COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2006AP2642

Cir. Ct. No. 2006CV2505

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

LEMEL HOMES, INC.,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF WHITEFISH BAY, WI, AND JOEL JASTER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 WEDEMEYER, P.J. Lemel Homes, Inc. appeals from a judgment dismissing its complaint against the Village of Whitefish Bay and Joel Jaster.

Lemel Homes claims the trial court erred in granting summary judgment in favor of Whitefish Bay/Jaster because there was a material issue of fact as to Jaster's actions and because Jaster's actions do not fall under the discretionary immunity protection of WIS. STAT. § 893.80 (2005-06).[1] Because there is no issue of material fact and because Jaster's actions here do fall under the municipality immunity protections in § 893.80, we affirm.

BACKGROUND

¶2 In July 2004, Joseph Lemel, the president of Lemel Homes became interested in a lot for sale located in Whitefish Bay. Realtor Bruce Nemovitz advised Lemel that he had inquired of the Whitefish Bay Building Inspector, who at the time was Jaster, whether the lot could be divided into two parcels. Jaster indicated that the lot for sale could be divided into two parcels.

¶3 Sometime thereafter, Jaster consulted with the City Attorney, who advised him whether the division could occur would have to be determined by the Village Board. Lemel asserts that he personally contacted Jaster to make sure that the lot could be subdivided and was never told that the decision would be up to the Village Board.

¶4 Lemel went forward with the transaction and purchased the lot with the belief that it could be divided into two separate lots. Subsequent to the purchase, the Village Board determined that the division was not permitted. Lemel served a Notice of Injury and Claim on Whitefish Bay and then

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

commenced this action. Whitefish Bay moved for summary judgment on two grounds: (1) there was discretionary immunity; and (2) Lemel was contributorily negligent. Whitefish Bay conceded, for the purposes of the summary judgment motion, that Jaster provided Lemel with erroneous advice. The trial court ruled that Jaster's action fell under the discretionary immunity protections of WIS. STAT. § 893.80. Lemel now appeals.

DISCUSSION

¶5 This case arises from the grant of summary judgment. In reviewing a grant of summary judgment, we employ that same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816, (1987). We first examine the pleadings and affidavits to determine whether a claim for relief has been stated. ***Id.*** If a claim for relief has been stated, we then determine whether any factual issues exist. ***Id.*** If there is no genuine issue as to any material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the trial court's decision granting summary judgment. ***Id.*** Our review is *de novo*. ***Id.***

¶6 Lemel makes two arguments. First, he contends that there is a material issue of fact as to exactly what transpired between Jaster and himself. He argues that Jaster testified that he advised Lemel that the decision on division was up to the Village Board, whereas Lemel contends that Jaster never told him that. Instead, Lemel was advised that the lot could be divided. Lemel continues that based on this disputed fact, summary judgment was improper. We reject this contention.

¶7 As noted above, Whitefish Bay conceded for the purpose of summary judgment, that Jaster provided Lemel with incorrect advice. Accordingly, this dispute is immaterial to resolution of the issue.

¶8 Lemel's second argument is that Jaster's actions should not be cloaked in discretionary immunity. He argues that ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 596 N.W.2d 417 (1999) and ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, 262 Wis. 2d 127, 663 N.W.2d 715, are not controlling and that we should follow the law from foreign jurisdictions suggesting that incorrect information from a zoning administrator is a ministerial act, and therefore not cloaked by municipality immunity. *See* ***Rogers v. City of Toppenish***, 596 P.2d 1096 (Wash. App. 1979); ***Weese v. Village of Medina***, 443 N.Y.S.2d 529 (N.Y. App Div. 1981); ***Village of Camden v. National Fire Ins. Co.***, 589 N.Y.S.2d 293 (N.Y. Sup. Ct. 1992), *aff'd*, 603 N.Y.S.2d 781 (N.Y. App. Div. 1993). We are not persuaded.

Wisconsin's municipal immunity statute, WIS. STAT. § 893.80 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.

The "legislative, quasi-legislative, judicial or quasi-judicial functions" are known as discretionary acts. *See* ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 288, 531 N.W.2d 357 (Ct. App. 1995). Thus, the issue in these cases becomes whether the acts by the employee were discretionary, and therefore

immune from suit, or whether they were ministerial, and therefore not immune from suit.

¶9 If the action requires the employee to use judgment or discretion, then the action is considered discretionary. *See* ***Lifer v. Raymond***, 80 Wis. 2d 503, 510, 259 N.W.2d 537 (1977). When the action does not involve any judgment or discretion, it is considered ministerial. *See* ***Kimps v. Hill***, 200 Wis. 2d 1, 10, 546 N.W.2d 151 (1996).

