COURT OF APPEALS DECISION DATED AND FILED

April 10, 2012

Diane M. Fremgen
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. 2011AP2430

Cir. Ct. No. 2010CV623

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

HARRIET OTTO AND DONALD OTTO,

PLAINTIFFS-APPELLANTS,

V.

EAU CLAIRE COUNTY AND WISCONSIN MUNICIPAL MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

THE CENTERS FOR MEDICARE AND MEDICAID SERVICES,

INVOLUNTARY-PLAINTIFF.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Harriet and Donald Otto appeal a judgment dismissing their negligence claim against Eau Claire County on the basis of governmental immunity. Harriet Otto asserts the County had a ministerial duty to place some type of barricade to prevent her from falling several inches off a platform in an exhibit hall at the Eau Claire County Expo Center. She also contends the step down from the platform to the hall's concrete floor represented a known and compelling danger that the County failed to mitigate. We conclude the circuit court properly granted the County's motion for summary judgment on immunity grounds, and affirm.

BACKGROUND

¶2 The Expo Center is a collection of buildings located on County property. The main exhibit hall is primarily used by a local curling club, which leases the building between October 15 and April 1 each year. The concrete floor of the building is flooded and frozen during that time. Carpeted platforms, or risers, form a perimeter around the ice, which club members use to walk on and spectate from while they are not participating. There is a short step down from the platforms to the ice.

¶3 The exhibit hall is rented to other event sponsors about 100 days per year. The ice is removed for these events and the hall's concrete floor is exposed.

The platforms are left in place, however, creating a four-inch step down from the platforms to the concrete floor.[1]

¶4 The Expo Center hosted the Eau Claire County Youth Fair in July 2009. Youth projects were displayed in the exhibit hall. Harriet Otto entered the hall to visit her granddaughter, who had a quilt on display. Otto did not notice the height difference between the platform and the concrete floor and stumbled off the riser, fracturing her hip. Otto then brought the present negligence action against the County.

¶5 It is unclear who was in charge of the exhibit hall at the time of the accident. The fair was planned by a committee of volunteers and open to any youth organization in Eau Claire County. A local 4-H program used much of the hall during this time, though it does not appear the exhibit hall was rented by 4-H or any other organization. Rolf Utegaard, the director of the Expo Center, did not know who was in charge of the event, but issued a key to the exhibit hall to a 4-H representative.

¶6 At his deposition, Utegaard testified that a similar accident occurred at the exhibit hall in 2005, although he could not recall many details. Utegaard believed that injury occurred when someone tripped over the corner of a riser. Following the 2005 accident, Utegaard created stanchions connected by rope. These were placed along the edge of the platforms. Their creation was entirely his

[1] Otto's brief repeatedly asserts that the step down from the platforms is approximately six inches. Otto's first reference to a six-inch step lacks a record citation. The other references cite to documents that do not support that assertion, including a photograph that lacks measurements and an Eau Claire County Incident Report Form that repeatedly describes a four-inch step, not a six-inch step.

own idea; the County had no "rule or code or guidance" regarding their use. The stanchions were left up when no events were scheduled. Utegaard told event sponsors they could remove the stanchions, but needed to place some other barricade across the platforms. No instructions regarding the stanchions were ever placed in writing, and it does not appear that the curling club was instructed to barricade the platforms.

¶7 The case was presented to the circuit court on cross-motions for summary judgment. The County asserted it was immune from suit for the negligent acts of its employees, while Otto asserted that two exceptions abrogated that immunity. The circuit court dismissed Otto's complaint, finding that neither exception applied because of the lack of a written policy regarding the use of the stanchions. Otto now appeals.

DISCUSSION

¶8 The governmental immunity defense, derived from the common law and codified in WIS. STAT. § 893.80(4),[2] provides that governmental subdivisions are not liable for an employee's acts done in the exercise of their legislative, quasi-legislative, judicial or quasi-judicial functions. *See* ***Pries v. McMillon***, 2010 WI 63, ¶20, 326 Wis. 2d 37, 784 N.W.2d 648. The immunity defense presumes negligence and looks to whether the municipal action (or inaction) broadly involves the exercise of discretion. *See* ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, ¶16, 262 Wis. 2d 127, 663 N.W.2d 715; ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶9 Several exceptions limit the scope of the immunity. These exceptions represent a judicial balance struck between the need of public officers to perform their functions freely and the right of an aggrieved party to seek redress. ***Lodl***, 253 Wis. 2d 323, ¶24. Otto asserts two such exceptions apply here: the "ministerial duty" exception and the "known danger" exception. The two require separate analyses, though both are designed to ferret out nondiscretionary conduct, which is not entitled to immunity. *See* ***Pries***, 326 Wis. 2d 37, ¶21. Whether an exception to immunity applies is a question of law that we review de novo. ***Id.***, ¶19. However, we will uphold the circuit court's factual findings unless they are clearly erroneous. ***Id.***

I. Ministerial Duty

¶10 The ministerial duty exception abrogates immunity in circumstances where the law imposes an affirmative obligation to act in a particular way. A ministerial duty 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 of Univ. of Wis. Sys.***, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976).

