COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3171 **Cir. Ct. No. 2004CV58**

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

JASON SCHILLING AND BRENDA SCHILLING,

PLAINTIFFS-APPELLANTS,

V.

SHEBOYGAN AREA SCHOOL DISTRICT AND WAUSAU INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

AETNA U.S. HEALTHCARE AND CIGNA HEALTH CARE COMPANY,

SUBROGATED DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jason and Brenda Schilling appeal from a judgment dismissing their complaint against the Sheboygan Area School District for damages for an injury Jason sustained while playing volleyball during gym class at Sheboygan South High School. The circuit court determined that the District was immune from liability. We agree and affirm the judgment.

¶2 In April 2001, while participating in freshman gym class, Jason was injured diving for a miss-hit volleyball in the school gym. He collided with the sharp metal edge of the stand holding the volleyball net. He gashed his knee open and surgical repair was necessary. The Schillings commenced this action alleging in part that the District was negligent in failing to maintain a safe place, in failing to safeguard equipment in the gym, and in failing to inspect and recognize dangerous conditions.

¶3 By its motion for summary judgment, the District asserted immunity from liability under WIS. STAT. § 893.80(4) (2003-04),[1] which immunizes discretionary or nonministerial acts. *See* ***Bauder v. Delavan-Darien Sch. Dist.***, 207 Wis. 2d 310, 313, 558 N.W.2d 881 (Ct. App. 1996). The Schillings contend that the District is liable under the "known danger" exception to the immunity rule. *See* ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶4, 253 Wis. 2d 323, 646 N.W.2d 314.

¶4 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***Id.***, ¶15. When an immunity defense is asserted, negligence is assumed. ***Id.***, ¶17. Thus, our inquiry is a question of

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

law—whether the known danger exception, one of the judicially-created exceptions to immunity, applies. ***Id.***

¶5 Immunity will not apply if a ministerial duty arises by virtue of a known and compelling danger. ***Id.***, ¶39. The known danger exception recognizes a ministerial duty "where a danger is known and of such quality that the public officer's duty to act becomes '"absolute, certain and imperative ...."'" ***C.L. v. Olson***, 143 Wis. 2d 701, 715, 422 N.W.2d 614 (1988) (quoting ***Cords v. Anderson***, 80 Wis. 2d 525, 541, 259 N.W.2d 672 (1977)). The exception requires a "a known present danger of such force that the time, mode and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion." ***C.L.***, 143 Wis. 2d at 717. We look for "particularly hazardous circumstances—circumstances that are both known to the municipality or its officers and sufficiently dangerous to require an explicit, non-discretionary municipal response." ***Lodl***, 253 Wis. 2d 323, ¶39.

¶6 The Schillings argue that the volleyball equipment was knowingly hazardous, thus requiring the District to take some measure to protect students. They point to six previous accidents involving the volleyball net stands, with at least two involving students getting cut by contact with a stand. They also quote the gym teacher's deposition testimony that she felt the sharp edges on the volleyball net stands every time she set them up and that the stands presented a potential problem.

¶7 It is not enough to establish that a known hazard existed such that some injury is possible. *See* ***Lodl***, 253 Wis. 2d 323, ¶40 (not every dangerous situation gives rise to a duty that can be characterized as ministerial). The genesis of the known danger exception is ***Cords***. There the danger was a trail open for

night hiking which "passed a few inches from an undercut dropping into a ninety foot gorge." ***Cords***, 80 Wis. 2d at 538. The court wrote that "the duty to either place warning signs or advise superiors of the conditions is, on the facts here, a duty so clear and so absolute that it falls within the definition of a ministerial duty." ***Id.*** at 542.

¶8 This case is not like ***Cords***. The danger presented by the sharp edge on the volleyball net stand, while observed by the gym teacher who worked with the stand every day, was not so clear or absolutely certain to result in injury such that a reasonable person would not utilize the stand without additional protective measures or warnings. *See* ***Bauder***, 207 Wis. 2d at 315-16 (playing soccer in gym with a deflated ball was not a danger in the same category of the obvious danger presented in ***Cords***). *See also* ***Kimps v. Hill***, 200 Wis. 2d 1, 16, 546 N.W.2d 151 (1996) (the danger presented by moving a volleyball standard could not be equated with the compelling and known danger in ***Cords***). This is particularly true here where the gym teacher's testimony is tempered by her recognition that everything in the gym is a potential problem. She also indicated that students in freshman gym did not usually play aggressively so as to put themselves at risk. The danger was not so compelling that it was self-evident that action was necessary. *See* ***Lodl***, 253 Wis. 2d 323, ¶40 (for the known danger exception to apply, the danger must be compelling enough that a self-evident action is required). We conclude that the known danger exception to immunity does not apply.

By the Court.—Judgment affirmed.

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