¶10 Here, the action upon which Lemel's suit is based was Jaster providing erroneous advice on whether the zoning code would permit the lot for sale to be divided into two parcels. The trial court found that ***Kierstyn*** and ***Scott*** controlled the instant case:

> ***Kierstyn*** was the case where erroneous advice was given by the benefits specialist of the Racine School District, for a Racine school teacher who apparently was terminally ill. The husband relies on that information and delays filing a claim for disability benefits, and as a result, the spouse receives a lower benefit in relying on the advice of the benefits specialist. The ***Kierstyn*** court rejected the argument that this was a ministerial duty, and if there was no ministerial duty, the fact that the benefits specialist chooses to provide wrong information does not create a ministerial duty. This is paragraph 22 in the decision. And this Whitefish Bay case is similar to both ***Kierstyn*** and to ***Scott***, in that there are rules and regulations, that the regulations that were under consideration there were also clear and unambiguous. There was not any interpretation necessary to arrive at. The Court's holdings were nonetheless that giving this advice is a process of applying these rules and regulations to a fact situation that's presented, whether it be to a benefits specialist in ***Kierstyn***, or to a high school guidance counselor in ***Scott***, which involves the exercise of discretion.
>
> And from those cases, this Court concludes that the exercise of discretion also applies here when the building inspector is called upon to give advice as to whether a lot is divisible under the applicable zoning code.

We agree with the trial court. This case is controlled by ***Kierstyn*** and ***Scott***. These cases stand for the general proposition that providing advice is a discretionary act, because it involves the judgment or discretion of the municipal employee. In ***Kierstyn***, a municipality's benefits specialist gave erroneous advice to an employee regarding the employee's eligibility for disability benefits. ***Id.***, 228 Wis. 2d at 84. The supreme court held that "a public officer's duty must arise from some obligation created by law." ***Id.***, at 92. Because the benefits specialist had no legal obligation to offer benefit advice to municipal employees, the court concluded that the action involved was discretionary and therefore immunity applied. ***Id.***, at 94-95.

¶11 In ***Scott***, a high school guidance counselor erroneously advised a student athlete that a particular course would satisfy eligibility requirements for college athletic scholarships. ***Id.***, 262 Wis. 2d 127, ¶¶9-10. In that case, the court again found that even though the counselor had the duty to give advice, the action was not ministerial because it required the counselor to apply a variety of rules and regulations to each student's specific situation. ***Id.***, ¶28. The court held that "[t]his interpretive process was inherently discretionary in nature." ***Id.***

¶12 Like these two cases, the facts in the instant case also required Jaster to exercise his discretion in providing a response to Lemel's zoning question. The question required Jaster to apply the zoning code's rules and regulations to the specific lot involved. Such action involves the exercise of judgment and discretion and therefore is a discretionary act entitled to immunity.

¶13 Lemel contends that Jaster's consultation with the Village Attorney removed any discretion and created a ministerial duty. We cannot agree. Even assuming that the Village Attorney provided Jaster with a clear interpretation,

Jaster's failure to apply the interpretation does not render the action ministerial. Rather, any failure by Jaster to apply clear rules rendered his conduct negligent. *See* ***Kierstyn***, 228 Wis. 2d at 94-95 ("The statute may have been clear and [the employee] may have negligently applied it, but the statute did not direct [the employee] to act in any manner."). When an action is discretionary, immunity applies regardless of the degree of negligence. ***Scott***, 262 Wis. 2d 127, ¶29.

¶14 Here, there was no statute or ordinance directing Jaster to provide advice regarding the zoning code or to relay any conversations he had with the Village Attorney regarding zoning code questions. Although the Village Attorney may have altered Jaster's opinion regarding the divisibility of the sale lot, such conversation did not specifically "impose[], prescribe[] and define[] the time, mode and occasion for [any action] with such certainty that nothing remain[ed] for judgment or discretion." ***C.L. v. Olson***, 143 Wis. 2d 701, 711-12, 422 N.W.2d 614 (1988). Because Jaster's action involved discretion and judgment, it constituted a discretionary act and is protected by the immunity cloak of WIS. STAT. § 893.80.

¶15 We are also not persuaded that Wisconsin should abandon the case law referenced above in favor of the foreign law Lemel cites. Case law from other states is not binding on us, ***State v. Muckerheide***, 2007 WI 5, ¶7, ___ Wis. 2d ___, 725 N.W.2d 930, particularly when Wisconsin law is clear.

¶16 Accordingly, based on the foregoing, we conclude that the trial court did not err in granting summary judgment to Whitefish Bay/Jaster. The municipal immunity statute bars negligence claims against municipalities and their employees where the negligence occurred during the course of a discretionary act. A discretionary act occurs when a municipal employee is required to exercise

judgment or discretion before acting. The undisputed facts here demonstrate that Jaster used both judgment and discretion in determining the answer to Lemel's question about the divisibility of the lot.

¶17 Further, there is no statute, ordinance, contract, regulation or other authority which imposes a ministerial duty upon Jaster to provide correct advice in the situation involved. Thus, the circumstances here do not create an act arising from a ministerial duty, and therefore Jaster and Whitefish Bay are immune from suit.[2]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[2] The parties also address the issue of Lemel's contributory negligence. Whitefish Bay points out that Lemel was a sophisticated land developer who should be charged with knowledge of the zoning ordinances and requirements. Because Lemel purchased the lot despite knowing that the proposed land division did not satisfy the zoning ordinance, Lemel should be more negligent as a matter of law. There is also reference to the fact that Lemel could have written the division as a contingency in his offer. We decline to address either of these contentions as neither is necessary for disposition of this case. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).