¶11 The first step in the ministerial duty analysis is to identify an acceptable source for the alleged duty. ***Pries***, 326 Wis. 2d 37, ¶31. Ministerial duties may be drawn from a wide variety of materials, but the spectrum is not limitless. ***Id.*** Statutes and administrative regulations that are sufficiently definite often serve as the basis for such duties. *See* ***Umansky v. ABC Ins. Co.***, 2009 WI 82, ¶4, 319 Wis. 2d 622, 769 N.W.2d 1 (federal safety regulation imposed ministerial duty); ***Lodl***, 253 Wis. 2d 323, ¶27 (statute did not remove officer's

discretion to undertake manual traffic control). Policies promulgated or adopted by government entities may also create ministerial duties. *See* ***Lodl***, 253 Wis. 2d 323, ¶¶26, 28 (police department policy established general protocols for manual traffic control, but did not eliminate officer's discretion to use manual traffic control in the first instance).

¶12 Otto relies heavily on ***Pries*** in asserting that Utegaard's verbal instruction to exhibit hall users is an acceptable source of a ministerial duty. In ***Pries***, an inmate dismantling horse stalls at the Wisconsin State Fair Park was injured when a piece of stall fell on him. ***Pries***, 326 Wis. 2d 37, ¶6. Our supreme court determined that written instructions developed by State Fair Park staff for use in safely disassembling the horse stalls "[fell] within the range of documents that could serve as a basis for a ministerial duty." ***Id.***, ¶32. The mandatory policy language to "always have someone holding up the piece that you are taking down," when coupled with the inherently dangerous nature of the work and instructions "logically encompassed" by the literal policy language, gave rise to a ministerial duty. ***Id.***, ¶¶37-38.

¶13 The instructions in ***Pries*** stand in stark contrast to the instructions in this case. Here there is no official written governmental policy regarding use of the rope stanchions or any other barrier. Utegaard's undisputed testimony was that his instructions were merely his personal "recommendation" to exhibit hall users. Utegaard's recommendation was "not a policy set by the county or anyone else or the grounds," and no "rule or code or guidance" existed for the use of the rope stanchions. *See* ***Noffke ex rel. Swenson v. Bakke***, 2009 WI 10, ¶45, 315 Wis. 2d 350, 760 N.W.2d 156 (finding it significant that a school district did not officially adopt rules it allegedly violated). In essence, Utegaard's recommendation was nothing more than a guideline for exhibit hall users, which

does not give rise to a ministerial duty. *See* ***Pries***, 326 Wis. 2d 37, ¶29 (discussing ***Noffke***, no ministerial duty where "spirit rules" described their content as "guidelines"); ***Lodl***, 253 Wis. 2d 323, ¶29 (relying on police chief's testimony describing policy as a guideline).

¶14 In arguing that Utegaard's verbal recommendation created a ministerial duty, Otto minimizes the importance of having a written source of law or policy. Even the ***Pries*** decision, in which a trio of dissenters accused the majority of extending the liability of public officers "far beyond the confines established by more than half-century of precedent," did not go so far as to say that word of mouth was sufficient. *See* ***Pries***, 326 Wis. 2d 37, ¶48 (Bradley, J., dissenting, joined by Justices Roggensack and Gableman). In fact, the ***Pries*** court held "the choice of discretionary versus mandatory language" to be a "significant factor" in determining the existence of a ministerial duty. *See* ***id.***, ¶30. In the absence of a written policy, the ministerial duty exception is reduced to nothing more than a battle of witnesses. Basing immunity solely on witness testimony, which is oftentimes malleable and subject to the vagaries of human recollection, is inconsistent with the ministerial duty inquiry, which looks for "absolute, certain and imperative" duties that are so specific that "nothing remains for judgment or discretion." *See* ***Lister***, 72 Wis. 2d at 301.

¶15 Regardless, the policy in this case is not well-defined. Contrary to Otto's assertion that hall patrons were instructed to use some type of barrier, it appears that whether a barricade was recommended depended, to some extent, on the intended use of the premises. The fact that Utegaard did not advise the curling club to use any barricade—despite a step down from the platforms to the ice—suggests that any duty arising from Utegaard's instructions was far from "absolute, certain and imperative." *See* ***id***. Thus, it appears that hall renters could use any

type of barricade to prevent access from the risers to the concrete floor, or none at all in the case of the curling club. In light of the foregoing, we conclude the ministerial duty exception does not apply.

II. Known Danger

¶16 Like the ministerial duty exception, the known danger exception abrogates immunity in situations where an official or employee has no choice but to act. However, this duty arises not by the command of rules or regulations, but by the exigencies of an obviously hazardous situation. ***Lodl***, 253 Wis. 2d 323, ¶39. The known danger exception is applicable when "there exists a danger that is known and compelling enough to give rise to a ministerial duty on the part of a municipality or its officers." ***Id.***, ¶4.

