COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2011

A. John Voelker
Acting 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. 2009AP2815 **Cir. Ct. No. 2007CV816**

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

TIMOTHY ELMER, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF KELLI ELMER AND TERRY ELMER,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN COUNTY MUTUAL INSURANCE COMPANY AND POLK COUNTY,

DEFENDANTS-RESPONDENTS,

MILESTONE MATERIALS,

DEFENDANT.

JEROME DOOLITTLE, A PARENT AND GUARDIAN FOR COURTNEY DOOLITTLE, A MINOR, JEROME DOOLITTLE AND KATHRIN DOOLITTLE,

PLAINTIFFS-APPELLANTS,

STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

PLAINTIFF,

V.

WISCONSIN COUNTY MUTUAL INSURANCE COMPANY AND POLK COUNTY,

DEFENDANTS-RESPONDENTS,

MILESTONE MATERIALS,

DEFENDANT.

APPEAL from a judgment of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed.*

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

¶1 PER CURIAM. In 2006, Polk County, pursuant to a contract with the State of Wisconsin, laid and compacted six inches of gravel on Highway 65. Kelli Elmer was killed and Courtney Doolittle was severely injured when Kelli lost control of her van as it entered the gravel lift[1] later that day.

¶2 Timothy and Terry Elmer, Kelli's representatives, and Jerome and Kathrin Doolittle, Courtney's representatives, appeal a summary judgment dismissing their negligence claims against the County.[2] They contend the circuit court improperly concluded the County is immune from liability under WIS. STAT.

[1] A gravel lift is a layer of gravel applied to a road as one step in the process of raising it.

[2] To prevent confusion with the plaintiffs, we will refer to the accident victims by their first names, Kelli and Courtney. We will also refer to the plaintiffs singularly as "Elmer" and "Doolittle" for ease of reading.

§ 893.80(4).[3] Specifically, they contend the County breached ministerial duties to use particular materials in the gravel lift, to place a certain amount of signage at the construction site, and to prepare a formal traffic control plan. They also assert the County had a ministerial duty to remedy the known and compelling danger presented by the lift. Because we agree with the circuit court that the County's duties were discretionary, we affirm.

BACKGROUND

¶3 In October 2006, the County began repairing a section of Highway 65 pursuant to a contract with the State of Wisconsin. On October 9, the County laid and compacted approximately six inches of gravel.[4] The purpose of the gravel lift was to raise the road for two new culverts. The County placed signs warning motorists of impending road work and loose gravel. The County also placed an advisory thirty-five mile-per-hour speed limit sign.

¶4 Later that evening, Kelli Elmer was driving her family's van north on Highway 65 with Courtney Doolittle and Jesse Flug. According to a police interview with Flug, the van was travelling in excess of eighty miles per hour as it

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[4] The record contains substantial, and conflicting, testimony regarding the adequacy of the compaction. Nevertheless, there is no need to relate the evidence on that point since we are solely concerned with the County's immunity defense, which assumes negligence. *See* ***Umansky v. ABC Ins. Co.***, 2009 WI 82, ¶12, 319 Wis. 2d 622, 769 N.W.2d 1.

crested the hill and entered the gravel lift.[5] Kelli lost control of the van and was killed. Courtney sustained severe brain injuries.

¶5 Elmer and Doolittle filed suit against Polk County and its insurer, alleging the accident occurred as a result of Polk County's negligent repair of Highway 65. The circuit court determined the County and its insurer were entitled to summary judgment on immunity grounds. Elmer and Doolittle now appeal.

DISCUSSION

¶6 We review a grant of summary judgment de novo. *See* ***Tews v. NHI, LLC***, 2010 WI 137, ¶40, 330 Wis. 2d 389, 793 N.W.2d 860. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08. We construe all facts and reasonable inferences in the nonmoving party's favor. ***Strozinsky v. School Dist. of Brown Deer***, 2000 WI 97, ¶32, 237 Wis. 2d 19, 614 N.W.2d 443.

¶7 WISCONSIN STAT. § 893.80(4) immunizes governmental subdivisions, including counties, against liability for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."[6] A

[5] A crash scene investigator estimated that the van was traveling, at a minimum, between fifty-three to fifty-nine miles per hour after it entered the gravel lift. The investigator noted that the vehicle's prior speed would likely have been higher.

