COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1113

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

GUADALUPE MENDOYA,

PLAINTIFF-APPELLANT,

V.

BROWN COUNTY AND BROWN COUNTY JAIL,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County: VIVI L. DILWEG, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

CANE, C.J. Guadalupe Mendoya appeals a summary judgment dismissing his negligence action against Brown County. Mendoya's complaint alleges that the County breached its duty under § 302.38(1), STATS., by failing to provide appropriate care to an intoxicated prisoner. Because the County is

immune from liability under § 893.80(4), STATS., we affirm the summary judgment.

I. BACKGROUND

In April 1996, the Green Bay Police Department arrested Guadalupe Mendoya for drunk and disorderly conduct and detained him for failure to pay fines for operating a vehicle after suspension or revocation of his license. At the Brown County Jail, the officer who booked Mendoya completed a physical screening form in compliance with the jail's written policy and procedure.[1] Jail personnel filled out the screening form, which indicates that Mendoya displayed "[s]igns of alcohol or drug use" and was "[u]nder the influence of alcohol and drugs." Mendoya signed the form. In his affidavit and brief, Mendoya claims that he consumed twenty-five alcoholic drinks, but the record does not reveal that he communicated this claim to the County.

The County placed Mendoya in a cell containing a number of beds, and he fell asleep in a top bunk, which he insists was the only bunk available. Mendoya later fell from the top bunk onto the cement floor and injured himself. The "rescue squad" transported him to a local emergency room where he received

[1] The applicable Brown County Jail policy, provides, in pertinent part, as follows:

> ADMISSION HEALTH SCREENING REFUSAL TO ACCEPT INJURED OR ILL PERSONS
>
> ….
>
> At any time that [an] inmate is brought to the jail, either for pre-trial detention or to serve a sentence, booking officer will, as part of the admissions process, complete a Physical Screening, (Form J-2) on the inmate. Part of this will involve visual observations of the inmate's condition, including such areas as … [i]ndications of possible influence of alcohol or other drugs.

medical treatment for a fractured wrist and lacerated forehead. Mendoya explained the reason for his fall as follows: "I fell because I was disoriented and thought that I was at home. I was going to go to the bathroom."

Mendoya filed a negligence suit, seeking damages for pain and suffering, medical expenses, and time lost from work. Both parties filed motions for summary judgment pursuant to § 802.08, STATS.[2] The trial court granted summary judgment to the County, dismissing Mendoya's complaint for negligence. This appeal followed.

II. ANALYSIS

We review a trial court's order granting summary judgment de novo using the same methodology as the trial court. Section 802.08(2), STATS.; ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315-17, 401 N.W.2d 816, 820-21 (1987). Whether the trial court properly granted summary judgment is a question of law. ***Green Spring Farms***, 136 Wis.2d at 315, 401 N.W.2d at 820. Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. ***Id***. To determine if summary judgment is proper, we first determine if the complaint states a claim for which relief can be granted. ***Barillari v. City of Milwaukee***, 194 Wis.2d 247, 256, 533 N.W.2d 759, 762 (1995). A court should dismiss a complaint as legally insufficient only if it is quite clear that under no circumstances can the plaintiff recover. ***Id***. If a municipality enjoys immunity from liability under § 893.80(4),

[2] Section 802.08(2), STATS., provides, in part, that "[t]he judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATS., the plaintiff's complaint will fail to state a cause of action, thus making summary judgment appropriate. *See* ***Barillari***, 194 Wis.2d at 256, 533 N.W.2d at 762.

In granting summary judgment, the trial court stated:

> What you're asking me to do is to require a jailer when a prisoner checks in who has signs of being under the influence of alcohol but doesn't admit to being under the influence of alcohol to any degree … passes it [the physical screening], you're asking that the jail take some special action for every prisoner who appears. That isn't possible. … There was no knowledge on their part that he … consumed twenty-five drinks. He gave no knowledge to them that he couldn't ambulate on his own, climb on his own, do everything on his own. He apparently was very good at looking sober even though he wasn't.

Further, the trial court pointed out that Mendoya was capable of providing answers to complete the jail intake forms, signed the forms, and showed no gross signs of intoxication.

