COURT OF APPEALS
DECISION
DATED AND RELEASED

March 21, 1996

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

NOTICE

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No. 95-2029

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

ROBERT VINES, JR.,

Plaintiff-Appellant,

v.

DON NORENBERG,
KATHY NAGEL
AND MARVIN VANTHOFF,

Defendants-Respondents.

APPEAL from an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed*.

Before Eich, C.J., Sundby and Vergeront, JJ.

VERGERONT, J. Robert Vines, Jr. is an inmate at Dodge Correctional Institution (DCI). He appeals from a summary judgment dismissing his claim for personal injuries against three officials at DCI--Don Norenberg, Director of Maintenance, Marvin VantHoff, Food Production Supervisor, and Kathy Nagel, Associate Warden Security Director. Vines

alleged in his complaint that while he was performing kitchen duties, a gallon of dishwashing liquid broke off its machine and fell to the floor. He allegedly slipped in the liquid soap that spilled from the machine and fell.

The trial court granted summary judgment to the defendants on the grounds that Vines' notice of claim did not meet the requirements of § 893.82(3), STATS., as to any of the three defendants. The notice of claim did not contain the names of Nagel and VantHoff and, although it contained Norenberg's name, did not specify the location where the injury occurred. The trial court also ruled that Norenberg was entitled to summary judgment on the ground that he was immune because his actions were discretionary, not ministerial.

Vines contends on appeal that the notice of claim was adequate as to all three defendants,[1] and that there is a genuine issue of material fact as to Norenberg's immunity, making summary judgment improper. We conclude that the notice of claim was deficient as to VantHoff and Nagel, and that Norenberg was entitled to summary judgment on the immunity issue. We therefore affirm the trial court's order.

The notice of claim listed the names and addresses of two persons: Gordon Abrahamson, Warden of DCI, and Don Norenberg. It also stated, among other assertions: "Gordon Abrahamson and Don Norenberg knew, or in the exercise of reasonable care, should have known, that the liquid soap container, in its condition on August 18, 1991, posed an unreasonable risk of harm to persons in the area." The notice of claim does not mention Nagel or VantHoff.

[1] Vines' first brief, prepared by counsel, states that while the brief does not challenge the order dismissing the complaint against VantHoff and Nagel, Vines wishes to do so. Vines' pro se reply brief addresses this issue. We do not ordinarily decide issues raised for the first time in the reply brief because that is unfair to the respondent. However, since the issue was mentioned in the first brief and fully briefed in the reply brief, and since there is no prejudice to the respondents given our resolution of this issue, we address it briefly in this opinion.

Section 893.82(3), STATS., states that no civil action may be brought against a state employee for acts arising out of his or her duties unless, within a prescribed time period, the claimant serves upon the attorney general a written notice of claim "stating the time, date, location and the circumstances of the event ... and the names of persons involved, including the name of the state officer, employe or agent involved." In ***Modica v. Verhulst***, 195 Wis.2d 633, 536 N.W.2d 466 (Ct. App. 1995), we held that a notice of claim that identified an unnamed person by job description was deficient as to that person because it did not meet the requirement in § 893.82(3) that the notice of claim state the name of the state officer, employee or agent involved.

Modica disposes of Vines' contentions regarding VantHoff and Nagel. The notice of claim does not state either name. Therefore no action may be brought against either for the acts alleged in the complaint. We do not reach the issue of the adequacy of the notice of claim as to Norenberg because we conclude that he is entitled to summary judgment on the immunity issue.

We review summary judgments de novo, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 314-15, 401 N.W.2d 816, 820 (1987). Generally, summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** "[T]he `mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'" ***Baxter v. DNR***, 165 Wis.2d 298, 312, 477 N.W.2d 648, 654 (Ct. App. 1991) (emphasis in original) (quoting ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-48 (1986)). A factual issue is genuine if the evidence is such that reasonable jurors could return a verdict for the nonmoving party. ***Id.***

Generally a public official is immune from liability for injuries resulting from acts performed within the scope of his or her public duties. ***C.L. v. Olson***, 143 Wis.2d 701, 710, 422 N.W.2d 614, 617 (1988). This rule does not apply, however, when the official's negligence is in the performance of ministerial duties or when the act was malicious, willful and intentional. ***Id.*** at 710-11, 422 N.W.2d at 617. Since Vines' complaint does not allege that Norenberg acted maliciously, willfully or intentionally, we are concerned only with the exception for ministerial duties.