[6] In full, WIS. STAT. § 893.80(4) reads:

(continued)

quasi-legislative act involves the exercise of discretion or judgment in determining the policy to be carried out or the rule to be followed. ***Lifer v. Raymond***, 80 Wis. 2d 503, 511-12, 259 N.W.2d 537 (1977). A quasi-judicial act, on the other hand, involves the exercise of discretion and judgment in the application of a rule to specific facts. ***Id.*** at 512.

¶8 The immunity conferred by WIS. STAT. § 893.80(4) is subject to "several exceptions 'representing a judicial balance struck between the need of public officers to perform their functions freely [and] the right of an aggrieved party to seek redress.'" ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶24, 253 Wis. 2d 323, 646 N.W.2d 314 (quoting ***C.L. v. Olson***, 143 Wis. 2d 701, 710, 422 N.W.2d 614 (1988)) (internal quotation marks omitted). Our supreme court has recognized limitations to governmental immunity where the activities performed are: (1) ministerial duties imposed by law; (2) duties to address a known and compelling danger; (3) actions involving professional discretion; and (4) malicious, willful, and intentional acts. ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, ¶16, 262 Wis. 2d 127, 663 N.W.2d 715. Here, Elmer and Doolittle invoke the ministerial duty and known and compelling danger exceptions. They also argue that WIS. STAT. § 893.83 also abrogates the County's immunity.

> No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any 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.

I. Ministerial Duty

¶9 "The ministerial duty exception is not so much an exception as a recognition that immunity law distinguishes between discretionary and ministerial acts, immunizing the performance of the former but not the latter." ***Lodl***, 253 Wis. 2d 323, ¶25. 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." ***Id.***; *see also* ***Meyer v. Carman***, 271 Wis. 329, 332, 73 N.W.2d 514 (1955). This narrow definition acknowledges that many governmental actions, even those done under a legal obligation, require the exercise of judgment and therefore qualify as discretionary. *See* ***Scott***, 262 Wis. 2d 127, ¶28.

¶10 Elmer and Doolittle contend the County breached three discreet ministerial duties when constructing the highway. First, they argue the County failed to use road materials purportedly required by the Wisconsin Facilities Development Manual (FDM). Second, they assert the County failed to erect proper signage at the construction site, contrary to the Manual on Uniform Traffic Control Devices (MUTCD). Third, they claim the County failed to prepare a formal traffic control plan allegedly required by the MUTCD.

Use of Proper Road Materials

¶11 Elmer and Doolittle contend the County breached a ministerial duty, imposed by the FDM, to use a particular size and type of material in the gravel lift.[7] They argue the FDM left nothing to the County's discretion.

¶12 The FDM and its contents are described in the affidavit of David Daubert, a registered professional engineer. The FDM, according to Daubert's affidavit,

> provides policy, procedural requirements, and guidance encompassing the facilities development process within the Wisconsin Department of Transportation. It is applicable to all types of highway improvements on the state trunk highway system, state facilities road systems funded with state funds administered by the department, and other highways and roads for which the department may act as an administrative agent.

Daubert's affidavit further states, "Under the FDM, a municipality should use Class 5 materials, and materials with a size of ¾ inch minus, at a construction site similar to the one at issue in this case. The County used improper materials on section 2 of the construction site." In an affidavit filed later in the litigation, engineer Albert Klais similarly concluded that the County violated the FDM by using improper materials.

¶13 At the summary judgment hearing, the circuit court requested that Elmer and Doolittle supplement Daubert's affidavit with the pertinent sections of the FDM. In response, Elmer and Doolittle submitted: (1) four pages of the

[7] The current version of the pavement chapter of the Wisconsin Facilities Development Manual (February 25, 2011) is available on the Wisconsin Department of Transportation's website: https://trust.dot.state.wi.us/static/standards/fdm/14-00toc.pdf.

pavements chapter from the November 29, 2007 edition of the FDM; (2) six pages of what was described as the "Wisconsin Department of Transportation 2009 Standard Specifications, section 301;" and (3) a portion of a federal administrative code subpart regarding safety procedures on federal-aid construction projects.

