumstances of this case. We agree. Because the County's duty was discretionary, we conclude that the County is immune from Jones's suit. We therefore reverse the order and remand with directions to grant the County and their insurer their motion for summary judgment of dismissal.

BACKGROUND

¶3 When the County purchased the group home in 1998, it installed a wheelchair ramp and railing to access the set of front doors. The entranceway originally had two steps leading to a concrete landing. When the County added a ramp on the opposite side of the landing, the contractor who performed the work made it uneven. The side where the ramp ends is two and three-quarter inches higher than the side at the top of the steps. As a result, there is a "tripper" running down the center of the landing, perpendicular to the set of doors.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are the 1999-2000 version unless otherwise noted.

¶4 In March 1999, Jones visited the group home. When she was standing on the landing, the door to the group home opened. Jones stepped out of the way and tripped over the two-and-three-quarter-inch drop. She fell down the steps and suffered severe head injuries.

¶5 Jones and her husband brought this action claiming that the County was negligent in the construction and maintenance of the premises where she fell. She claimed that the County violated the safe-place statute.

¶6 The County moved for summary judgment on the ground of governmental immunity. It argued that all of its decisions and actions involved in building and maintaining the landing were discretionary. The trial court disagreed and determined that the County was not immune. The court ruled: "[A]s a ministerial duty you, if you build a step, you cannot have a 3 inch rise in it." The court concluded that the County's duty was ministerial under ***Anderson v. City of Milwaukee***, 199 Wis. 2d 479, 544 N.W.2d 630 (Ct. App. 1996) (***Anderson I***), *rev'd,* 208 Wis. 2d 18, 559 N.W.2d 563 (1997) (***Anderson II***), and denied the County's motion. We granted the County's petition for leave to appeal the court's denial of its summary judgment motion.

STANDARD OF REVIEW

¶7 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08.

DISCUSSION

I. Safe-Place Duty

¶8 Generally, in Wisconsin a county is immune from liability for injuries resulting from acts "done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." WIS. STAT. § 893.80(4).[2] Immunity is grounded in the common law and based on public policy considerations. ***Kimps v. Hill***, 200 Wis. 2d 1, 9-11, 546 N.W.2d 151 (1996). These considerations include:

> (1) The danger of influencing public officers in the performance of their functions by the threat of lawsuit; (2) the deterrent effect which the threat of personal liability might have on those who are considering entering public service; (3) the drain on valuable time caused by such actions; (4) the unfairness of subjecting officials to personal liability for the acts of their subordinates; and (5) the feeling that the ballot and removal procedures are more appropriate methods of dealing with misconduct in public office.

Id. at 9. It is "the categorization of the specific act upon which negligence is based and not the categorization of the overall general duties of a public officer which will dictate" whether § 893.80(4) provides immunity. ***Coffey v. City of Milwaukee***, 74 Wis. 2d 526, 533-34, 247 N.W.2d 132 (1976).

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[2] WISCONSIN STAT. § 893.80(4) 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.

¶9 This immunity doctrine is not without exception, however, and the most common is that a public officer or employee is not shielded from liability for the negligent performance of a purely ministerial duty. ***Kimps***, 200 Wis. 2d at 10.

> The test for determining whether a duty is discretionary (and therefore within the scope of immunity) or ministerial (and not so protected) is that the latter is found " 'only when [the 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.' "

Id. at 10-11 (citation omitted).

¶10 In ***Spencer v. County of Brown***, 215 Wis. 2d 641, 651, 573 N.W.2d 222 (Ct. App. 1997), we concluded that the duty imposed by the safe-place statute, WIS. STAT. § 101.11, was discretionary. In that case, a jail inmate slipped on a terrazzo floor in a shower area. We determined that § 101.11 "does not impose the duty to perform an act with specificity as to time, mode and occasion 'with such certainty that nothing remains for judgment or discretion.'" ***Id.*** (citations omitted). Under the terms of the safe-place statute, the defendants were required to use reasonably adequate methods to make facilities safe. ***Id.*** The statutory language "implies the exercise of discretion and judgment by government officials in determining what measures are reasonably necessary to make the … facilities safe." ***Id.***

¶11 In ***Spencer***, we recognized that ***Anderson I*** reached an apparently conflicting result. In that case, the plaintiff tripped and fell on a raised line of bricks on a walkway at a farmer's market owned, constructed and operated by the city. ***Id.*** at 485. ***Anderson I*** held that once the city had exercised its discretion to construct the farmer's market, it had a ministerial duty to comply with the

safe-place statute. ***Id.*** at 493. It also concluded that the city waived the WIS. STAT. § 893.80(3) damage limitation and, accordingly, was subject to liability under the safe-place statute. ***Id.*** at 492.

