

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 01-0022
01-0853**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

No. 01-0022

JOYCEL AND CELESTINE WOYCHIK,

PLAINTIFFS-APPELLANTS,

v.

**RUZIC CONSTRUCTION COMPANY, DRESEL CONSTRUCTION
COMPANY, LTD., GENERAL CASUALTY COMPANY OF
WISCONSIN, MATHEY CONSTRUCTION COMPANY, MONARCH
PAVING COMPANY, ST. PAUL FIRE & MARINE
INSURANCE COMPANY, ALLIED GROUP-DEPOSITORS
INSURANCE COMPANY, U.S. DEPARTMENT OF JUSTICE
AND DAN WINRICH,**

DEFENDANTS-RESPONDENTS.

No. 01-0853

PAULA WOYCHIK AND MARK WOYCHIK,

PLAINTIFFS-APPELLANTS,

v.

**RUZIC CONSTRUCTION, DRESEL CONSTRUCTION, MATHEY
CONSTRUCTION, GENERAL CASUALTY COMPANY OF**

**WISCONSIN, ST. PAUL FIRE & MARINE INSURANCE
COMPANY, DEPOSITORS INSURANCE COMPANY, MEDICA,
AND DAN WINRICH, STATE OF WISCONSIN DEPARTMENT
OF TRANSPORTATION,**

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joycel and Celestine Woychik and Paula and Mark Woychik appeal summary judgments dismissing their tort claims against the Wisconsin Department of Transportation and governmental contractors for injuries incurred when Joycel and Paula drove through a construction site.¹ The department and the governmental contractors contend that they are protected from the claims by governmental immunity. We agree and affirm the summary judgments granted by the trial court.

BACKGROUND

¶1 In 1998, the Wisconsin Department of Transportation contracted with Ruzic Construction Company to complete road work on a stretch of Hwy. 10 between Prescott and Ellsworth. Ruzic, the general contractor, subcontracted the

¹ We consolidated these cases by order dated May 11, 2001.

approach work to Dresel Construction and the pavement marking and blacktopping to Monarch Paving Company.

¶2 The department, through its project manager, Daniel Winrich, supervised the entire project. Winrich was present on a daily basis during the construction project. His duties included monitoring work progress, ensuring contract compliance, and paying the contractors. He also made the ultimate decision whether the work was completed to contract specifications. The construction was completed, and the roadway reopened on October 8, 1998.

¶3 After the roadway was reopened, a portion of the blacktop became soft and spongy. Winrich asked the contractors to return to the site and repair the problem. On October 21, Monarch returned and repaved part of the road, but the section failed again once it was reopened. On October 22, Dresel returned to the construction site to perform further repair work. Dresel finished its portion of the job at approximately 6:30 p.m., but there was no time for Monarch to repave the road that evening.

¶4 Dresel created a makeshift gravel ramping system over the open portion to make the area passable. Winrich did not specify how the work was to be done, nor did he give any directions regarding signs and barricades. David Dresel testified that after the ramps were complete, he drove his half-ton pickup through the construction site at a speed between thirty-five and fifty-five miles per hour. He indicated that he felt the site was safe for traffic at fifty-five miles per hour. Winrich later that same evening drove through the construction site at fifty-five miles per hour, and he believed the roadway was “travelable.”

¶5 On the evening of October 22, 1998, Joycel Woychik drove to Prescott from Ellsworth with his daughter-in-law, Paula Woychik, in the car.

Joycel and Paula were injured when they drove through the construction zone. Whether barricades and signs were in place is disputed. Paula and Joycel both testified at deposition that they never observed any bump signs, warning signs, or flashers at the construction site. Dresel testified that he placed signs and barricades to warn traffic.

¶6 Joycel and Paula each initiated separate litigation. In Joycel's case, the trial court granted summary judgment and concluded that the respondents were entitled to governmental immunity. The court signed a stipulation and order that dismissed Paula's action for the same reason.² The cases now are consolidated and we decide them together.

GOVERNMENTAL IMMUNITY

¶7 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). WISCONSIN STAT. § 893.80(4)³ provides:

No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

² The stipulation preserved Paula's right to appeal.

³ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶8 In *In re Estate of Lyons*, 207 Wis. 2d 446, 457, 558 N.W.2d 658 (Ct. App. 1996), we adopted a form of governmental contractor immunity applicable to parties who contract with municipal or state authorities and are directed to perform certain tasks under the contract. An independent professional contractor who follows official directives is an “agent” for the purposes of WIS. STAT. § 893.80(4) and is entitled to common law immunity when:

- (1) the governmental authority approved reasonably precise specifications;
- (2) the contractor’s actions conformed to those specifications; and
- (3) the contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor but not to the governmental officials.