¶14 None of the supplemental documents supports the existence of a ministerial duty. Daubert's affidavit indicates he relied only on the FDM—not the 2009 Standard Specifications or the federal administrative code—as the source of the County's ministerial duty. We have been unable to locate a ministerial duty anywhere in the four FDM pages supplied by Elmer and Doolittle.[8] Even if we could locate such a duty in the pages of the 2007 FDM, our discovery would say nothing about whether the duty existed when the County began construction in 2006. In sum, Elmer and Doolittle have failed to establish that the County had a

[8] Elmer and Doolittle fail to provide meaningful record citations to the highly technical documents they contend create a ministerial duty. Consequently, this court has received virtually no assistance in locating provisions to support their argument. We have done our best to locate the alleged ministerial duties within the complex design standards, but have found none. This case is a shining example of the importance of providing proper citation to the record. Proper record citations are more than a tool for the court to use in resolving a controversy (though they are certainly that); they are *required* by the Rules of Appellate Procedure. *See* WIS. STAT. RULE 809.19(1)(d), (1)(e). "An appellate court is improperly burdened where briefs fail to properly and accurately cite to the record." ***Hedrich v. Board of Regents***, 2001 WI App 228, ¶1 n.2, 248 Wis. 2d 204, 635 N.W.2d 650. We caution Elmer's and Doolittle's appellate counsel that future rules violations will likely result in sanctions. *See* WIS. STAT. RULE 809.83(2).

Additionally, we note that Elmer and Doolittle also misstate the contents of the record. For example, in their brief's statement of facts, Elmer and Doolittle contend that the County used "small orange cones [to delineate the edges of the road surface] … instead of large orange barrels with reflectors and/or flashing lights on them. This decision was contrary to the specific directive given to the county by State DOT employee, Michael Ostrenga." Elmer and Doolittle then cite Ostrenga's deposition testimony in which he states that, although the DOT will normally use orange barrels, "cones are allowed" too. Parties to an appeal must ensure that the record adequately supports the proposition for which it is cited.

ministerial duty to use a particular type and size of material when repaving the road.

¶15 Elmer and Doolittle claim they have created a genuine issue of material fact because they have presented affidavits that purport to establish the requirements of state law regarding gravel composition. State law includes statutes, administrative rules, policies, orders, plans adopted by governmental units, or contracts to which a governmental unit is a party. *See* ***Meyers v. Schultz***, 2004 WI App 234, ¶19, 277 Wis. 2d 845, 690 N.W.2d 873. The question of whether a ministerial duty exists is a question of law, not fact. *See* ***Weiss v. City of Milwaukee***, 79 Wis. 2d 213, 230, 255 N.W.2d 496 (1977); *see also* ***Pries v. McMillon***, 2010 WI 63, ¶26, 326 Wis. 2d 37, 784 N.W.2d 648 ("Where there is a written law or policy defining a duty, we naturally look to the language of the writing to evaluate whether the duty and its parameters are expressed so clearly and precisely, so as to eliminate the … exercise of discretion."). As such, we are not bound by the affidavits' legal conclusions.

Proper Signage

¶16 Elmer and Doolittle next assert that the County failed to erect proper signage at the construction site, contrary to the MUTCD. The MUTCD, according to Daubert's affidavit, is published by the Federal Highway Administration and "defines standards and directives for installing and maintaining traffic control devices on all streets and highways in the United States." WISCONSIN STAT. § 84.02(4)(e) requires the state department of transportation to adopt a manual establishing a uniform system of traffic control devices that "is consistent with and, so far as practicable, conform[s] to current and nationally recognized standards for traffic control devices." Local authorities must place and maintain

traffic control devices in accordance with the state manual. WIS. STAT. § 349.065. Daubert's affidavit states that the department has adopted the MUTCD and added a supplement to modify the standards for use in Wisconsin.

¶17 Elmer and Doolittle assert the number of signs at the highway construction site did not meet the number required by the MUTCD. The 2003 edition of the MUTCD[9] classifies its text into four categories: standard, guidance, option, and support. Of the four, only those practices designated a "standard" are "required, mandatory, or specifically prohibit[ed]."[10] Section 6C.04 of the MUTCD, regarding advance warning of a work zone, does not contain a standard.[11]

[9] Eight pages of the 2003 Manual on Uniform Traffic Control Devices are attached to Daubert's affidavit. We assume the 2003 edition was applicable at the time the County began construction.

