COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0703 **Cir. Ct. No. 99-CV-70**

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

RAQUEL R.S. AND K.B., A MINOR, APPEARING BY JAY S. CARMICHAEL, GUARDIAN AD LITEM, BRIAN J., TERRI J. AND A.J., A MINOR, APPEARING BY JAY S. CARMICHAEL, GUARDIAN AD LITEM, DAVID D., CARRIE D. AND R.D., A MINOR, APPEARING BY JAY S. CARMICHAEL, GUARDIAN AD LITEM, JAMES S., MARIANNE S. AND S.S., A MINOR, APPEARING BY JAY S. CARMICHAEL, GUARDIAN AD LITEM, MICHAEL I., TAMMY I. AND S.I., A MINOR, APPEARING BY JAY S. CARMICHAEL, GUARDIAN AD LITEM, AND KAREN R.J. AND S.J., A MINOR, APPEARING BY JAY S. CARMICHAEL, GUARDIAN AD LITEM,

PLAINTIFFS-APPELLANTS,

V.

NECEDAH AREA SCHOOL DISTRICT AND EMPLOYERS MUTUAL CASUALTY COMPANIES,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 VERGERONT, P.J. The minor plaintiffs in this action are elementary school children in the Necedah Area School District who were fondled by a District bus driver. They and their parents and guardians appeal the trial court's order granting summary judgment in favor of the School District. The trial court concluded that the District was immune from suit for negligence under WIS. STAT. § 893.80(4)[1] and dismissed the action. The plaintiffs contend that the District is not immune from suit for negligence because: (1) the alleged negligent District employees were mandatory reporters under WIS. STAT. § 48.981, and therefore their duties were ministerial, not discretionary; and (2) the known danger exception to immunity applies. We conclude that, even if certain District employees are mandatory reporters under § 48.981(2), an issue we do not decide, the only duty that would be ministerial as a result is the specific reporting obligation in § 48.981(3)(a); the acts of the District employees that form the basis for the claim of negligence remain discretionary. We also conclude that a known danger did not exist under the standard established in ***Lodl v. Progressive Northern Insurance Co.***, 2002 WI 71, ¶¶20-21, 253 Wis. 2d 323, 335, 646 N.W.2d 314. Accordingly, we affirm.

BACKGROUND

¶2 The second amended complaint alleged that the District was negligent because, through its employees, it knew of John Lynch's inappropriate sexual contact with students and (1) permitted him to continue in his employment;

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

(2) failed to adequately supervise him; (3) failed to investigate reports of his misconduct, and (4) failed to take appropriate action to protect the students, including the minor plaintiffs, from him.[2]

¶3 The parties agreed to the following facts for purposes of the District's motion for summary judgment based on governmental immunity.

¶4 John Lynch had been employed as a bus driver by the District for many years. During the spring of 1997 and the 1997-98 school year, he fondled the plaintiff children, then in kindergarten through second grade, on the school bus. The principal of the elementary school, Charlotte Preiss, first had notice of sexually inappropriate conduct by Lynch on February 27, 1998, when a county deputy sheriff and an employee of the Wisconsin Cooperative Educational Service Agency[3] told her that the deputy sheriff's stepdaughter told him of the allegations of two girls that Lynch had touched them in their private parts. That prompted an investigation, which resulted in Lynch's arrest on March 6, 1998, and he did not drive for the District after that date.[4]

¶5 The school secretary, Donna Jorandby, was responsible for handling issues needing immediate attention when Preiss was off school premises and for

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[2] The action was originally filed in federal court, but the federal claims were dismissed by stipulation, and the remaining claims were remanded to state court. As we understand the plaintiffs' brief, they have abandoned their claim that the school district was liable for Lynch's actions because he was acting within the scope of his employment, and only negligence claims remain. We have summarized the alleged acts of negligence in the complaint rather than tracking the complaint's division into three causes of action.

[3] This employee is not an employee of the District.

