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DISTRICT IV

August 29, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP2447 T.R.M., by his guardian ad litem, Joel Larimore and Stefanie Madison v. School District of La Crosse and Community Insurance Corporation (L.C. # 2013CV382)

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

T.R.M. and Stefanie Madison appeal the circuit court's order granting summary judgment to the School District of La Crosse and its insurer on governmental immunity grounds.[1] T.R.M. contends that the ministerial duty and known and compelling danger exceptions to governmental

[1] The named appellants are T.R.M. and Stefanie Madison, and the named respondents are School District of La Crosse and Community Insurance Corporation. For ease of reading, we refer to the appellants collectively as "T.R.M.," and the respondents collectively as "the School District of La Crosse" or "the School District."

immunity apply to the facts of this case. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[2] We summarily affirm.

In December 2012, T.R.M. was injured when he slipped on ice while kicking a ball during recess as a student at North Woods Elementary School in La Crosse. T.R.M. sued the School District of La Crosse, alleging that his injuries resulted from the negligence of school employees in supervising T.R.M. during recess. The court granted the School District summary judgment based on governmental immunity under WIS. STAT. § 893.80(4).

T.R.M. contends that the School District was not entitled to summary judgment on governmental immunity grounds because, he argues, both the ministerial duty exception and the known and compelling danger exception to immunity apply. We disagree.

Under WIS. STAT. § 893.80(4), governmental bodies and their employees are immune from liability for acts involving the exercise of discretion or judgment. *See* ***Noffke v. Bakke***, 2009 WI 10, ¶41, 315 Wis. 2d 350, 760 N.W.2d 156. "However, no immunity against liability exists for those acts associated with … the performance of ministerial duties imposed by law [or] known and compelling dangers that give rise to ministerial duties on the part of public officers or employees ...." ***Id.***, ¶42. We independently review whether the governmental immunity statute and its exceptions apply to the facts of a case and whether a moving party is entitled to summary judgment. *See* ***id.***, ¶¶7, 9.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

T.R.M. contends, first, that the School District is not immune from liability in this case because it violated a ministerial duty imposed by its "Active Supervision" policy for staff supervising students at recess. T.R.M. cites the "Active Supervision" section of the North Woods Elementary School's written expectations of student behavior on the school playground as the source of that ministerial duty. The "Active Supervision" section states that "North Woods strives to maintain an adult expectation that staff, substitutes, and volunteers will use the 'Active Supervision' model." The section then explains that "Active Supervision" includes scanning for areas of concern, engaging students with a positive attitude, problem solving, and circulating throughout the playground. T.R.M. argues that supervising staff violated the "Active Supervision" policy by failing to stop T.R.M. from kicking a ball in an area of the playground where kicking balls was prohibited. Thus, he contends, the School District violated a ministerial duty and is not immune from liability.

"A ministerial duty is one that '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.'" ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶25, 253 Wis. 2d 323, 646 N.W.2d 314 (quoted source omitted). Here, the language of the "Active Supervision" section of the written expectations for playground behavior does not require a specific response by school staff when students disobey the playground expectations. Rather, it provides general guidelines for staff to follow when supervising student behavior on the playground. Because the "Active Supervision" section does not create an "absolute, certain and imperative" duty for "the performance of a specific task" by staff when students fail to follow the expectations of student behavior, it does not establish a ministerial duty. *See* ***id.***

T.R.M. also contends that the School District is not immune from liability because the facts surrounding T.R.M.'s injury amounted to a known and compelling danger. He argues that the School District knew that T.R.M. was not wearing boots and thus was required to play on the "blacktop" area of the playground; that the blacktop was covered by snow and ice patches; and that balls were provided to the students during recess. He contends that those facts created a known and compelling danger that gave rise to a ministerial duty.

The known and compelling danger exception arises 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.'" ***Id.***, ¶38 (quoted source omitted). It is created "by virtue of particularly hazardous circumstances … that are both known to the municipality or its officers and sufficiently dangerous to require an explicit, non-discretionary municipal response." ***Id.***, ¶39. For the known danger exception to apply, the circumstances must be "sufficiently dangerous so as to give rise to a ministerial duty—not merely a generalized 'duty to act' in some unspecified way, but a duty to perform the particular act upon which liability is premised." ***Id.***, ¶45. T.R.M.'s kicking a ball on snow- and ice-covered blacktop while wearing shoes rather than boots may have been dangerous, but the danger was not "of such force" and the circumstances were not so "particularly hazardous" as to require a single, explicit response. *See* ***id.***, ¶¶38-47. Shoes are not inherently more slippery than boots. For that matter, kicking a ball on a slippery surface is not inherently more dangerous than many other playground activities.

Finally, T.R.M. argues that we should develop the law by limiting the scope of governmental immunity. However, arguments for changes or developments in the law are properly directed to the supreme court or the legislature, not this court. *See* ***Cook v. Cook***, 208

Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (only the supreme court may overrule or modify prior case law); ***Mulder v. Acme-Cleveland Corp.***, 95 Wis. 2d 173, 186, 290 N.W.2d 276 (1980) (only the legislature may change a law after it has been interpreted by the court).

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals