COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 2010

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2009AP200

Cir. Ct. No. 2007CV285

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

ABBY KRUS, A MINOR BY HER GUARDIAN AD LITEM, MARK J. MINGO, ROBIN KRUS AND RICHARD KRUS,

PLAINTIFFS-APPELLANTS,

V.

COMMUNITY INSURANCE CORPORATION, JEANNE DRUSCHKE AND NORTHLAND PINES SCHOOL DISTRICT,

DEFENDANTS-RESPONDENTS,

WAUSAU BENEFITS, DEPARTMENT OF HEALTH AND FAMILY SERVICES, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY AND GHI INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Vilas County: NEAL A. NIELSEN, III, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Abby Krus and her parents appeal a summary judgment dismissing their action against Abby's physical education teacher, Jeanne Druschke, the school district and their insurer. The court concluded Druschke was protected by governmental immunity for her actions that contributed to Abby's injury during a gym class. *See* WIS. STAT. § 893.80(4). Krus contends two exceptions to governmental immunity apply in this case: (1) the "known and compelling danger" exception; and (2) the ministerial duty exception. Because we conclude neither of these exceptions apply, we affirm the judgment.

¶2 Krus seriously injured her knee in a physical education class while performing beginner parallel bar gymnastics. Abby expressed fear about performing the routine, but Druschke required her to perform the exercises. The bars were set at the lowest level, approximately three feet, ten inches off the floor and above four inches of mats. Before Abby performed the routine, another student successfully demonstrated the exercises for Abby. Abby requested a "spotter," and Druschke volunteered to spot Abby. Just as Druschke's attention was diverted by another student asking a question, Abby caught her leg on the parallel bar and injured her knee. Abby was Druschke's first pupil to injure herself in gymnastics in thirty-two years of teaching.

¶3 Government agencies and employees are immune from liability for their discretionary actions. *See* WIS. STAT. § 893.80(4). The immunity defense assumes negligence and focuses on whether the negligent party's action or inaction is entitled to governmental immunity. ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314. Exceptions to governmental immunity include known and compelling dangers and ministerial duties. ***Id.***, ¶24. Whether governmental immunity applies to a set of facts is a question of law that we review de novo. ***Id.***

¶4 The known and compelling danger exception does not apply in this case. That exception "arises out of the theory that a known and compelling danger may be so dangerous that a public officer has a duty to act." ***Noffke v. Bakke***, 2009 WI 10, ¶52, 315 Wis. 2d 350, 760 N.W.2d 156. The exception is "reserved for situations that are more than unsafe, where the danger is so severe and so immediate that a specific and immediate response is demanded." ***Umansky v. ABC Ins. Co.***, 2009 WI 82, ¶14, n.7, 319 Wis. 2d 622, 756 N.W.2d 1. The dangers created by the gymnastics exercises are not so severe and immediate as to eliminate discretion and create an absolute duty for the teacher.

¶5 Krus relies heavily on ***Voss v. Elkhorn Area School Dist.***, 2006 WI App 234, 291 Wis. 2d 389, 724 N.W.2d 420, to argue that her situation constituted a known and compelling danger. In ***Voss***, the injuries were sustained while a student was wearing "fatal vision goggles" which replicate the effects of alcohol intoxication. ***Id.***, ¶2. The teacher instructed the students to walk in a straight line between metal desks and attempt to retrieve a tennis ball while wearing the goggles. The court concluded the known and compelling danger exception applied because the teacher's only self-evident response was to stop the activity before Voss was injured. ***Id.***, ¶20. The purpose of the goggle exercise was to simulate a dangerous condition of intoxication. The dangers presented by the gymnastics exercises are not comparable to those in ***Voss***. Beginners gymnastics is not "more than unsafe," *see* ***Umansky***, 319 Wis. 2d 622, ¶14, n.7, and the exercise was not designed to simulate a dangerous condition. Druschke's precautions and the nature of the activity were not such that it was necessary to stop teaching beginner parallel bar exercises.

¶6 Krus argues the known and compelling danger exception applies because Druschke should not have turned away to answer another student's

question while spotting Abby. That action describes Druschke's alleged negligence rather than the creation of a ministerial duty. *See* ***Noffke***, 315 Wis. 2d 350, ¶57. The immunity defense assumes negligence. ***Lodl***, 253 Wis. 2d 323, ¶17. Druschke's assumed negligence is not relevant to whether the beginners' gymnastics exercises were a known and compelling danger.

¶7 Krus also cites this court's recent decision in ***Heuser v. Community Ins. Corp.***, 2009 WI App 151, 774 N.W.2d 653, to support her known and compelling danger argument. In ***Heuser***, a student was cut by a scalpel after receiving a caution that it was very sharp. The teacher did not demonstrate the proper technique for capping and uncapping the scalpels. Two other students were cut while using the scalpels earlier that day. Those circumstances created a known and compelling danger because the correct method was not demonstrated to the students and the previous injuries should have notified the teacher of the inherent dangers.

¶8 The trial court also correctly concluded the ministerial duty exception does not apply. That duty applies when a law or regulation requires a public employee to act in a particular way, leaving no room for discretion. ***Lodl***, 253 Wis. 2d 323, ¶¶25-26. A ministerial duty 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." ***Umansky***, 319 Wis. 2d 622, ¶15. No statute, regulation or rule specified how Druschke should teach gymnastics. The statutory requirement that schools teach physical education and provide "safe and healthful facilities," *see* WIS. STAT. § 121.02(1)(i), (1)(L)(2), does not provide a specific directive that eliminates the teacher's discretion. ***Bauder v. Delavan-Darien School Dist.***, 207 Wis. 2d 310, 314, 558 N.W.2d 881 (Ct. App.

1996). Krus identifies no specific statute or regulation that would affect Druschke's discretionary decisions regarding the gymnastics exercises and her spotting activities.

By the Court.—Judgment affirmed.

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