COURT OF APPEALS DECISION DATED AND FILED

October 7, 2014

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. 2014AP32 **Cir. Ct. No. 2009CV13956**

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

ROBERT JACOBY AND JUDY JACOBY,

PLAINTIFFS-APPELLANTS,

V.

KEVIN A. DUDLEY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Reversed and cause remanded.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Robert and Judy Jacoby appeal a judgment from the circuit court granting summary judgment in favor of Kevin A. Dudley on the basis of public officer immunity. We reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 The facts of this case are generally not in dispute. On September 13, 2006, Robert Jacoby was walking his dog west on Clarke Street in Milwaukee. Jacoby altered his intended route after he heard Corey Flenorl shouting at him. Flenorl shouted racial slurs at Jacoby, told Jacoby to "get the hell away," and asked "what's this cracker ass doing here?" Jacoby kept walking, heading north on 54th Street, towards Center Street. Jacoby realized that Flenorl was still behind him when Flenorl screamed at a group of children on 54th Street to "stay away from that cracker. He's a pervert." Flenorl then said "I'm going to kill him."

¶3 Jacoby continued to proceed towards Center Street. He called his wife from his cellular phone, telling her to call the police because a man was threatening to kill him. Flenorl continued to shout at Jacoby. Jacoby turned towards Flenorl and saw Flenorl point towards Jacoby, making a shooting motion. Jacoby again called his wife, who told him that she called 911. Jacoby then walked towards the intersection of 51st and Center Streets, where he saw his wife walking towards him. He also saw a squad car on 51st Street.

¶4 Jacoby stepped in front of the squad car and then approached Officer Kevin Dudley's window. Jacoby asked Dudley if Dudley was there in response to Jacoby's 911 call, to which Dudley responded "no." Jacoby told Dudley that he (Jacoby) was being followed by a man who "[has] been chasing me, threatening to kill me." While still in the squad car, Dudley turned around and looked down 51st Street. According to Jacoby, Dudley saw nothing and told Jacoby to "wait right there" because another squad was on its way. Dudley then left. It is undisputed that Dudley was aware of an outstanding 911 call from 51st and Center Streets.

¶5 Jacoby stayed near the intersection of 51st and Center Streets, looking for another squad car. Flenorl then came charging out of a nearby car with his hand behind his back, yelling at Jacoby "I'm going to kill you." Jacoby ran into traffic on Center Street, trying to draw attention to the situation. He was consequently hit by a vehicle. Witnesses chased Flenorl away from the scene.

¶6 The Milwaukee Police Department discharged Dudley for his failure to provide any sort of assistance to Jacoby. Jacoby then filed suit against both the City of Milwaukee and Dudley individually, arguing that Dudley was negligent in performing his official duties. Both the City and Dudley filed motions for summary judgment on the issue of liability. The circuit court granted the City's motion, but initially denied Dudley's motion. The court allowed Dudley to file a renewed summary judgment motion. Dudley argued that he was immune from Jacoby's negligence claims under WIS. STAT. § 893.80(4) (2011-12),[1] which provides general immunity for government officers, agencies or employees "for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions," *see* ***id.***, as opposed to acts done in a ministerial capacity. *See* ***Pries v. McMillon***, 2010 WI 63, ¶24, 326 Wis. 2d 37, 784 N.W.2d 648 (stating that "a ministerial duty for purposes of the ministerial duty exception is imposed by law or policy and performance is required in a time, manner, and under conditions where the officer does not exercise discretion or judgment"). Dudley argued that his "decisions and actions on how to handle his interaction with Mr. Jacoby and the investigation into Mr. Jacoby's complaint to him were discretionary," thus he was protected from civil liability.

---

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶7 The circuit court granted Dudley's motion, finding that Dudley was subject to public officer immunity. The court determined that the issue "comes down to a determination of whether the situation involves a ministerial act or a discretionary act," and found that Dudley did take certain actions, albeit minimal actions, which were within Dudley's discretion. The court stated that Dudley "did not have the right to do absolutely nothing," but stated that what Dudley did do—stop, speak with Jacoby and look outside of his car to determine if anyone was in the area, while knowing that another squad was on the way—were actions within Dudley's discretion. The court declined to find that Dudley had a ministerial duty to investigate further, stating "[i]f we turn this into a ministerial duty, then you're going to open up police officers to make determinations as to how much time you need to spend with anyone who talks to them."

