COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-2490

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

ROBERT VINES, JR.,

PLAINTIFF-APPELLANT,

V.

KEN SONDALLE, KENNETH MORGAN,
DAN A. BUCHLER, CHRISTOPHER ELLERD,
BARBARA WHITMORE, DR. DALEY,
DR. THOMAS MALLOY, C. GREELY,
JAMES LABELLE, SGT. ABBOTT, C/O KAUFMAN,
OFFICER PICOLDI, AND OFFICER FREY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Robert Vines, Jr., appeals from an order dismissing his action against various prison officials. The action was dismissed because the officials enjoy immunity from Vines' claims. We affirm the order.

In 1996, Vines was incarcerated at the Racine Correctional Institution. He suffered from chronic back pain and was confined to a wheelchair. In this action, Vines sought to recover for additional injuries and pain to his back caused by his transportation on February 21, 1996, to a medical appointment in a van that was not wheelchair-accessible. Vines' mobility was restricted on that date because officers had been ordered not to remove Vines' restraints. Vines alleged that he was lifted by officers Abbott, Kaufman, Picoldi and Frey and shoved into the van with a twisting motion and then dropped four feet back into his wheelchair after the destination was reached. He alleged that defendants Ellerd, Daley, Greely, and LaBelle failed to provide sufficient training to personnel with respect to transporting Vines and failed to implement appropriate policies and procedures for transporting Vines in a wheelchair-accessible van.[1]

The circuit court granted summary judgment. When reviewing a grant of summary judgment, we apply the standards set forth in § 802.08, STATS., in the same manner as the circuit court. *See* ***Williams v. State Farm Fire & Cas. Co.***, 180 Wis.2d 221, 226, 509 N.W.2d 294, 296 (Ct. App. 1993). The first step requires us to examine the pleadings to determine whether a claim for relief has

[1] Doctor Daley was the Director of the Bureau of Health Services. Courtney Greely was the manager of Health Services at the Racine Correctional Institution (RCI). James LaBelle was the sector chief of Health Services at the RCI. Christopher Ellerd was the security director at the RCI. Although Dr. Thomas Malloy's name appears in the caption, he died before the action was commenced and was never a party. On Vines' motion the action was dismissed as to Ken Sondalle, Director of Adult Institutions, Kenneth Morgan, warden of the RCI, Dan Buchler, deputy warden at RCI, and Barbara Whitmore.

been stated. *See* ***Crowbridge v. Village of Egg Harbor***, 179 Wis.2d 565, 568, 508 N.W.2d 15, 17 (Ct. App. 1993). In an action against a public employee, immunity is presumed and the complaint must plead an exception to the general rule of immunity. *See* ***C.L. v. Olson***, 143 Wis.2d 701, 725, 422 N.W.2d 614, 623 (1988).

Determining the scope of public officer immunity is a question of law. *See* ***Kimps v. Hill***, 200 Wis.2d 1, 8, 546 N.W.2d 151, 155 (1996). Immunity does not protect a public officer from the negligent performance of a ministerial duty, or from malicious, willful and intentional conduct. *See* ***C.L.***, 143 Wis.2d at 710-11, 422 N.W.2d at 617.

Here, we are concerned only with the exception for ministerial duties. Whether a particular action is a ministerial duty is also a question of law. *See* ***K.L. v. Hinickle***, 144 Wis.2d 102, 109, 423 N.W.2d 528, 531 (1988). "A public officer's duty is ministerial only when it 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***, 72 Wis.2d 282, 301, 240 N.W.2d 610, 622 (1976) (footnote omitted). A duty is also ministerial when circumstances give rise to a known and compelling danger of such force that an officer has no discretion not to act. *See* ***C.L.***, 143 Wis.2d at 715, 422 N.W.2d at 619.

The defendants made a prima facie case that they are immune from liability because Vines' transportation involved a discretionary, not ministerial, act. Their affidavits make clear that no statute, administrative rule, or other

mandatory regulation prescribes the manner of transportation for prison inmates.[2] There was no suggestion to these officials that transporting Vines in a vehicle that was not wheelchair-accessible presented a risk of harm. The transportation method was a discretionary determination to be made based on the nature of the handicap with which a particular inmate was afflicted.[3]

It appears that Vines' claim with respect to defendants Ellerd, Daley, Greely, and LaBelle, is that they have a duty to exercise reasonable care to protect a person in custody from harm. The duty to not act negligently is not itself a ministerial duty. *See* ***Kimps***, 200 Wis.2d at 11, 546 N.W.2d at 156. Whether or not policies would be established or training given regarding the transportation of a wheelchair-dependent inmate was a matter of discretion for the supervisory defendants.

