

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JUNE 24, 1997

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. 96-3557

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DENNIS M. MAKEEFF AND MARCIA MAKEEFF,

PLAINTIFFS-APPELLANTS,

v.

**EAU CLAIRE COUNTY, WISCONSIN COUNTY MUTUAL
INSURANCE CORP., AND GROUP HEALTH COOPERATIVE
OF EAU CLAIRE,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PATTERSON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Dennis and Marcia Makeeff appeal a summary judgment dismissing their personal injury action against Eau Claire County. The complaint alleges that the County was responsible for Makeeff's losing control of

his motorcycle when he traveled through spilled and tracked oil on Highway 53 shortly after a county road worker, Michael Brindle, observed the spill and stopped to begin the cleanup process. The trial court dismissed the action, ruling that the County was protected by immunity for Brindle's discretionary acts. Makeeff argues that Brindle's duties were ministerial, not discretionary, and that the trial court lacked authority to reconsider the county's motion for summary judgment four months after it initially denied the motion. We reject these arguments and affirm the judgment.

Because this case was decided on summary judgment, we consider the facts in the light most favorable to Makeeff. *See Kraemer Bros., Inc. v. United States Fire Ins. Co.*, 89 Wis.2d 555, 567, 278 N.W.2d 857, 862 (1979). The record shows that Brindle was driving southbound on Highway 53 when he saw approximately three gallons of oil spilled on the highway in the southbound lanes and a five gallon pail in the roadway. He proceeded past the oil spill approximately 150 feet and turned around, parking his truck on the boulevard east of the northbound lanes. He had no equipment in his truck to clean up the oil spill. He turned on his four-way flashers and overhead emergency lights and retrieved the pail from the median where an unknown person had placed it. He then returned to his truck, intending to drive back to the station to get some sand to cover the oil. Around the time Brindle got back in the truck, Makeeff proceeded northbound on Highway 53 through oil that had been tracked into the northbound lanes, and lost control of his motorcycle. Makeeff faults Brindle for not having immediately pulled across the boulevard to block northbound traffic after seeing the oil spill in the southbound lanes and for his "failure to address the spill immediately."

The County is immune from civil liability for negligent acts committed by its employees within the scope of their employment unless the duty the employee violated is purely ministerial in nature. *See Lister v. Board of Regents*, 72 Wis.2d 282, 300, 240 N.W.2d 610, 621 (1976). Ministerial duties are created when the law imposes, prescribes and defines the time, mode, and occasion for the duty's performance with such certainty that nothing remains for the exercise of his judgment and discretion. A "present known danger" of such force that the danger itself defines the time, mode and occasions for the duty's performance and also creates a ministerial duty. *See C.L. v. Olson*, 143 Wis.2d 701, 710, 422 N.W.2d 614, 617 (1988). Immunity provisions derive from considerations of public policy and are designed to protect public officers from being unduly hampered or intimidated in the performance of their functions by threat of lawsuit or personal liability. *Scarpaci v. Milwaukee County*, 96 Wis.2d 663, 682, 292 N.W.2d 610, 621 (1976).

Brindle did not have a ministerial duty to immediately block traffic in the northbound lanes of Highway 53. No law or rule or contractual obligation precisely dictated the manner in which Bindle had to address the oil spill. His decision to pick up the pail, inspect the problem and go to the station to get sand rather than blocking the northbound lanes with his truck was a discretionary decision for which the County cannot be held liable.

Citing *Cords v. Anderson*, 80 Wis.2d 525, 542, 259 N.W.2d 672, 680 (1977), Makeeff argues that the oil spill was a "known present danger" of such force that its existence defined Brindle's duty. In *Cords*, the court held that governmental immunity did not apply to a state employee who had knowledge of the uniquely dangerous terrain of a path passing close to a ninety-foot gorge because the danger itself created the circumstances in which the employee had a

nondiscretionary duty to barricade the path or provide warning to its users. The danger posed by oil tracked into the northbound lanes of Highway 53 is not comparable. The tracked oil did not create a danger appreciated only by Brindle. The question of how to respond to oil spilled and tracked over many lanes of a highway leaves substantial room for judgment by the road worker. His duties are not defined by the nature of the problem.

The trial court had authority to reconsider its four-month-old decision denying summary judgment. In its initial decision, the court failed to address the immunity question. It makes no sense to require the parties to go to trial when, as a matter of law, the defendant is immune from suit. Makeeff cites § 805.17, STATS., for the proposition that reconsideration must be made not later than twenty days after entry of a judgment. That statute applies to trials to the court. A summary judgment is not a trial to the court. *See Continental Cas. v. Milwaukee Metro. Sewerage Dist.*, 175 Wis.2d 527, 532-33, 499 N.W.2d 282, 284-85 (Ct. App. 1993). Makeeff also cites § 806.07, STATS., in support of his argument. That statute relates to vacating existing final judgments. None of its provisions affects the trial court's authority to reconsider an interlocutory order denying summary judgment.

By the Court.—Judgment affirmed.

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