¶12 The supreme court reversed, holding that the WIS. STAT. § 893.80(3) damage limitation was not impliedly waived. ***Anderson II***, 208 Wis. 2d at 33-34. The court also considered whether the WIS. STAT. § 893.80(4) discretionary immunity defense can be waived by omission, and held that it is an affirmative defense that is deemed waived if not raised. ***Id.*** at 34. Because it concluded that the city had waived its statutory immunity defense, the supreme court did not reach the issue whether the city had a ministerial duty to comply with the safe-place statute. ***Id.*** at 35-36.

¶13 Ordinarily, "holdings not specifically reversed on appeal retain precedential value." ***Spencer***, 215 Wis. 2d at 650. However, we noted that in ***Anderson II***, our supreme court observed: "Since this determination [that city waived immunity defense] is dispositive, and since, therefore, we do not reach the ministerial duty—safe-place issue, we emphasize that our decision should not be taken as approval of the reasoning of the Court of Appeals on that issue." ***Spencer***, 215 Wis. 2d at 650-51 (quoting ***Anderson II***, 208 Wis. 2d at 37 n.17).

¶14 Based on that cautionary note, we declined to apply the reasoning that has not been approved by our state supreme court, though not specifically overruled. ***Id.*** at 651. Therefore, we concluded that the duty imposed by the safe-place statute was discretionary. ***Id.***

¶15 Our result was consistent with prior case law. In ***Meyer v. Carman***, 271 Wis. 329, 73 N.W.2d 514 (1955), the supreme court "reversed the trial court's finding that defendants were not immune because they breached a ministerial duty

imposed by a statute requiring defendants to 'keep the buildings and grounds in good repair, suitably equipped and in safe and sanitary condition at all times.'" ***Spencer***, 215 Wis. 2d at 651-52 (citation omitted). Hence, we determined that "while the safe-place statute imposes a duty on owners of public buildings to maintain safe premises for employees and frequenters, the duty set forth in § 101.11, STATS., does not rise to the level of imposing a ministerial duty for purposes of analysis under § 893.80(4), STATS." ***Id.*** at 652.

¶16 Jones argues, nonetheless, that because of the analogous fact situation presented in ***Anderson I***, its outcome must control here. We disagree. For the reasons advanced in ***Spencer***, we decline to characterize the County's duty as ministerial. Also,

> [a]t first blush it might appear that the duty to keep the school grounds "safe" is ministerial in character, but it is apparent on closer analysis that a great many circumstances may need to be considered in deciding what action is necessary to do so, and such decisions involve the exercise of judgment or discretion rather than the mere performance of a prescribed task.

Id. (quoting ***Meyer***, 271 Wis. at 331-32). We conclude that the safe-place statute does not impose a ministerial duty under WIS. STAT. § 893.80(4).

II. "Compelling and Known Danger"

¶17 Next, Jones argues that the landing presented "an accident waiting to happen" and, therefore, under the "compelling and known danger" rule enunciated in ***Cords v. Anderson***, 80 Wis. 2d 525, 259 N.W.2d 672 (1977), the duty to eliminate the danger was ministerial. ***Kimps***, 200 Wis. 2d at 15. Like the trial court, we are unpersuaded. As we have explained, under this rule

> a public officer's duty is ministerial where a danger is known and of such quality that the public officer's duty to

> act becomes " 'absolute, certain and imperative....' " .... Stated otherwise, where a public officer's duty is not generally prescribed and defined by law in time, mode, and occasion, such that "nothing remains for judgment or discretion," circumstances may give rise to such a certain duty where .... 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.

Hoskins v. Dodge County, No. 01-0834, 2002 WL 122935, at *4 (Wis. App. Jan. 31, 2002).

¶18 ***Cords*** presented a unique factual setting. At a recreational area known as Parfrey's Glen, a park manager knew that a hiking trail came within inches of a ninety-foot gorge, yet placed no warning signs. ***Cords***, 80 Wis. 2d at 538. Our supreme court held that the park manager had a ministerial duty to either place warning signs or advise his superiors of the dangerous situation existing on the trail where one misstep would cause an uninterrupted twenty-foot slide down a sharp incline to a direct drop-off of approximately eighty feet to the rock bottom. ***Id.*** at 541. The court ruled that the manager, who knew the terrain was dangerous, particularly at night, and who was in a position to take action, was liable for breach of his duty to take appropriate precautions. ***Id.***

¶19 Other cases that have applied this rule include ***Domino v. Walworth County***, 118 Wis. 2d 488, 347 N.W.2d 917 (1984), in which a sheriff's dispatcher was found to have a ministerial duty with respect to warning motorists of a fallen tree that blocked a road. Also, in ***Lodl v. Progressive Northern Ins. Co.***, 2001 WI App 3, ¶2, 240 Wis. 2d 652, 625 N.W.2d 60, a passenger was injured in a vehicle that was struck broadside in an intersection without operative traffic control signals during a storm. We held that the intersection was a compelling and known danger of such force that it created a ministerial duty in the performance of traffic control. ***Id.*** at ¶1.

¶20 We are unpersuaded that the danger presented by a two-and-three-quarter-inch unevenness on a landing can be equated with the dangers in the cases cited. Parfrey's Glen posed uniquely dangerous terrain to unwary visitors, fully appreciated only by the custodial state officials. ***Cords***, 80 Wis. 2d at 541. Also, the traffic hazards posed in ***Domino*** and ***Lodl*** presented uniquely dangerous conditions appreciated fully only by the government officials who had notice of them. In contrast, stairway dangers are a matter of general common knowledge, and an uneven landing is apparent. We conclude that the landing does not constitute a known and present danger of the dimensions enunciated in ***Cords***, ***Domino*** and ***Lodl***.

III. Wisconsin Administrative Code

¶21 Next, Jones argues that a ministerial duty is imposed on the County by the Wisconsin Administrative Code. She contends that community-based residential facilities serving nine to twenty disabled adult residents require ramps on each side of the door that are "level for a distance of five feet from the door," citing WIS. ADMIN. CODE § HFS 83.45(2)(d).[3] The problem with this argument, as Jones concedes, is that the group home in question does not serve nine to twenty adults and therefore this code section does not apply. Based on her concession, we conclude that a nonapplicable code section does not impose a ministerial duty on the County.

¶22 Jones further argues that a code section relating to residential facilities for three to eight adults is the source of a ministerial duty, citing WIS.

[3] Although Jones cites § ILHR 61.18, we assume she refers to § HFS 83.45(2)(d).

ADMIN. CODE § Comm 21.04[4] providing that "level landings shall be provided on each side of any door located at the top or base of a stairs, regardless of the direction of swing." WIS. ADMIN. CODE § Comm 21.04(4) (c). This quoted language does not provide a ministerial duty. The phrase "each side of any door" may refer to the landing before and after one enters the door, not the landing that extends the width of the door. Also, the cited language does not describe the required width of the landing. Because it does not require the performance of an act with specificity as to time, mode and occasion with such certainty that nothing remains for judgment or discretion, *see* ***Kimps***, 200 Wis. 2d at 9-11, it does not impose a ministerial duty.

CONCLUSION

¶23 We conclude that the County's duty with respect to constructing and maintaining the landing was discretionary. Consequently, its actions do not fit within the exception to governmental immunity. We reverse the order denying summary judgment and remand with directions to grant the County and its insurer their motion for summary judgment of dismissal.

By the Court.—Order reversed and cause remanded with directions.

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

[4] WISCONSIN ADMIN. CODE § ILHR 21 was renumbered § Comm 21.