[10] "Guidance" is defined as "a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate." An "option" is "a statement of practice that is a permissible condition and carries no requirement or recommendation." "Support" is defined as "an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition."

[11] Elmer and Doolittle assert that, regardless of their label, all provisions of the MUTCD are binding on the County under ***Chart v. Dvorak***, 57 Wis. 2d 92, 203 N.W.2d 673 (1973). In ***Chart***, an automobile passenger was injured when the driver failed to negotiate a right-angle curve. ***Id.*** at 94. She sued two state employees, alleging that they failed to properly place a sign warning of the curve. ***Id.*** at 94-95. The pertinent portion of the 1961 MUTCD read, "In rural areas warning signs *should normally* be placed about 750 feet in advance of the hazard or condition warned of …." ***Id.*** at 100 (emphasis added). Our supreme court concluded, based on this language, that sign placement was not a legislative or quasi-legislative decision; "once [the state] made the legislative or quasi-legislative decision to place the highway warning sign, they had a duty to place it and maintain it without negligence." ***Id.*** at 100-01.

(continued)

¶18 Instead, Elmer and Doolittle appear to rely on a diagram within section 6C.04 entitled "Component Parts of a Temporary Traffic Control Zone." The diagram shows three signs within the advance warning area. However, nothing in the diagram indicates three signs are required, nor does the diagram identify what warnings the signs should carry.

¶19 Further, the text of MUTCD section 6C.04 suggests that including more than one sign in the advance warning area is discretionary. Section 6C.04 discusses signage on freeways, urban streets and rural highways. The section contemplates that at least one sign will be used on each, but—in a portion labeled "guidance"—suggests the use of two or more advance warning signs on higher speed urban streets and on rural highways. There is no dispute that the County

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We are not persuaded that ***Chart*** transforms every provision in the MUTCD into a ministerial duty. Notably, the ***Chart*** court did not recite the current ministerial duty standard: a duty that 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 decision." ***C.L.***, 143 Wis. 2d at 711-12 (citing ***Lister v. Board of Regents***, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976)). In a recent decision, our supreme court appears to treat the ***Chart*** case as if it were decided under the "absolute, certain and imperative" standard. *See* ***Pries***, 326 Wis. 2d 37, ¶30. However, the supreme court's discussion of ***Chart*** in ***Pries*** did not mention the discretionary language of the 1961 MUTCD; instead, the court relied on ***Chart***'s discussion of state statutes that required the State Highway Commission to erect and maintain warning signs. Thus, the court appears not to have considered whether the ***Chart*** court properly concluded that the MUTCD imposed a ministerial duty as currently defined.

While the ***Chart*** court may have applied a more permissive rule, recent supreme court decisions have applied the "absolute, certain and imperative" standard. *See* ***Pries v. McMillon***, 2010 WI 63, ¶22, 326 Wis. 2d 37, 784 N.W.2d 648; ***Umansky v. ABC Ins. Co.***, 2009 WI 82, ¶11, 319 Wis. 2d 622, 769 N.W.2d 1 (noting the definition of ministerial duty has remained "substantially the same" since it was adopted by ***Meyer*** in 1955). At least two supreme court justices have expressed their view that ***Chart*** is inconsistent with the court's current ministerial duty jurisprudence. *See* ***Umansky***, 319 Wis. 2d 622, ¶75 (Prosser, J., concurring) (joined by Crooks, J.). "[W]here decisions of the supreme court appear to be inconsistent, or in conflict, 'we follow the court's most recent pronouncement.'" ***Glacier State Distrib. Servs., Inc. v. DOT***, 221 Wis. 2d 359, 368, 585 N.W.2d 652 (Ct. App. 1998) (quoting ***Krawczyk v. Bank of Sun Prairie***, 203 Wis. 2d 556, 567, 553 N.W.2d 299 (Ct. App. 1996)).

erected at least three signs in this case: one warning drivers of road work ahead, a second warning drivers of loose gravel, and a third advising drivers to slow to thirty-five miles per hour.

