COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2953 **Cir. Ct. No. 00-CV-286**

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

RYAN SCOTT, KATHY SCOTT, AND PATRICK SCOTT,

PLAINTIFFS-APPELLANTS,

V.

SAVERS PROPERTY AND CASUALTY INSURANCE COMPANY, WAUSAU UNDERWRITERS INSURANCE COMPANY, AND STEVENS POINT AREA PUBLIC SCHOOL DISTRICT,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Portage County: JAMES MASON, Judge. *Affirmed*.

Before Vergeront, P.J., Dykman, and Lundsten, JJ.

¶1 PER CURIAM. Ryan, Kathy and Patrick Scott appeal from a judgment which dismissed their claims against the Stevens Point Area Public School District and its insurers. For the reasons discussed below, we affirm.

BACKGROUND

¶2 According to the amended complaint, Ryan Scott was a student hockey player at Stevens Point Area Senior High (SPASH). Scott and his parents sought advice from a licensed guidance counselor at the school as to the core course curriculum requirements for NCAA Division I scholarship eligibility. The counselor incorrectly advised the Scotts that a certain Broadcast Communications class would meet the core course requirements. Scott took the course in reliance upon the counselor's advice. He was subsequently offered a full hockey scholarship, which was rescinded when the university discovered that Scott had not met the core English requirements for NCAA Division I scholarship eligibility due to having taken the Broadcast Communications class.

¶3 Scott and his parents attempted to sue the school district under theories of breach of contract, promissory estoppel and negligence, but the trial court dismissed their amended complaint for failure to state a claim upon which relief could be granted. The Scotts appeal.

STANDARD OF REVIEW

¶4 A motion to dismiss a complaint for failure to state a claim upon which relief may be granted tests the legal sufficiency of the pleading. ***Evans v. Cameron***, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985). We independently review the complaint to determine whether, liberally construed, it is quite clear that under no conditions can the plaintiffs recover based upon the facts alleged and inferences reasonably drawn therefrom. ***Bartley v. Thompson***, 198 Wis. 2d 323, 332, 542 N.W.2d 227 (Ct. App. 1995).

ANALYSIS

Breach of Contract Claim

¶5 The Scotts first contend that they had a contract with the school district wherein they agreed to pay property taxes and send Ryan to school in their district and, in exchange, the District agreed to provide guidance counseling services to them. Contract law, however, permits parties to bargain for obligations to one another rather than having obligations based on social interests imposed by law. ***Prent Corp. v. Martek Holdings, Inc.***, 2000 WI App 194 ¶18, 238 Wis. 2d 777, 618 N.W.2d 201. Here, the District was obligated by law to provide certain counseling services once the Scotts unilaterally chose to send Ryan to SPASH. *See* WIS. STAT. § 121.02(1)(e) (1999-2000)[1] and WIS. ADMIN. CODE § PI 8.01(2)(e) (Oct. 2001). This was not a bargained-for exchange of promises between the parties. We conclude that the performance of these legally imposed duties did not constitute consideration sufficient to establish the existence of a contract.

Promissory Estoppel Claim

¶6 The Scotts next assert that the doctrine of promissory estoppel may permit enforcement of a promise that is not supported by sufficient consideration. A cause of action for promissory estoppel lies when: (1) a promise is made which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) the promise actually

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

induces such action or forbearance; and (3) injustice can only be avoided by enforcement of the promise. ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965).

¶7 The District concedes that the facts alleged might support a finding that it "promised" to provide guidance counseling to Ryan. It argues, however, that it was not the District's promise to provide counseling that induced Ryan to take the Broadcast Communications class, but rather the counselor's representation that the Broadcast Communications class would satisfy NCAA scholarship eligibility requirements. We agree. The representation upon which Ryan relied was not in the form of a promise. It merely provided information that turned out to be wrong. Moreover, as the District was not itself the entity in charge of certifying Ryan's eligibility status or granting him the scholarship, judicial enforcement of the alleged promise to provide information would not avoid or remedy any injustice which may have occurred.

Negligence Claim

¶8 The parties do not dispute that the complaint properly stated all of the elements for a negligence claim. They disagree over whether the District was immune from suit.

¶9 WISCONSIN STAT. § 893.80(4) shields municipal entities from liability for injuries resulting from the negligent performance of acts within the scope of their employees' public office. *See* ***Santiago v. Ware***, 205 Wis. 2d 295, 338, 556 N.W.2d 356 (Ct. App. 1996). This governmental immunity doctrine is qualified by several exceptions, however. Immunity is not available: (1) if the conduct was malicious, willful and intentional, *see* ***C.L. v. Olson***, 143 Wis. 2d 701, 711, 422 N.W.2d 614 (1988); (2) if the conduct involved a non-discretionary,

ministerial duty imposed by law, *see* ***Lister v. Board of Regents***, 72 Wis. 2d 282, 300-01, 240 N.W.2d 610 (1976); if there existed a known present danger of such force that the time, mode and occasion for performance left no room for the exercise of judgment, *see* ***Cords v. Anderson***, 80 Wis. 2d 525, 541, 259 N.W.2d 672 (1977); or (4) any discretion involved was non-governmental in nature, *see* ***Scarpaci v. Milwaukee County***, 96 Wis. 2d 663, 686-87, 292 N.W.2d 816 (1980). The Scotts do not contend that the guidance counselor's actions here were malicious or that action was necessary to avoid a known present danger.

¶10 The Scotts argue that if the guidance counselor was legally obligated to advise Scott so as to defeat a contract claim, it follows that he had a ministerial duty to provide accurate information about NCAA scholarship eligibility requirements. We disagree. The fact that a duty may exist does not answer the question whether that duty is ministerial or discretionary in nature. ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 95, 596 N.W.2d 417 (1999). As explained in ***Lister***:

> A public officer'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.

Lister, 72 Wis. 2d at 301. Here, the counselor's general obligation to provide counseling services did not dictate precisely what advice or information should be given to each student. Rather, the counselor was required to apply the requirements of various institutions to each student's situation. This interpretive process was inherently discretionary in nature. *See* ***Kierstyn***, 228 Wis. 2d at 92 (rejecting argument that "an unambiguous statute creates a ministerial duty"). We conclude that whatever obligation the counselor had to provide information to

Ryan was not ministerial in nature, even if the NCAA scholarship eligibility requirements were themselves clear.

¶11 The Scotts also argue that any discretion the counselor may have exercised was professional rather than governmental in nature. As noted in ***Kierstyn***, however, the professional exception has to date been applied only in the medical context, and the court has on two occasions declined to extend it further. ***Kierstyn***, 228 Wis. 2d at 97-98. While a high school guidance counselor may perform some medical professional functions to the extent he or she engages in psychological analysis of students, the provision of information about scholarship requirements is not among them.

¶12 Finally, the Scotts provide several policy arguments as to why the current state of the law ought to be modified. Such arguments are more properly addressed to the supreme court. We conclude that the trial court properly determined that the Scott's complaint failed to state a claim upon which relief could be granted.

By the Court.—Judgment affirmed.

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