Id. at 457-58. When a contractor merely is acting as an agent for a governmental unit that retains ultimate responsibility for decisions, the contractor has immunity. *Id.* at 453-54.

¶9 The *Lyons* test ensures that state government is able to make the best use of outside resources without unfairly burdening contractors with lawsuits for following governmental directives. *Id.* at 458. The test’s first two prongs ensure that the challenged decision is within the class of official decisions that should be insulated from judicial scrutiny. *Id.* at 457. The third prong ensures that the contractor will not ignore a duty to the public and withhold information about a potentially dangerous situation about which the government does not know. *Id.* at 458.

SUMMARY JUDGMENT

¶10 On a motion for summary judgment on the basis of governmental contractor immunity, the record must conclusively demonstrate that the governmental contractors meet the three-part standard for governmental contractor immunity. *Id.* at 458. We independently apply the summary judgment methodology and owe no deference to the trial court's grant of summary judgment. *Id.*

¶11 Summary judgment is granted only when pleadings, depositions, interrogatories, admissions and affidavits show that there is no genuine issue as to any material fact. WIS. STAT. § 802.08(2). When examining material presented, we view all inferences to be drawn from the underlying facts in the light most favorable to the party opposing the summary judgment motion. *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979).

DISCUSSION

¶12 The Woychiks argue that the contractors failed to meet the *Lyons* three-prong test that would afford them governmental immunity under WIS. STAT. § 893.80(4). They contend that (1) the department did not set out reasonably precise specifications for ramps and signs; (2) the contractors' actions did not conform to uniform specifications; and (3) the contractors did not conclusively demonstrate that they alerted Winrich of dangers. The Woychiks further argue that Winrich negligently performed a ministerial duty and is not entitled to immunity under § 893.80(4). Finally, the Woychiks contend that Winrich should be denied immunity because he breached a mandatory duty created because the construction zone constituted a compelling and known danger.

¶13 We reject the Woychiks' arguments and affirm the judgments. This was not a ramping and signing job. It was a road repair project to address the soft pavement problem. Under the Woychiks' theory, there would be no government contractor immunity because it is impossible to anticipate each and every detail that will be encountered in completing each constituent part of the project. We measure compliance with the *Lyons* factors for the overall repair project, not for each and every detail involved in its completion.

¶14 For reasons that follow, we conclude that the *Lyons* test was satisfied as to the repair project, and the contractors are protected by governmental immunity. Further, Winrich enjoys immunity because he breached no ministerial duty and the *Cords v. Anderson*, 80 Wis. 2d 525, 542, 259 N.W.2d 672 (1977), known danger exception does not apply.

A. *LYONS* TEST

¶15 The undisputed facts demonstrate that the first of the three parts of the *Lyons* test is satisfied. The first part, the specifications prong, is met when the government contractor acts in accordance with the government's directives. *Id.* at 457. *Lyons* requires that the contractor's actions be the product of a government official's decision. *Id.*

¶16 The department did not issue written plans for the October 21-22, 1998, repair work because the softening road was unexpected. Nevertheless, the repairs were performed in accordance with Winrich's directives and under his supervision. Winrich gave the specifications for the entire project orally, and he made sure that the work was completed to his satisfaction, including ramps and signs. He controlled the scope of the repairs and the mode of payment to subcontractors.

¶17 The undisputed proofs demonstrate that Winrich approved and supervised reasonably precise specifications for all phases of the repair project. Winrich instructed Dresel what to do—the length of the excavation, the depth of the excavation, and the materials to be used as fill. Winrich decided that the highway would remain open and that the construction zone would be passable to traffic. While it is true that Dresel both ramped and signed the project, Winrich remained on site after Dresel left to ensure that the transition areas between the asphalt and the temporary gravel roll bed were properly and safely ramped.

¶18 Next, the Woychiks attack the second prong of the *Lyons* test, which requires that the contractor conform to the government’s specifications. *Id.* at 457. The Woychiks argue that factual disputes about whether contractors complied with government specifications preclude summary judgment. We disagree.

¶19 Only Winrich’s directions constitute the specifications for the repair project. Winrich approved the project as completed by Dresel. Dresel testified that Winrich would not have let the contractors leave until everything was done properly. Dresel complied with Winrich’s reasonably precise specifications for the repair project.

¶20 Finally, the Woychiks argue that the third *Lyons* prong is unsatisfied because contractors did not alert Winrich to problems with the construction signing and ramping. We reject that argument because it targets the ramps and signs, and not the repair project as a whole.

B. WINRICH

¶21 The general rule in Wisconsin is that “a public officer or employee is immune from personal liability for injuries resulting from acts performed within the scope of the individual’s public office.” *C.L. v. Olson*, 143 Wis. 2d 701, 710, 422 N.W.2d 614 (1988). The employee is “immune from personal liability for injuries resulting from the negligent performance of a discretionary act within the scope of their public office.” *Kierstyn v. Racine Unified Sch. Dist.*, 221 Wis. 2d 563, 569, 585 N.W.2d 721 (Ct. App. 1998).

¶22 There are four exceptions to the rule of immunity: (1) ministerial duties, (2) duties to address a known danger, (3) actions involving medical discretion, and (4) actions that are malicious, willful and intentional. *Willow Creek Ranch v. Town of Shelby*, 2000 WI 56, ¶26, 235 Wis. 2d 409, 611 N.W.2d 693. The Woychiks invoke two of the four exceptions to the rule of immunity against Winrich: the breach of ministerial duties and the *Cords* known danger exception. However, Winrich had no ministerial duty to breach, and the *Cords* exception does not apply because the construction site did not present a known danger.

¶23 A state employee is liable for negligence in the performance of a ministerial duty. *Kimps v. Hill*, 200 Wis. 2d 1, 10, 546 N.W.2d 151 (1996). A ministerial duty can arise only out of a statute or administrative regulation that imposes an absolute, certain and imperative duty on a particular employee that does not permit any area of judgment or discretion. *Hjerstedt v. Schultz*, 114 Wis. 2d 281, 285, 338 N.W.2d 317 (Ct. App. 1983). In the absence of a mandate, Winrich’s alleged failure to warn highway drivers of a hazardous highway condition does not subject the employee to personal liability. *See id.*

¶24 The Woychiks argue that Winrich had a ministerial duty to assure compliance with “uniform specifications ... incorporated into every Wisconsin highway construction project.” They allude to several department publications, including the Manual on Uniform Traffic Control Devices (MUTCD). The MUTCD and Facilities Development Manual only provide guidance and examples; they impose no legal requirements regarding signs and ramps. *See Harmann v. Schulke*, 146 Wis. 2d 848, 854-55, 432 N.W.2d 671 (Ct. App. 1988). The publications the Woychiks point to imposed no duty on Winrich, let alone one that was “absolute, certain and imperative, involving merely the performance of a specific task when the law imposes” *Lister v. Board of Regents*, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976). We conclude that Winrich breached no ministerial duty because none existed.

¶25 The *Cords* exception “is a very limited one, having rarely been asserted successfully.” *Kierstyn*, 228 Wis. 2d at 95. In *Cords*, a park manager failed to put up warning signs or close trails when he knew that one step away from the walking path was a hazardous ninety-foot drop-off from a cliff into a gorge that was a hidden danger to the public, but “obvious” to him. *Id.* at 538. The park manager’s duty was “so clear and so absolute that it falls within the definition of a ministerial duty” even though it was not created by statute or administrative rule. *Id.* at 542.

¶26 In *C.L.*, 143 Wis. 2d at 723, the supreme court refined the *Cords* analysis to require a showing of “imminent danger [that] is known by the employee or officer to be present and is a danger of such force as to leave nothing to the discretion of the officer.” Further, the danger must be immediately apparent to the defendant. In *Barillari v. City of Milwaukee*, 194 Wis. 2d 247, 251, 533 N.W.2d 759 (1995), an ex-boyfriend sexually assaulted a woman at knife-point

and threatened to kill her. Our supreme court held that the exception did not apply because the detectives assigned to the case could not predict that the victim would be killed on a certain date. *Id.* at 261.

¶27 The last major element of the *Cords* exception is that the defendant failed to act. *Ottinger v. Pinel*, 215 Wis. 2d 266, 276, 572 N.W.2d 519 (Ct. App. 1997). The difference in grade between the road and the excavated area left much to Winrich’s discretion. It presented no immediate danger, and Winrich did not fail to act. Winrich noticed the drop-off from the pavement to the lower grade and directed the contractors to build gradual gravel ramps. Winrich tested the ramps at fifty-five miles per hour and found them “travelable.” Because there is no proof to support a finding that the site was an obvious danger, we conclude that the *Cords* exception does not apply to Winrich.

¶28 Neither the ministerial duty exception, nor the *Cords* known danger exception, applies to Winrich. Therefore, governmental immunity protects him from claims. WIS. STAT. § 893.80(4).

By the Court.—Judgments affirmed.

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