[4] Lynch was charged with eighteen counts of illicit sexual conduct, but died before the trial.

reporting back to Preiss, her supervisor. After Lynch's arrest, Jorandby reported to Preiss for the first time the following information and observations that occurred prior to his arrest. Jorandby had observed Lynch hugging girls as they boarded the bus and the manner in which he did so made her uncomfortable. A custodian had told Jorandby sometime ago that another District bus driver, Don Julius, told the custodian that two girls on his bus had told him that Lynch touched them in their private parts when they rode Lynch's bus. Jorandby and the custodian spent a number of days watching the buses arrive and leave, and Jorandby decided there was no cause for concern. A teacher's aide reported to Jorandby that she had observed Lynch rub the leg of a child and was unsure whether Lynch had gone under the child's skirt. Jorandby moved the child to a different bus and watched Lynch's bus closely, but saw nothing other than his hugging girls, some longer than others.

¶6 Other incidents that were reported for the first time after Lynch's arrest included the following. Julius reported that sometime in 1995 or 1996 a girl on his bus told him she did not want to ride on Lynch's bus because he touched her; Julius confronted Lynch with the girl's statement and Lynch "said he would take care of it." The girl rode on Julius's bus the rest of the year. Julius also reported that sometime in 1997, a girl on his bus told him that Lynch had touched her in her private parts; Julius told the girl to tell her mother. A teacher, Michael Schroeder, reported that during the 1993-94 school year, he had seen Lynch rest his hand on a girl's buttocks outside her clothing and pull her close to him, but he did not think the conduct was sexually inappropriate.

¶7 The District transportation supervisor, Pat Pesik, who supervised the bus drivers, testified that he had a phone call, some three to five years before 1998, from a parent who said Lynch was hugging his or her child on the bus and it made

the child uncomfortable; Pesik told Lynch to keep his hands off the child. Pesik did not report this incident to his supervisor or anyone in the District. A District bus driver, Marcia Kimbrue, reported to Pesik about two and a half years before Lynch's arrest that two girls told her that Lynch touched them on their buttocks and sometimes under their arms or shoulders; she did not consider the behavior sexual, but reported it to Pesik because the children were upset. Pesik said he would talk to Lynch.

¶8 Kimbrue, Neil Kandziora, and a third bus driver overheard Pesik tell Lynch sometime between 1992 and 1994 "he had been warned before to keep his hands off the children on the bus and that parents had called in"; they heard Lynch deny that he had done anything wrong. Three to four months after that conversation, Kandziora overheard a second conversation between Pesik and Lynch in which Pesik told Lynch to keep his hands off the children.

¶9 A parent testified that she phoned Lynch's wife, who was an elementary school secretary, about one year prior to Lynch's arrest, and asked whether it was possible that Lynch was touching her three girls between their legs and on their buttocks as they had told her, and Lynch's wife said Lynch would not have done that. The parent did not report this to Preiss or anyone in an administrative or supervisory capacity in the school or the District. Lynch's wife testified this conversation never occurred.

¶10 None of the plaintiffs are the children referenced in the above incidents.

DISCUSSION

¶11 We review the grant or denial of a summary judgment de novo, and we apply the same standard as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987). A party is entitled to summary judgment if there are no disputed issues of fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶12 WISCONSIN STAT. § 893.80(4)[5] immunizes units of local government and their officers and employees from liability for any act that involves the exercise of discretion and judgment. ***Lodl v. Progressive Northern Ins. Co.***, 2002 WI 71, ¶¶20-21, 253 Wis. 2d 323, 335, 646 N.W.2d 314. The immunity defense assumes negligence and focuses on whether the governmental action or inaction, upon which liability is premised, is entitled to immunity under the statute. ***Id.*** at ¶17. The two exceptions to immunity on which the plaintiffs rely in this case are for the performance of ministerial duties imposed by law and for a known danger that gives rise to a ministerial duty. *See* ***id.*** at ¶24. The application of the immunity statute and its exception to a given set of facts presents a question of law, which we review de novo. ***Id.*** at ¶ 17.

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[5] WISCONSIN STAT. § 893.80(4) provides:

> **(4)** 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.

¶13 We first address the exception for ministerial duties imposed by law. This is not so much an exception as a recognition that the law of immunity distinguishes between discretionary and ministerial acts, immunizing the former but not the latter. ***Id.*** at ¶25. 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.'" ***Id.***, citing ***Lister v. Bd. of Regents***, 72 Wis. 2d 282, 301, 240 N.W.2d 610, 622 (1976).

¶14 The plaintiffs argue that Jorandby, Schroeder, and Pesik all had a ministerial duty to report the conduct of Lynch that they were told about or observed, and the District is therefore not immune from suit for their negligence. The source of this ministerial duty, according to the plaintiffs, is WIS. STAT. § 48.981(2) and (3)(a), which provide in part:

> **(2)** PERSONS REQUIRED TO REPORT. A physician, coroner, medical examiner, nurse, dentist, chiropractor, optometrist, acupuncturist, other medical or mental health professional, social worker, marriage and family therapist, professional counselor, public assistance worker, including a financial and employment planner, as defined in s. 49.141 (1) (d), school teacher, administrator or counselor, mediator under s. 767.11, child care worker in a day care center or child caring institution, day care provider…having reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected or having reason to believe that a child seen in the course of professional duties has been threatened with abuse or neglect and that abuse or neglect of the child will occur shall, except as provided under sub. (2m), report as provided in sub. (3).
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> ….
>
> **(3)** REPORTS; INVESTIGATION. (a) *Referral of report.*
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> A person required to report under sub. (2) shall immediately inform, by telephone or personally, the county department or, in a county having a population of 500,000

> or more, the department or a licensed child welfare agency under contract with the department or the sheriff or city, village, or town police department of the facts and circumstances contributing to a suspicion of child abuse or neglect or of unborn child abuse or to a belief that abuse or neglect will occur.[6]

The plaintiffs contend that Jorandby, Schroeder, and Pesik are mandatory reporters under subsec. (2), and the specific task they are required to perform, the time for performing it, and how they are to perform it are defined in para. (3)(a).

¶15 We will assume for purposes of discussion that these three District employees are mandatory reporters under WIS. STAT. § 48.981(2). However, the only act subsec. (3) requires of a mandatory reporter is that he or she immediately inform the county department, sheriff, or police department "of the facts and circumstances contributing to a suspicion of child abuse … or to a belief that abuse or neglect will occur." The statute does not require the acts upon which the complaint premises liability—discontinuing Lynch's employment, adequately supervising him, investigating reports about his conduct, and protecting the students from him. Even if the obligation to report to the county department, sheriff, or police department under § 48.981(2) and (3)(a) meets the definition of a "ministerial duty" under ***Lister***, an issue we do not decide, that does not create a ministerial duty to perform the acts upon which plaintiffs' contention of liability is premised. The requirement in the statute of what and when to report to the county department, sheriff, or police department does not eliminate the three employees' discretion about whether, what, and when to report to District personnel or to parents, what investigation to undertake, what steps to take in supervising Lynch,

[6] WISCONSIN STAT. § 48.981(6) authorizes a penalty of not more than $1,000 or imprisonment of not more than six months, or both, for whoever intentionally violates the statute by failing to report as required.

what employment decisions to make concerning Lynch, and how to protect the students.[7]

¶16 We next consider the exception to immunity from suit because of a known danger. This exception applies only when "'there exists a known present danger of such force that the time, mode and occasions for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion.' [Citation omitted.]" ***Lodl***, 2002 WI 71 at ¶38. In the context of this exception, "the ministerial duty arises not by operation of law, regulation or government policy, but by virtue of particularly hazardous circumstances—circumstances that are both known to the municipality or its officers and sufficiently dangerous to require an explicit, non-discretionary municipal response," ***id.*** at ¶39, that is, a response that is "self-evident and particularized." ***Id.*** at 40. The focus "is on the specific act the public officer or official is alleged to have negligently performed or omitted." ***Id.*** The supreme court in ***Lodl*** recently made clear that it is not sufficient that a situation is dangerous enough to require that a public officer or employee "do something" about it; rather the

[7] We understand that the plaintiffs are not asserting a cause of action for a violation of WIS. STAT. § 48.981. Although the amended complaint refers to § 48.981, it does so as a basis for an exception to immunity for negligence, not as a basis in itself for a cause of action for a violation of the statute. In its responsive brief on appeal, the District argues that there is no private civil cause of action for a violation of § 48.981, and, in reply, the plaintiffs assert this issue is a "red herring," that "it was not argued at summary judgment and is not an issue on this appeal." We therefore we do not decide whether a private civil cause of action for a violation of § 48.981 exists.

The District has moved to strike the sentence in the reply brief that the issue of a private civil cause of action under WIS. STAT. § 48.981 "was not argued at summary judgment." The District points out that it did in its reply brief in support of its motion for summary judgment assert that there was no private civil cause of action for a violation of the statute. We understand the plaintiffs to mean that *they* did not argue in the trial court that there was a private civil cause of action for a violation of the statute, and our review of the record shows that to be accurate. Therefore, we deny the motion to strike.

danger must be such that it requires the public officer or employee to act in a particular way—the act upon which liability is premised. ***Id.*** at ¶¶43-44.[8]

¶17 Applying this standard to the circumstances facing each of the District employees,[9] we conclude the known danger exception does not apply. Jorandby was presented with: (1) her observation that Lynch hugged girls as they boarded the bus and her reaction of discomfort with the manner in which he did so; (2) a third-hand account that Lynch had touched two girls in their private parts; and (3) a second-hand account that Lynch had rubbed the leg of a girl and may have gone under her skirt. While her own observation may or may not have required some kind of response from her, certainly the two reports to her did, and she did respond by observing Lynch and by moving one child to another bus. The plaintiffs argue that this was, in effect, "doing nothing." However, they do not explain what particular act the circumstances known to Jorandby compelled her to do, which is the test under the supreme court's decision in ***Lodl***. We conclude there were a number of responses that may, alone or in combination, have been reasonable in the circumstances, including informing Preiss, talking to Lynch, talking to the persons who had talked directly to the children, talking directly to the children, and talking to their parents, as well as removing the children from Lynch's bus. Thus, the information Jorandby had, while requiring a response, allowed for the exercise of discretion as to the mode of response; it did not compel

[8] In ***Lodl***, the supreme court reversed the decision of this court, 2001 WI App 3, 240 Wis. 2d 652, 625 N.W.2d 601, in which we held the known danger exception applied to the facts in that case. Because the supreme court's decision was issued after the parties filed their briefs on this appeal, the plaintiffs relied in their briefs on this court's decision.

[9] The plaintiffs do not argue that Schroeder, Lynch's wife, or Kimbrue were confronted with a known danger, and therefore we do not address those employees with respect to this exception.

a particularized non-discretionary response. ***Lodl***, 2002 WI 71 at ¶46. Accordingly, the known danger exception does not apply to Jorandby.

¶18 Our analysis is similar with respect to Julius, another bus driver, and Pesik, the transportation supervisor. Each was given information on at least two occasions of Lynch's conduct toward children on his bus that was such as to require a response. Each did respond. Julius, after the report from the first child, confronted Lynch and was told Lynch would "take care of it"; he told the second child to tell her mother. Pesik responded by talking to Lynch. The issue is not, as plaintiffs suggest, whether these responses were adequate, but whether either Julius or Pesik was given information that compelled either to respond in a particular, non-discretionary way. As with Jorandby, we conclude that the information given each was such that there were a number of reasonable actions each could have taken in response, and the information therefore did not give rise to a ministerial duty to act in one particular non-discretionary way.

¶19 The plaintiffs also make an argument based on the important public policy of protecting children from sexual abuse. This public policy, they contend, will be undermined by according the District and its employees discretionary act immunity. Since we are bound by the decisions of the supreme court, ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997), the supreme court is the proper forum for an argument that existing precedent, when applied to this case, does not sufficiently take into account an important public policy.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.