"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 v. Board of Regents***, 72 Wis.2d 282, 301, 240 N.W.2d 610, 622 (1976) (footnote omitted). A discretionary, or non-ministerial act, is one which "involves the exercise of discretion or judgment in determining the policy to be carried out or the rule to be followed ... [and] the exercise of discretion and judgment in the application of a rule to specific facts." ***Lifer v. Raymond***, 80 Wis.2d 503, 511-12, 259 N.W.2d 537, 541-42 (1977) (footnote omitted).

A ministerial duty may also exist when there is a danger that is obvious to the defendant but hidden to the plaintiff. ***Cords v. Anderson***, 80 Wis.2d 525, 541, 259 N.W.2d 672, 680 (1977). In such a situation, a duty to warn exists. ***Id.*** The question whether a ministerial duty exists is one of law, which we review de novo. ***Larsen v. Wisconsin Power & Light Co.***, 120 Wis.2d 508, 516, 355 N.W.2d 557, 562 (Ct. App. 1984).

We first examine the material submitted by Norenberg in support of his motion to determine whether it establishes a *prima facie* case that he is immune from liability because he was engaged in a discretionary, not ministerial, act. Norenberg states in his affidavit that he is the Director of Maintenance at DCI. In this position, he does not personally inspect, maintain or repair any DCI kitchen soap containers or dispensing equipment. No statute, administrative rule, or other mandatory regulation prescribes the time, manner or occasion for the inspection, maintenance or repair of such soap containers or dispensers by him or staff members under his control and direction. He was at no time on or prior to August 18, 1991 (the date of the alleged injury), informed or otherwise aware, that such soap containers or dispensers were in defective condition or that they presented a risk of harm due to improper maintenance or repair.

Norenberg avers that his job duties are specified in the job description attached to his affidavit. Vines does not appear to argue that any of the duties described are specific or defined sufficiently to give rise to a ministerial duty in and of themselves. We conclude they are not. We therefore turn to Vines' argument that evidence of Norenberg's duties, in conjunction with the material submitted by Vines in opposition to the motion, create a

genuine dispute as to the ministerial nature of Norenberg's duty with respect to the soap container.

Vines submitted the affidavit of John McMichael, also an inmate at DCI, which states as follows. VantHoff was the food production supervisor at DCI. McMichael was the lead man in the DCI kitchen, assigning tasks to other inmates. There was a defective soap rack in the kitchen that contained a gallon of liquid soap and that would come unattached at random or when the dish machine shook. McMichael informed VantHoff (his boss) on several occasions that the rack should be fixed before someone was injured, specifically on July 28, 29, 30 and 31, 1991, and on August 1 and 2, 1991. VantHoff stated, "[W]hat the fuck do you care, much money as we're paying you, most of these assholes ain't nothing but sex offenders anyways." VantHoff made no effort to contact the appropriate individuals to resolve the situation. According to McMichael, "[a] safety hazard of this magnitude was known to all DCI staff who worked in the DCI kitchen and most inmates who worked in the kitchen for any length of time."

Vines argues that, in view of certain duties in Norenberg's position description, there is a reasonable inference that VantHoff told Norenberg about the defective soap container, or that Norenberg observed it or learned about it in his routine inspections and discussions with the staff and supervisors. For this reason, Vines contends, there is a genuine issue of material fact as to whether the defective soap container was a known and obvious danger, such that Norenberg should have either warned others or had the defective container repaired.

Norenberg states in his affidavit that no one told him about the defective soap container and he was not aware of it. In order to create a genuine factual dispute concerning Norenberg's knowledge, Vines must present evidence from which it is reasonable to infer that Norenberg did know. He has not done so.

The specific duties Vines points to in Norenberg's position description are: (1) review work orders for items of repair work which are received from each department, supervise repair work in progress, and interact

with other program supervisors on matters of repair and maintenance;[2] (2) conduct periodic performance report interviews with employees in the maintenance section; and (3) inspect all building interiors on a periodic basis.

