COURT OF APPEALS
DECISION
DATED AND RELEASED

May 2, 1996

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

NOTICE

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

No. 95-1483

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

EDDIE B. ROBINSON,

Plaintiff-Appellant,

v.

HAROLD WILSMAN and
RICK BASTEN,

Defendants-Respondents.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. Eddie Robinson appeals from an order dismissing his personal injury claims against Harold Wilsman and Rick Basten. The issue is whether the defendants are immune from suit under the general immunity extended to state employees for negligence in performing discretionary acts. We conclude that the undisputed facts establish that Wilsman and Basten are immune, and we therefore affirm.

When injured, Robinson was an inmate at the Green Bay Correctional Institution. Wilsman was the recreational director at the institution and Basten was a recreational assistant. For three years Robinson had worked in the recreational unit performing various chores assigned by Wilsman. When injured, Robinson was retrieving ping-pong balls at Wilsman's direction and under his supervision from the roof of music booths located near the ping-pong table. The booths were nine-feet high and had a very flimsy roof. To retrieve the balls, Robinson climbed up a six-foot ladder leaning against a more stable structure and swept balls to the floor with a broom. To reach some of the distant balls, he leaned over and placed his weight on the roof of the music booths. The roof collapsed and he fell and was injured.

Wilsman reported that the ball-retrieving operation had been going on for ten to fifteen years with no previous injuries. Robinson himself had performed the operation two or three times before. The ladder was placed against a guitar storage cabinet which had a roof that was strong enough to support someone climbing onto it. According to Robinson, he was not aware that the roof of the music booths was so flimsy, and neither Wilsman nor Basten, who was also present, warned him that he should not put his weight on the roof.

The trial court dismissed Robinson's claims on summary judgment, holding that Wilsman and Basten were immune from suit. On appeal, Robinson acknowledges that, with certain limited exceptions, state employees are generally immune from suit for their discretionary acts. ***C.L. v. Olson***, 143 Wis.2d 701, 717-18, 422 N.W.2d 614, 620 (1988). However, one of these exceptions is for certain acts of *nongovernmental* discretion and Robinson contends that it should apply to such acts as overseeing the retrieval of ping-pong balls. Robinson also contends that Wilsman and Basten are liable because they allowed him to confront a compelling and known danger, and, under ***Cords v. Anderson***, 80 Wis.2d 525, 541-42, 259 N.W.2d 672, 679-80 (1977), therefore had a nondiscretionary duty to warn him of the flimsy roof.

We decide motions for summary judgment in the same manner as the trial court and without deference to its decision. ***Schaller v. Marine Nat'l Bank***, 131 Wis.2d 389, 394, 388 N.W.2d 645, 648 (Ct. App. 1986). Summary judgment is appropriate if, as here, the material facts are not in dispute and

permit only one reasonable inference. ***Wagner v. Dissing***, 141 Wis.2d 931, 940, 416 N.W.2d 655, 658 (Ct. App. 1987).

Governmental immunity extends to the supervisory acts of Wilsman and Basten while Robinson retrieved the ping-pong balls. Only acts of medical malpractice by state employees fall under the exception for nongovernmental discretion. ***Stann v. Waukesha County***, 161 Wis.2d 808, 818, 468 N.W.2d 775, 779 (Ct. App. 1991). We have previously considered whether to overrule ***Stann*** and have declined to do so. *See* ***Kimps v. Hill***, 187 Wis.2d 508, 516, 523 N.W.2d 281, 285-86 (Ct. App. 1994), *aff'd*, No. 92-2736 (Wis. April 10, 1996).

Wilsman and Basten cannot be held liable for disregarding a compelling, known danger. Balls had been retrieved from the roof of the music booths for ten to fifteen years with no accidents. Robinson had worked for Wilsman for some three years and had retrieved balls before without incident. A safe, alternative method for retrieval existed that did not require placing one's weight on the roof of the music booths. Under those circumstances, there was no "absolute, certain, or imperative duty" to warn Robinson. *See* ***Cords***, 80 Wis.2d at 541, 259 N.W.2d at 679-80 (the question is whether the defendant had an absolute, certain or imperative duty to warn of dangerous condition).

By the Court.—Order affirmed.

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