The principal issue is whether the County breached its ministerial duty under § 302.38, STATS., to provide appropriate care or treatment to an intoxicated prisoner because it provided "no care." Whether the County's duty regarding Mendoya's placement in a cell containing upper bunk beds violated a ministerial duty is a question of law we review de novo. *See* ***Larsen v. Wisconsin Power & Light Co.***, 120 Wis.2d 508, 516, 355 N.W.2d 557, 562 (Ct. App. 1984). Mendoya further argues that summary judgment is inappropriate because there is a question of fact whether the County's decision to "do nothing" met its duty. The County asserts that governmental immunity under § 893.80(4), STATS., bars Mendoya's negligence claim because its decision was inherently discretionary, not ministerial. Because the

ministerial exception does not apply, we conclude that the County is entitled to immunity as a matter of law.

Under § 893.80(4), STATS.,[3] municipal entities, employees, and officials are immune from personal liability for injuries resulting from discretionary acts performed within the scope of their official duties. ***Kimps v. Hill***, 200 Wis.2d 1, 10 n.6, 546 N.W.2d 151, 156 n.6 (1996).[4] Discretionary acts involve a choice or a judgment. ***Id***. at 23-24, 546 N.W.2d at 161. This shield of immunity dissolves if the municipality negligently performs a ministerial duty or engages in malicious, willful, or intentional conduct. ***Id***. at 10 n.7, 546 N.W.2d at 156 n.7. The ministerial duty exception may be embodied in statutes, administrative rules, polices, or orders. ***Ottinger v. Pinel***, 215 Wis.2d 265, 273, 572 N.W.2d 519, 521 (Ct. App. 1997). A municipality's duty is ministerial only if 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). A known and

[3] Section 893.80(4), STATS., provides, in pertinent part, that: "No suit may be brought against any ... political corporation, governmental subdivision or any agency thereof ... or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."

[4] "The concepts and theories articulated in ***Lister*** are generally applicable to both state and municipal officers and the tests for immunity are similar." ***Kimps v. Hill***, 200 Wis.2d 1, 10 n.6, 546 N.W.2d 151, 156 n.6 (1996).

dangerous condition may also create a ministerial duty.[5] ***Kimps***, 200 Wis.2d at 15, 546 N.W.2d at 158.

We first address the County's duty under § 302.38(1), STATS., which provides that if a prisoner is intoxicated or incapacitated by alcohol, the sheriff or other keeper of the jail shall provide appropriate care or treatment and may transfer the prisoner to a hospital or treatment facility. While the statute imposes a ministerial duty on the County to provide an intoxicated or incapacitated prisoner with the appropriate care or treatment, the manner in which the municipality provides this care is discretionary. *See* ***Swatek v. County of Dane***, 192 Wis.2d 47, 58-59, 531 N.W.2d 45, 49-50 (1995).[6] Mendoya argues that although the mandatory duty to provide appropriate care "requires only that something be done which the jail believes is appropriate," the County breached its duty because it provided no care

[5] There is some confusion regarding whether a known present danger is an *exception* to the immunity rule or whether it *creates* a ministerial duty. In ***Barillari v. City of Milwaukee***, 194 Wis.2d 247, 258, 533 N.W.2d 759, 763 (1995), the supreme court noted that there are three exceptions to the general rule of immunity; it lists a known present danger as the third exception. In contrast, a year later in ***Kimps***, the supreme court explained that a known danger *creates* a ministerial duty: "a public officer's duty becomes ministerial only where, as in ***Cords***, the nature of the danger is compelling and known to the officer and is of such force that the public officer has no discretion not to act." ***Id.*** at 15, 546 N.W.2d at 158 (citation and internal quotation marks omitted). Here, we follow ***Kimps*** and address a known danger as a means to create a ministerial duty.