All of these duties are phrased generally and none require Norenberg to inspect the kitchen, let alone inspect or repair the kitchen soap containers at particular times or by particular methods. None require Norenberg to initiate discussion of the need for repairs in the kitchen or elsewhere. The most that can be reasonably inferred from these duties is that if VantHoff had decided that repair of the defective soap container was necessary, Norenberg would have learned of the need for the repair. It is not reasonable to infer from the description of Norenberg's duties that VantHoff told him about the defective container. Indeed, McMichael's affidavit itself states that VantHoff did not contact "the appropriate individuals"; and VantHoff's response to McMichael's complaint, as related by McMichael, certainly is not evidence that VantHoff had any intention of requesting a repair. It is also not reasonable to infer from the description of Norenberg's duties that Norenberg himself would have observed the defective soap container in the kitchen.

Because the undisputed facts, including all reasonable inferences from them drawn in Vines' favor, show that Norenberg's duties with respect to the defective soap container were not ministerial, the trial court properly granted summary judgment in Norenberg's favor.

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[2] Vines actually refers to another duty in the position description instead of the first one we have cited: "Communicate regularly with supervisor on all matters affecting the services of the Maintenance Department and the operation of the Repair and Maintenance Department in general." However, this duty relates to Norenberg's duty to communicate with his supervisor and is not relevant to Vines' argument. We understand Vines to be concerned here with those duties that require him to interact with the persons he supervises concerning repair and maintenance and we have therefore substituted the pertinent duty for the one referred to by Vines.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

SUNDBY, J. (*dissenting*). If Robert Vines, Jr. had been a patron of Simpson's Garment Store and slipped and fell on dishwashing liquid negligently discharged onto the floor, he would state a claim for his injuries. *See* ***Sturm v. Simpson's Garment Co.***, 271 Wis. 587, 74 N.W.2d 137 (1956). However, because he is an inmate in a correctional institution, we propose to hold that he does not state a claim against a prison official who negligently caused and allowed that condition to exist where he lived and worked. My colleagues conclude that Vines cannot state a claim against the director of maintenance and engineering because the director's duty to maintain the prison in a condition reasonably safe for the inmates is discretionary and he is therefore immune from personal liability.

The majority does not decide the question of immunity but the question of negligence. They state: "[The director of maintenance] was at no time ... informed or otherwise aware, that [the] soap containers or dispensers were in defective condition or that they presented a risk of harm due to improper maintenance or repair." Maj. Op. at 6. On a summary judgment motion to dismiss on grounds of immunity, the officer's negligence is assumed. ***Kimps v. Hill***, 187 Wis.2d 508, 514, 523 N.W.2d 281, 285 (Ct. App. 1994), *review granted*, 531 N.W.2d 325 (1995). However, even if a public officer's choice turns out badly, he or she is immune from suit and liability if the choice was within the officer's discretion.

Because the director of maintenance and engineering is a state officer or employee, § 893.82, STATS., governs. That statute does not contain a provision comparable to § 893.80(4), STATS., which immunizes local officials from suits for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions. However, the test for the immunity of a state officer under § 893.82 is no different from the test for immunity of a local officer under § 893.80(4). *See* ***Lifer v. Raymond***, 80 Wis.2d 503, 511-12, 259 N.W.2d 537, 541-42 (1977). ***Lifer*** defines acts for which a public officer may not be held liable as follows:

> A quasi-legislative act involves the exercise of discretion or judgment *in determining the policy to be carried out or the rule to be followed*. A quasi-judicial act involves the exercise of discretion and judgment *in the application of a rule to specific facts*.

Id. at 511-12, 259 N.W.2d at 541 (emphasis added).

The ***Holytz*** court,[3] which abrogated governmental immunity (not public officer immunity), excepted acts of governance. Unfortunately, by judicial construction, the courts have so broadened the doctrines of governmental immunity and public officer immunity that immunity is accorded because of the officer's or employee's status, not his or her act. ***Kimps*** is a classic example of that unwarranted expansion of public officer immunity. In that case, we found that the University's safety officer was immune from liability when a volleyball standard he was charged with maintaining fell and injured a student. The fall occurred because the screws attaching the standard to its base had not been properly tightened. The only way the majority would have found the safety officer non-immune would have been if his job description had read: "Tighten screws on volleyball standards every Tuesday at 8:30 a.m." 187 Wis.2d at 528, 523 N.W.2d at 290.

