COURT OF APPEALS
DECISION
DATED AND FILED

December 21, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2513-FT

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

WENDI MUEHLS-SUSSMAN AND LAWRENCE SUSSMAN,

PLAINTIFFS-APPELLANTS,

JOURNAL COMMUNICATIONS, INC.,

INVOLUNTARY-PLAINTIFF,

V.

DENNIS GREENWOOD AND DENNIS KLOTZ,

DEFENDANTS-RESPONDENTS.

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

Before Vergeront, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Wendi Muehls-Sussman and Lawrence Sussman appeal from an order which dismissed their personal injury action against two University of Wisconsin-Milwaukee employees on governmental immunity grounds. The Sussmans claim the respondents were not entitled to immunity because they had a ministerial duty to remove ice from campus sidewalks under the university's snow removal policy and because the ice presented a known present danger. For the reasons discussed below, we reject each contention and affirm the order of the trial court.

BACKGROUND

¶2 Wendi Muehls-Sussman fractured her left ankle when she slipped and fell on an icy sidewalk at the University of Wisconsin-Milwaukee campus. Earlier in the week there had been a snowfall of several inches followed by freezing drizzle. The university police officers who responded to the scene noted that the entire width of the sidewalk was covered in ice and very slippery and that there was no evidence that the area had been salted. At the time of the injury, the university had a snow removal policy in effect that indicated university personnel would "monitor walks and drives daily if conditions warrant and salt as necessary."

¶3 Sussman and her husband filed suit against Dennis Greenwood, the university's superintendent of buildings and grounds, and Dennis Klotz, the employee responsible for snow removal in the area where Sussman was injured. The Sussmans alleged that Greenwood and Klotz were negligent in failing to inspect the sidewalk and eliminate the hazard. The respondents moved to dismiss on the grounds of governmental immunity and the trial court granted summary judgment in their favor.

STANDARD OF REVIEW

¶4 This court applies the same summary judgment methodology as that employed by the circuit court. *See* WIS. STAT. § 802.08 (1997-98);[1] ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue. *See* ***id***. If we conclude the pleadings are sufficient to join an issue of law or fact, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. ***Id***. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. ***Id***. We draw all reasonable inferences in favor of the non-moving party. ***Williamson v. Steco Sales, Inc.***, 191 Wis. 2d 608, 624, 530 N.W.2d 412 (Ct. App. 1995).

ANALYSIS

¶5 Public officials are shielded from personal liability for injuries resulting from the negligent performance of acts within the scope of their public office. ***Santiago v. Ware***, 205 Wis. 2d 295, 338, 556 N.W.2d 356 (Ct. App. 1996); *see* WIS. STAT. § 893.80(4). This governmental immunity doctrine is qualified by several exceptions, however. Immunity is not available: (1) if the conduct was malicious, willful and intentional, ***C.L. v. Olson***, 143 Wis. 2d 701, 710-11, 422 N.W.2d 614 (1988); (2) if the conduct involved a non-discretionary, ministerial duty imposed by law, ***Lister v. Board of Regents of the University of Wisconsin System***, 72 Wis. 2d 282, 300-01, 240 N.W.2d 610 (1976); (3) if there

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

existed a known present danger of such force that the time, mode and occasion for performance left no room for the exercise of judgment, ***Cords v. Anderson***, 80 Wis. 2d 525, 541, 259 N.W.2d 672 (1977); or (4) any discretion involved was non-governmental in nature, *see* ***Scarpaci v. Milwaukee County***, 96 Wis. 2d 663, 682-86, 292 N.W.2d 816 (1980).

¶6 The Sussmans first contend that the university's snow removal policy created a ministerial duty on the part of the respondents to inspect the campus walkways and remove any ice accumulated thereon. *See* ***Ottinger v. Pinel***, 215 Wis. 2d 266, 274-75, 572 N.W.2d 519 (1997) (noting a ministerial duty can arise from statutes, administrative rules, policies or orders). An examination of the language used in the operation procedures defeats their contention, however. The operation procedures provide that university personnel are to "evaluate snow/ice problems as they occur" and then "select what control methods are most appropriate and what equipment will do the best job." The evaluation of conditions and the selection of appropriate responses are discretionary actions requiring the exercise of judgment. There is no timeframe or particular action specified for any particular conditions. In fact, the operational procedures explicitly note that every storm is different. University personnel are thus required to do more than merely perform a "specific task" imposed by law. ***Lister***, 72 Wis. 2d at 301. They must disperse limited resources across a large campus. We conclude that whatever duty the operational procedures may have reflected or implied with relation to snow and ice removal, it was not ministerial in nature.

¶7 The Sussmans next claim that the danger presented by the icy sidewalk was known to the respondents and so compelling as to require immediate action under ***Cords***. The ***Cords*** exception, however, applies only in "extraordinary" circumstances. ***Kierstyn v. Racine Unified School Dist.***, 228 Wis.

2d 81, 95, 596 N.W.2d 417 (1999). We see nothing extraordinary about the accumulation of ice on a sidewalk during winter in Wisconsin. Nor are we persuaded that the danger presented by slipping on ice rises to the same compelling level as the danger of falling off a ninety-foot cliff, as in ***Cords***, or of hitting a fallen tree blocking a road at night as in ***Domino v. Walworth County***, 118 Wis. 2d 488, 347 N.W.2d 917 (Ct. App. 1984). We agree with the trial court's conclusion that the condition of the campus sidewalk did not present a known danger of sufficient force that the time, mode and occasion for performance left no room for the exercise of judgment.

¶8 Finally, the Sussmans argue that it would be "absurd" to allow the respondents to see the ice and take no action, then escape liability. They seem to believe that establishing negligence ought to be sufficient to defeat immunity. But it is precisely negligent conduct to which the immunity doctrine applies. ***Kimps v. Hill***, 200 Wis. 2d 1, 11-12, 546 N.W.2d 151 (1996).

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.