With respect to the officers who actually transported him, defendants Abbott, Kaufman, Picoldi and Frey, Vines argues that the imminent danger of moving him into the van was "open and obvious," thus eliminating any discretion in the form of transportation used. However, Vines had been transported in a van not accessible by wheelchair on eleven prior occasions without incident. Vines attempts to distinguish the February 21, 1996, transport from all others because,

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[2] Vines claims that the Americans With Disabilities Act (ADA) prescribes required transportation methods for handicapped individuals. The ADA does not prescribe transportation accommodations that must be made. Even if it did, not until the decision in ***Pennsylvania Dep't of Corrections v. Yeskey***, 118 S. Ct. 1952 (1998), was it made clear that the ADA applies to state prisoners. The defendants are required only to act only under the law as it clearly existed on February 21, 1996. *See* ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982).

[3] As a result of Vines' complaint in the Inmate Complaint Review System, James LaBelle subsequently made a file notation that Vines be transported only in a wheelchair-accessible vehicle. That order does not act retroactively to create a ministerial duty to use such a vehicle on February 21, 1996.

for the first time, his restraints were not removed.[4] This one difference in circumstance does not give light to a known or compelling danger; it is simply not of great magnitude. Even with the shackles intact, the officers could have moved Vines in a manner which would not result in harm. Again, that the officers may have been negligent does not break the shield of immunity absent a showing that the challenged conduct was ministerial. *See* ***C.L.***, 143 Wis.2d at 723-24, 422 N.W.2d at 622.

For the first time on appeal, Vines argues that the defendants are excepted from immunity because the discretion they exercised was nongovernmental. We generally will not review an issue raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980). Although it is possible that a governmental/nongovernmental exception to immunity may exist with respect to situations involving medical decisions, *see* ***Kimps***, 200 Wis.2d at 19-20, 546 N.W.2d at 159-60, the "critical inquiry when determining public officer immunity, in all but the very rare case, remains the discretionary versus ministerial analysis." ***Id.*** at 21-22, 546 N.W.2d at 160. This is not the rare case.

Vines argues that the defendants exhibited a deliberate indifference to his medical needs. He cites ***Estelle v. Gamble***, 429 U.S. 97, 104-05 (1976), which extends the Eighth Amendment prohibition against cruel and unusual punishment to the deliberate indifference to a prisoner's "serious" medical needs and recognizes that such deliberate indifference states a cause of action under 42

[4] Vines explains that on the other occasions in which he was lifted into the vehicle with his restraints removed, he had the "luxury of balancing his weight and controlling his landing by shifting his weight and using his hands."

U.S.C. § 1983.[5] Two elements must be established—that the deprivation alleged must be, objectively, "sufficiently serious," and that the prison officials must have a "sufficiently culpable state of mind." *See* ***Farmer v. Brennan***, 511 U.S. 825, 834 (1994).

It is sufficient here to focus on the second inquiry—the measure of deliberate indifference. More than ordinary lack of due care is required. *See* ***id.*** at 835. Thus, the decision not to utilize certain diagnostic or treatment techniques, while perhaps medical malpractice, does not amount to cruel and unusual punishment. *See* ***Estelle***, 429 U.S. at 107. Subjective recklessness as used in the criminal law is the test for "deliberate indifference."[6] *See* ***Farmer***, 511 U.S. at 839-40. "[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *See* ***id.*** at 842.

As we have already pointed out, Vines had been transported in the same manner on eleven occasions without incident. The nonremoval of his shackles on February 21, 1996, did not pose an obvious increased risk. There was no known risk and consequently no recklessness. Thus, the decision on February 21, 1996, not to utilize a wheelchair-accessible van to transport Vines did not constitute cruel and unusual punishment.

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[5] But for his citation to ***Estelle v. Gamble***, 429 U.S. 97, (1976), Vines does not couch his argument in terms of the Eighth Amendment. Nonetheless, we use the analysis fashioned under that provision.

[6] It is unclear whether Vines' claim is one pertaining to a condition of confinement—the failure to use a wheelchair-accessible van—or that excessive force was used when the officers lifted him to and from his wheelchair. When "officials stand accused of using excessive physical force," the claimant must show that officials applied force "maliciously and sadistically for the very purpose of causing harm," or that officials used force with "a knowing willingness that [harm] occur." ***Farmer v. Brennan***, 511 U.S. 825, 835-36 (1994). The more stringent standard is not applied to a condition of confinement claim. *See* ***id.*** at 836. We give Vines the benefit of the doubt by only applying the reduced standard applicable to condition of confinement claims.

Vines' final attempt to establish a ministerial duty is a claim that the defendants violated the Americans With Disabilities Act (ADA). Vines cannot claim an ADA violation in his suit against these defendants. The ADA redresses the denial of services by a public entity. Vines has not named the State as a party and there is no public entity involved.

Additionally, Vines has not demonstrated that he was denied any service, activity or program contemplated by the ADA.[7] The ADA prohibits discrimination against persons with disabilities in the providing of public services. Vines' claim merely implicates the manner in which he was transported to the medical services being provided to him. He was transported by a method used for all other inmates. There is no requirement in the ADA that Vines be provided with the safest and best method of transportation.

Vines has not established an exception to the defendants' immunity. The complaint was properly dismissed.

By the Court.—Order affirmed.

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

[7] We again note that it was not clear until a 1998 United States Supreme Court decision that the ADA applies to state prisoners. *See supra* note 2.