In the appeal before us, apparently the only way the majority would find the director of maintenance non-immune would be if his job description included: "[P]ersonally inspect, maintain or repair any DCI kitchen soap containers or dispensing equipment." Maj. Op. at 6. Thus, even though it is the director of maintenance's duty to keep the prison safe for inmates, because he did not personally perform all of the duties of his office, he is immune. That is an unacceptable result because it allows a public officer to escape liability by simply failing to perform the duties imposed upon him or her. An officer whose general duties include supervision of acts performed by subordinates is liable for the subordinate's negligence in performing those acts under the rule of *respondeat superior*. *See* ***Holytz***, 17 Wis.2d at 40, 115 N.W.2d at 625.

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[3] ***Holytz v. City of Milwaukee***, 17 Wis.2d 26, 115 N.W.2d 618 (1962).

Further, in applying the rule of public officer immunity in a particular case, we do not look to the nature of the officer's or employee's general duties but to the specific act of negligence. ***Coffey v. City of Milwaukee***, 74 Wis.2d 526, 533-34, 247 N.W.2d 132, 136 (1976). "[I]t 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 or not the provisions of § 895.43(3), STATS., apply to enable the municipality to escape liability." ***Id***. That holding applies with equal force to the public officer. *See* ***Scarpaci v. Milwaukee County***, 96 Wis.2d 663, 685, 292 N.W.2d 816, 826-27 (1980).

Our decision in ***Kimps*** and our decision today are directly contrary to the holding of the supreme court in ***Coffey***, and as such, cannot stand. We are bound by the decisions of the supreme court. ***State v. Lossman***, 118 Wis.2d 526, 533, 348 N.W.2d 159, 163 (1994). If a building inspector's duty to inspect premises and discover defects is not discretionary, ***Scarpaci***, 96 Wis.2d at 686, 292 N.W.2d at 827, how can we say that the failure of the prison's director of maintenance to inspect the prison premises and correct dangerous defects is a discretionary act? I submit that the gulf between ***Coffey/Scarpaci*** and ***Kimps*** and this appeal has so widened that no consistent principles of law guide our decisionmaking. Each case is decided on an ad hoc basis without concern for doctrinal consistency. In my dissent in ***Vines v. Clusen***, No. 89-2065, unpublished slip op. (Wis. Ct. App. Mar. 29, 1990), I suggested that we adopt the Restatement's proposal that in attempting to decipher the undecipherable discretionary/ministerial dichotomy, the court weigh a number of policy factors and make its decision accordingly. I again commend that approach.

The decisions of the appellate courts since ***Holytz*** and ***Lister v. Board of Regents***, 72 Wis.2d 282, 240 N.W.2d 610 (1976), amply demonstrate that we have forgotten that there is a distinction between governmental tort immunity and public officer tort immunity. ***Holytz*** abrogated governmental tort immunity, not public officer immunity. The court was concerned that the

scope of its abrogation would be eroded by subsequent judicial decisions and therefore declared: "Perhaps clarity will be afforded by our expression that henceforward, so far as governmental responsibility for torts is concerned, the rule is liability--the exception is immunity." 17 Wis.2d at 39, 115 N.W.2d at 625. However, when the suit is against a public officer or employee, the rule is immunity and the exception is liability. "[I]n negligence actions against individual officers, the rule is immunity, the exception, liability." ***Cords v. Anderson***, 80 Wis.2d 525, 555, 259 N.W.2d 672, 686 (1977) (Hansen, J., dissenting). It does not follow, however, that the governmental employer is immune whenever the public officer is immune. A municipal employer is liable for the negligence of its employees by reason of the rule of *respondeat superior*. "By reason of the rule of *respondeat superior* a public body shall be liable for damages for the torts of its officers, agents and employees occurring in the course of the business of such public body." ***Holytz***, 17 Wis.2d at 40, 115 N.W.2d at 625.