¶8 This appeal follows.

DISCUSSION

¶9 On appeal, Jacoby argues that the circuit court erred in determining that Dudley was entitled to immunity because Dudley's actions were so minimal and inadequate to determine whether Jacoby was in serious danger, as to amount to no investigation at all.

Standard of Review.

¶10 "We review an order granting summary judgment de novo, applying the same methodology as the circuit court, benefiting from the lower courts' analyses." ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶15, 253 Wis. 2d 323, 646 N.W.2d 314. Summary judgment is granted when the pleadings, depositions, affidavits, and other moving papers establish that no material facts are in dispute

and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08. "The well-established purpose of summary judgment procedure is to determine the existence of genuine factual disputes in order to avoid trials where there is nothing to try." ***Lodl***, 253 Wis. 2d 323 ¶16 (quotation marks and citations omitted).

Exceptions to Discretionary Act Immunity.

¶11 The defense of discretionary act immunity for public employees assumes negligence but focuses on whether the action or inaction upon which liability is premised is entitled to immunity. ***Id.***, ¶17. The general rule is that state employees "are immune from personal liability for injuries resulting from acts performed within the scope of their official duties." ***Kimps v. Hill***, 200 Wis. 2d 1, 10, 546 N.W.2d 151 (1996). This doctrine is grounded in common law. ***Id.*** at 9. Whether immunity lies because of the common law doctrine of public officer immunity (discretionary act immunity) is a question of law that we review *de novo*. ***Id.*** at 8. The doctrine is based largely on public policy considerations that spring from an interest in protecting the state's financial resources and a preference for political rather than judicial redress for actions of public officers. ***Lodl***, 253 Wis. 2d 323, ¶23.

¶12 While immunity is the general rule, it is subject to exceptions that represent a judicial balance between the need of public officers to perform their functions freely and the right of an aggrieved party to seek redress. ***Lister v. Board of Regents of the Univ. of Wis. Sys.***, 72 Wis. 2d 282, 300, 240 N.W.2d 610 (1976). There are two exceptions potentially applicable in this case: the ministerial duty exception and the known danger exception.

¶13 As relevant to this case, the ministerial duty exception applies when a 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.'" *See* ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, ¶27, 262 Wis. 2d 127, 663 N.W.2d 715 (citation and footnote omitted). "If liability is premised upon the negligent performance (or non-performance) of a ministerial duty imposed by law or government policy, then immunity will not apply." ***Lodl***, 253 Wis. 2d 323, ¶26.

¶14 "The [known danger] exception, … applies where dangerous circumstances give rise to a ministerial duty to act." ***Pries v. McMillon***, 2008 WI App 167, ¶18, 314 Wis. 2d 706, 760 N.W.2d 174, *aff'd*, 2010 WI 63, 326 Wis. 2d 37, 784 N.W.2d 648 (footnote omitted). ***Lodl*** explained that in the context of known dangers,

> 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. If liability is premised upon the negligent performance (or non-performance) of a ministerial duty that arises by virtue of a known and compelling danger, then immunity will not apply.

Id., 253 Wis. 2d 323, ¶39. Stated differently, ***Lodl*** emphasized that "a dangerous situation will be held to give rise to a ministerial duty only 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 (citation omitted). ***Lodl*** also recognized that

the applicability of the known danger exception is determined on a case-by-case basis. *See* ***id.***

¶15 Jacoby argues that the ministerial duty exception and the known danger exception overlap and both apply to the facts of his case. Jacoby contends that once Dudley became aware of a serious threat to Jacoby's life, Dudley had a ministerial duty to act. Dudley was not entitled to effectively do nothing, hoping that another squad would act on Jacoby's concerns. We agree that threats to kill cannot be ignored without a serious investigation to determine the efficacy of the threat.