¶17 Not every dangerous situation will give rise to a ministerial duty to mitigate the hazard. ***Id.***, ¶40. "For the known danger exception to apply, the danger must be compelling enough that a self-evident, particularized, and non-discretionary municipal action is required." ***Id.*** For example, in the seminal known danger case ***Cords v. Anderson***, 80 Wis. 2d 525, 541, 259 N.W.2d 672 (1977), our supreme court concluded that a park trail running near the edge of a gorge in a public park constituted a compelling danger that required action by the park manager. Since then, compelling dangerous conditions have been found where, for example, a downed tree fell across a road, *see* ***Domino v. Walworth Cnty.***, 118 Wis. 2d 488, 490, 347 N.W.2d 917 (Ct. App. 1984), or a four-year-old was trapped inside a submerged vehicle, *see* ***Linville v. City of Janesville***, 174 Wis. 2d 571, 587-88, 497 N.W.2d 465 (Ct. App. 1993), *aff'd* 184 Wis. 2d 705, 516 N.W.2d 427 (1994).

¶18 Indeed, the known danger exception is most often applied in circumstances that are, in essence, "accidents waiting to happen." ***Voss ex rel. Harrison v. Elkhorn Area Sch. Dist.***, 2006 WI App 234, ¶19, 297 Wis. 2d 389, 724 N.W.2d 420. This type of situation is almost certain to cause injury, ***id.***, and involves more than the mere possibility of harm, ***C.L. v. Olson***, 143 Wis. 2d 701, 723, 422 N.W.2d 614 (1988). Thus, the use of a deflated soccer ball does not constitute a known and compelling danger, ***Bauder v. Delavan-Darien Sch. Dist.***, 207 Wis. 2d 310, 315-16, 558 N.W.2d 881 (Ct. App. 1996), nor does allowing a paroled sex offender to drive, ***Olson***, 143 Wis. 2d at 722-23. Similarly, the potential of escape from a minimum security work release center does not present an obvious and compelling danger. *See* ***Ottinger v. Pinel***, 215 Wis. 2d 266, 277, 572 N.W.2d 519 (Ct. App. 1997), *abrogated on other grounds by* ***Bicknese v. Sutula***, 2003 WI 31, 260 Wis. 2d 713, 660 N.W.2d 289.[3]

¶19 Here, the short step down from the riser to the exhibit hall's concrete floor did not present a compelling danger. Nearly every daily activity carries with it some possibility of injury, and that is, at best, what we are dealing with here. No reasonable person could view the four-inch step as an "accident[] waiting to happen." *See* ***Voss***, 297 Wis. 2d 389, ¶19. The probability of injury is relatively

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[3] We recognize that our supreme court has recently clarified that an overruled court of appeals opinion has no precedential value, even on points of law not specifically reversed. *See* ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶¶42, 56, 326 Wis. 2d 729, 786 N.W.2d 78. However, the rule appears limited to circumstances in which our supreme court expressly repudiates a prior opinion. *See* ***id.***, ¶56. Our supreme court has not held that abrogated cases—cases that are "effectively (but not explicitly) overruled or departed from"—also lose all precedential value. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.7.1(c)(i), (ii), at 102 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010). Here, ***Bicknese v. Sutula***, 2003 WI 31, ¶18 n.3, 260 Wis. 2d 713, 660 N.W.2d 289, implicitly overruled ***Ottinger v. Pinel***, 215 Wis. 2d 266, 572 N.W.2d 519 (Ct. App. 1997), on a relatively minor point: whether an exception to immunity not at issue in this case was properly stated in the conjunctive or disjunctive. Thus, we regard ***Ottinger***'s precedential authority to have survived the court's new rule in ***Blum***.

remote. The fact that two injuries occurred, four years apart, on or near the platforms is an unfortunate coincidence.

¶20 In reaching this conclusion, ***Kimps v. Hill***, 200 Wis. 2d 1, 546 N.W.2d 151 (1996), is instructive. There, a student was also injured in an unforeseen mishap: the base of a volleyball pole fell off during transport for a class exercise. ***Id.*** at 6. A maintenance worker had been injured in a similar accident two years earlier. ***Id.*** at 6-7. In response, a university safety official recommended in writing that maintenance personnel check the screws before moving the poles. ***Id.*** at 7. This was not done, apparently because the recommendation was made in a worker's compensation report not subject to widespread distribution. ***Id.*** In the student's negligence suit against the safety official, our supreme court declined to apply the known danger exception, concisely reasoning that "a single incident involving a piece of athletic equipment that the University had owned and safely used for between 15 and 17 years cannot reasonably be compared with the 'compelling and known' danger posed by a path passing within inches of a 90-foot cliff." ***Id.*** at 16. ***Kimps*** demonstrates that even if, by chance, two accidents occur under similar circumstances, the focus must remain on the nature of the danger. Here, the probability of injury was too remote to give rise to a clear and absolute duty.

By the Court.—Judgment affirmed.

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