[6] In ***Swatek***, an inmate sued the county alleging that it breached its duty under § 302.38(1), STATS., to provide appropriate medical care during an attack of appendicitis. ***Swatek v. County of Dane***, 192 Wis.2d 47, 57, 531 N.W.2d 45, 49 (1995). While ***Swatek*** explains which duties are ministerial and which are discretionary under § 302.38(1), STATS., it does not address or even mention immunity under § 893.80(4), STATS. ***Id***. After holding that prisoners are entitled to appropriate care, ***Swatek*** noted that the sheriffs had the discretion or liberty how to provide that care. The court then analyzed whether the sheriffs "properly discharged (did not breach) their discretionary duties" under the statute. ***Id***. at 60-61, 531 N.W.2d at 50. Under § 893.80(4), however, public officials are immune from personal liability for injuries resulting from discretionary acts performed within the scope of their official duties, ***Kimps***, 200 Wis.2d at 10 n.6, 546 N.W.2d at 156 n.6, so if the act is discretionary, immunity precludes us from addressing whether the care and treatment was "appropriate."

beyond what it provides to a sober inmate. Simply put, he claims that the County did nothing to help him, "a helplessly inebriated person."

The record does not support this argument. To determine if the inmate's condition triggers the ministerial duty under § 302.38(1), STATS., the County must determine whether and to what extent the inmate is intoxicated. While the County's duty to provide appropriate care or treatment is ministerial under ***Swatek***, § 302.38(1) does not specify the manner of identifying and determining whether an inmate is intoxicated, the degree of his intoxication, and what care or treatment is required if it deems care and treatment are necessary. Thus, while the ministerial duty to provide care and treatment is always present, *whether the duty is triggered is dependent upon the person's condition at the time of admission to the jail*. For example, if the person is not intoxicated, the ministerial duty under § 302.38(1) would not be triggered. On the other hand, if the person appears highly intoxicated and unable to care for himself, the duty under § 302.38(1) would be triggered. It is the gray area in between which is difficult.

Because the trial court decided this case on summary judgment, the underlying issue is therefore whether the evidence is sufficient to create an issue of disputed fact regarding whether Mendoya's intoxication appeared so extreme that care or special precautions were required. Nothing indicates that there were facts from which the degree of intoxication should have alerted the jailers; the evidence only goes to how intoxicated he was, not the extent to which he appeared to be intoxicated.

Viewing the evidence in a light most favorable to Mendoya, however, his apparent condition at the time of admission to the jail did not trigger some other action under § 302.38(1), STATS., because the jailers had no knowledge that he was,

as Mendoya claims, "helplessly inebriated." As the affidavits indicate, the County determined that Mendoya was "[u]nder the influence of alcohol" and "[s]howed signs of alcohol or drug use." In his affidavit, Mendoya claims that he was "highly intoxicated" and had consumed twenty-five alcoholic drinks, but his affidavit does not state that he told the County he had consumed twenty-five drinks. While his complaint contends that the jailers knew he was "highly intoxicated," as reflected in the physical screening form, the jailers saw nothing unusual about his condition requiring treatment out of the ordinary. Because Mendoya showed no signs of intoxication out of the ordinary, no ministerial duty arose or was triggered under § 302.38(1).

Alternatively, even if Mendoya's condition triggered the ministerial duty, the County did not breach the duty. Section 302.38(1), STATS., requires the County to provide appropriate care or treatment, but does not specify the manner in which the care or treatment should be provided. These are discretionary determinations left to the County's judgment. *See* ***Swatek***, 192 Wis.2d at 59-60, 531 N.W.2d at 50. Here, the County provided the care it believed was necessary based on Mendoya's condition at the time of admission; it completed a physical screening form and supplied him with a bunk in which to sleep. Based on Mendoya's apparent condition, the County exercised its judgment that these measures were appropriate for Mendoya's apparent level of intoxication.

Mendoya claims, however, that the jail provided no care because it did "nothing but lock Mr. Mendoya in a cell just like Brown County does to every other prisoner." Further, he reasons that if "treating intoxicated just like non-intoxicated prisoners could constitute 'medical care or treatment,' then no jailer would *ever* have to take any action with *any* intoxicated prisoner, for it would *always* be within the jailer's discretion." (Emphasis added.) We disagree. The statute requires

appropriate care and treatment, and as ***Swatek*** explains, the jailers had discretion to determine what was appropriate under the circumstances.