¶16 According to the Milwaukee Police Department Code of Conduct, police officers are required to "place the safety of others before our own and accept our moral responsibility to take action against injustice and wrongdoing. Police members are expected to take prudent risks on behalf of the public."[2] Officers are also required to "treat the public … with courtesy and professionalism."[3] Dudley did not follow code of conduct requirements. Dudley does not dispute that he was aware of an outstanding 911 call concerning the area of 51st and Center Streets. Nor does he dispute that Jacoby approached him and told him that he (Jacoby) was being followed and that his (Jacoby's) life was being threatened. Dudley also stated that he did not remember whether he told Jacoby to wait for a responding squad car, but stated that "I may have." Dudley claims that his response to Jacoby's situation—looking out the back window of the squad car

---

[2] MILWAUKEE POLICE DEPARTMENT CODE OF CONDUCT, § 2 (2010), http://city.milwaukee.gov/ImageLibrary/Groups/mpdAuthors/PDFs/CodeofConductReadersSpreadComp.pdf (last visited Sept. 16, 2014).

[3] MILWAUKEE POLICE DEPARTMENT CODE OF CONDUCT, § 5.01 (2010), http://city.milwaukee.gov/ImageLibrary/Groups/mpdAuthors/PDFs/CodeofConductReadersSpreadComp.pdf (last visited Sept. 16, 2014).

and then driving away because he saw no one—was discretionary. However, the exercise of discretion requires some reasonable effort to remove a known and present danger (i.e. a recent repeated threat to kill). Dudley's cavalier response to a citizen fearing for his life based on clear, distinct threats, did nothing to remove the threat. Dudley was on duty, was aware that a 911 call had been made in the relevant vicinity, and was approached by a man describing a threat of potentially imminent death. Yet, rather than actually investigate the threat or offer temporary protection to a citizen fearing for his life, Dudley drove away. When Dudley drove away, Flenorl reappeared from a point near where Dudley had just driven away, and again threatened Jacoby. Jacoby ran into traffic to escape Flenorl and to draw attention to his situation. As former Chief of Milwaukee Police Nanette Hegerty stated in her deposition, Dudley "could have gotten on the radio and asked if a squad had been dispatched and stayed with Mr. Jacoby until the investigating squad arrived; he could have called the dispatcher and said he was not going to do his other assignment, that he was going to take care of this assignment because this man needed help. He could have done any number of things that he didn't do. He just drove off." All of Chief Hegerty's suggested actions would have been consistent with the Milwaukee Police Department's Code of Conduct. Dudley's actions were the antithesis of the Code.

¶17 "[A]llowing for the exercise of discretion does not suffice to bring the actions under the blanket of immunity provided by sec. 893.80(4), Stats., when the facts or the allegations reveal a duty so clear and absolute that it falls within the concept of a ministerial duty." ***Domino v. Walworth Cnty.***, 118 Wis. 2d 488, 491, 347 N.W.2d 917 (Ct. App. 1984). "There comes a time when 'the buck stops.'" ***Id.*** (citation and one set of quotation marks omitted). The facts of this case overwhelmingly establish that Jacoby was in such a "dangerous situation"

that a ministerial duty to act existed. This was "'a known present danger of such force that the time, mode and occasion for performance [was] evident with such certainty that nothing remain[ed] for the exercise of judgment and discretion.'" *See* ***Lodl***, 253 Wis. 2d 323, ¶38 (citation omitted). Dudley had a ministerial duty based on the known danger to actually investigate the threat. Looking out of the squad back window and doing *nothing* more cannot reasonably be called a minimal investigation of a death threat. Dudley made no effort to determine the details of the threats; indeed he did not even ask Jacoby whether Jacoby knew the man threatening him. Dudley is not immune from his liability for the breach of his duty to serve and protect the community. Accordingly, we conclude Dudley's actions are not subject to discretionary act immunity.

¶18 For the foregoing reasons, we reverse the circuit court and remand for further proceedings as may be required.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.