The doctrine of *respondeat superior* does not, however, transmute an action against a state officer or employee into an action against the state. ***Cords v. Ehly***, 62 Wis.2d 31, 36-37, 214 N.W.2d 432, 435 (1974). Under ***Holytz***, there is *substantive* liability imposed upon the state when its agents, in the course of their employment, commit a tort. ***Forseth v. Sweet***, 38 Wis.2d 676, 679, 158 N.W.2d 370, 371 (1968). However, "the mere creation of substantive liability [does] not suffice to pierce the legislatively controlled barrier against suit." ***Id***. at 684, 158 N.W.2d at 373. Contrary to municipal liability and immunity, the state's immunity has a dual nature. As the ***Forseth*** court observed, "[s]ince a municipal body has always been subject to suit, the entire barrier of immunity crumbled when it was concluded that there was substantive liability under sec. 270.58 [now § 895.46, STATS.] as well as under ***Holytz***." ***Id***. at 685, 158 N.W.2d at 374. However, the state's barrier of immunity from suit is unaffected by ***Holytz*** and § 895.46. ***Id***.

The inapplicability of the doctrine of *respondeat superior* to the state is, therefore, procedural, not substantive. However, there is no procedural barrier to imposing the doctrine of *respondeat superior* on the superior officer who is responsible for the acts of his or her agents. "The thrust of [***Clausen v. Eckstein***, 7 Wis.2d 409, 97 N.W.2d 201 (1959)] is that the *respondeat superior* chain extends from those who are responsible for an act to their superiors." ***Chart v. Dvorak***, 57 Wis.2d 92, 105, 203 N.W.2d 673, 679 (1973).

The sum of the these cases is that § 895.46, STATS., removes the procedural impediment to state substantive liability. Under that statute, a judgment against a state officer or employee acting within the scope of his or her employment is to be paid by the state rather than the public officer or employee. However, the judgment is entered against the officer or employee.

It is this lack of personal liability which signals that the time has come to abrogate public officer immunity. *See* RESTATEMENT (SECOND) OF TORTS § 895D, Comment f (1979). The common-law bases for public officer immunity included the danger of influencing public officers in the performance of their functions by the threat of personal liability and the deterrent effect which personal liability might have on those considering entering public service. ***Lister***, 72 Wis.2d at 299, 240 N.W.2d at 621. With the enactment of what is now § 895.46, STATS., and the advent of liability insurance, a public officer or employee need no longer fear personal liability for acts performed in the course of the officer's or employee's employment. The reason for the rule of public officer immunity having disappeared, so should the rule. Since the rule was court-created, it may be abrogated by the court. *See* ***Holytz***, 17 Wis.2d at 39, 115 N.W.2d at 624 ("The doctrine of governmental immunity having been engrafted upon the law of this state by judicial provision, we deem that it may be changed or abrogated by judicial provision."). Plainly, however, so important a judicial act should be taken by our supreme court, not this court. It is, of course, appropriate for the legislature to abrogate public officer immunity. It is time that Wisconsin join the rest of the world in assuming community liability for the

torts of its public officers. *See* COMMENT, *Municipal Responsibility for the Torts of Policemen*, 42 YALE L.J. 241, 244-45 (1932), *quoted in* ***Holytz***, 17 Wis.2d at 35, 115 N.W.2d at 622-23; *see also* ***Walker v. University of Wis. Hospitals***, 542 N.W.2d 207, 213-14 (Wis. Ct. App. 1995) (Sundby, J., concurring).

The majority seems to have written the concept of duty out of the public officer immunity equation. However, when the state takes away from a person the power to protect himself or herself from harm, the state assumes a duty to exercise reasonable care to protect such person. *See* 60 AM. JUR. 2D *Penal and Correctional Institutions* § 200 (1987). "The majority of courts hold that the sheriff or other officer owes a duty to the prisoner to keep him safely and protect him from unnecessary harm and it has also been held that the officer must exercise reasonable and ordinary care for the life and health of the prisoner." Annotation, *Civil Liability of Sheriff or Other Officer Charged with Keeping Jail or Prison for Death or Injury of Prisoner*, 14 A.L.R.2D 353, 354 (1950); *see also* ***Vines v. Clusen***. The state's duty to keep prisoners safe makes moot any claim that that duty can be avoided by labeling it "discretionary."

Because the majority does not reach the issue of the adequacy of Vine's notice of claim, I express no opinion on that question.