Next, we address whether the County breached a ministerial duty created under a jail policy[7] providing that inmates cannot be admitted to jail custody with a blood alcohol level of 0.27% or higher. The policy requires the jail to transport such inmates to a hospital emergency room. Significantly, the record does not reflect that Mendoya's blood alcohol content was measured, and Mendoya does not contend that the County was required to measure it. Therefore, the County had no knowledge whether Mendoya's alcohol level was 0.27% or higher, so it had no duty under this policy to deny his admission to the jail and transport him to a hospital emergency room.[8] The fact that the County was required to exercise its judgment, or that it may have done so wrongly, does not transform this exercise of judgment into a ministerial act. *See* ***Lister***, 72 Wis.2d at 302-03, 240 N.W.2d at 622-23.

Finally, we turn to whether a known danger created a ministerial duty dissolving the County's shield of immunity. Mendoya seems to argue that, given his condition, the fact that he had access to an upper bunk bed was a known danger. For a known danger to create a ministerial duty, the nature of the danger must be compelling, known to the municipality, and "of such force that the public officer has no discretion not to act." ***Kimps***, 200 Wis.2d at 15, 546 N.W.2d at 158 (quoting ***C.L. v. Olson***, 143 Wis.2d 701, 715, 422 N.W.2d 614, 619 (1988)). For a

[7] We reject the County's argument that a policy cannot create a ministerial duty. As we stated in the text, the ministerial duty exception may be embodied in statutes, administrative rules, polices, or orders. ***Ottinger v. Pinel***, 215 Wis.2d 265, 273, 572 N.W.2d 519, 521 (Ct. App. 1997).

[8] Mendoya makes much of the fact that, as reflected in his affidavit, he had 25 alcoholic drinks. His affidavit does not reflect, however, that he communicated this fact to the County.

known danger to create a ministerial duty, the nature of the danger must create a clear and absolute duty. *See* ***id.*** at 15, 546 N.W.2d at 158; ***Olson***, 143 Wis.2d at 715, 422 N.W.2d at 614.

The "known present danger" concept originated in ***Cords v. Anderson***, 80 Wis.2d 525, 259 N.W.2d 672 (1977). In ***Cords***, a public park ranger failed to warn night hikers that a trail, with no rails and no warning signs, was inches away from a drop into a deep gorge. ***Id***. at 538, 259 N.W.2d at 678. The court held that the ranger knew of the dangerous condition, and his duty to alleviate the danger was clear and absolute. ***Id***. at 542, 259 N.W.2d at 680. Given Mendoya's apparent condition at the time of admission, the bunk bed stands in stark contrast to the "compelling and known danger" a trail presents to those hiking at night.

First, unlike the ranger who had knowledge of the danger the trail imposed to night hikers, here, the County had no knowledge of the degree of Mendoya's intoxication. If, however, Mendoya obviously had been highly intoxicated, access to an upper bunk may have been an obvious danger creating a ministerial duty. Second, this one incident over a period of five years does not give the County knowledge that an upper bunk creates an obvious and compelling danger to an intoxicated individual. In ***Kimps***, the court noted that it could not reasonably compare a single incident involving a piece of equipment a university had owned and used safely for many years to the trail in ***Cords***. Similarly, we cannot compare the danger an upper bunk bed presents to the danger the trail presented to night hikers. As the record reveals, there were no documented injuries to intoxicated or sober inmates at the jail in the five years preceding Mendoya's fall. As in ***Kimps,*** we cannot equate the nature of the danger in ***Cords*** with the bunk bed here. Under the circumstances, the bunk bed presented no obvious, known, and compelling danger creating a "clear and absolute" duty. Accordingly, the bunk bed created no

ministerial duty dissolving the shield of immunity. *See* ***Barillari,*** 194 Wis.2d at 262, 533 N.W.2d at 765.

In summary, we hold that the County is immune from suit under § 893.80(4), STATS., because it breached no ministerial duty. Because the County is immune under § 893.80(4), we conclude that it is entitled to judgment as a matter of law. *See* ***Barillari***, 194 Wis.2d at 262, 533 N.W.2d at 765. Accordingly, we affirm the trial court's grant of summary judgment.

By the Court.—Judgment affirmed.

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