Failure to Prepare a Traffic Control Plan

¶20 Elmer and Doolittle also argue the County failed to prepare a formal traffic control plan purportedly required by section 6C.01 of the MUTCD. According to that section, a traffic control plan "describes TTC [temporary traffic control] measures to be used for facilitating road users through a work zone or an incident area." However, the only "standard" contained in that section states, "The needs and control of all road users … through a [temporary traffic control] zone shall be an essential part of highway construction …." Nothing in section 6C.01 obligates the County to fulfill its obligation through the use of a traffic control plan. Accordingly, the County had no ministerial duty to prepare one.

II. Known and Compelling Danger

¶21 Elmer and Doolittle contend the roadway presented a known and compelling danger. This exception abrogates immunity when "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." ***C.L.***, 143 Wis. 2d at 715.

¶22 Elmer and Doolittle rely on three cases that applied the exception: ***Cords v. Anderson***, 80 Wis. 2d 525, 259 N.W.2d 672 (1977); ***Domino v. Walworth Cnty.***, 118 Wis. 2d 488, 347 N.W.2d 917 (Ct. App. 1984); and ***Turner v. City of Milwaukee***, 193 Wis. 2d 412, 535 N.W.2d 15 (Ct. App. 1995). In ***Cords***, 80 Wis. 2d at 541, at our supreme court abrogated immunity for a state employee who "knew the terrain [in a state park] was dangerous particularly at

night[,] … was in a position as park manager to do something about it[, and] … failed to do anything about it." In ***Domino***, 118 Wis. 2d at 491-92, we concluded that Walworth County had a ministerial duty, once informed of a downed tree across a road, to take steps to respond to the emergency condition. Finally, in ***Turner***, 193 Wis. 2d at 416, 421, we determined that the City of Milwaukee could be held liable for failing to seek removal or destruction of a dog that had attacked at least twelve people.

¶23 In each case, the governmental entity was held liable because it was aware of a compelling danger but nonetheless failed to act. Those results are consistent with the three-part factual sequence triggering application of the known and compelling danger exception:

> First, something happens to create compelling danger. Second, a government actor finds out about the danger, making it a known and compelling danger. And third, the government actor either addresses the danger and takes one or more precautionary measures, or the actor does nothing and lets the danger continue.

Heuser v. Community Ins. Corp., 2009 WI App 151, ¶28, 321 Wis. 2d 729, 774 N.W.2d 653. In ***Heuser***, we concluded a school district could be held liable for injuries sustained by a student while using a scalpel in a dissection exercise. ***Id.***, ¶34. We emphasized that several other children had been previously injured and that those injuries gave rise to a duty "to 'stop the activity the way it was presently conceived.'" ***Id.*** (quoting ***Voss v. Elkhorn Area Sch. Dist.***, 2006 WI App 234, ¶20, 297 Wis. 2d 389, 724 N.W.2d 420). The teacher did nothing, abrogating immunity. ***Id.***, ¶¶33-34. ***Heuser*** establishes that if a government entity is aware of the danger and acts to minimize it, the entity has not forfeited its immunity. ***Id.***, ¶33. The "action chosen was 'something' and, whatever the choice, it was within that actor's discretion." ***Id.***

¶24 Here, viewing the evidence most favorably to Elmer and Doolittle, the County knew that the construction presented a dangerous condition. We therefore agree with Elmer and Doolittle that the County had an obligation to do something.

¶25 What Elmer and Doolittle fail to recognize, however, is that the County did do something. About two and one-half miles from the construction site, an orange sign with black lettering warned motorists of road work ahead. At approximately one and one-half miles, motorists were warned to expect loose gravel. Motorists were also advised to reduce speed to thirty-five miles per hour. Because the County took steps to reduce the risks presented by the construction, the known and compelling danger exception is inapplicable.

III. WISCONSIN STAT. § 893.83

¶26 Elmer and Doolittle also assert that WIS. STAT. § 893.83 abrogates the County's WIS. STAT. § 893.80(4) immunity. Section 893.83 makes counties liable for damages sustained "by reason of the insufficiency or want of repairs of a highway that any county by law or by agreement with any town, city, or village is bound to keep in repair." Elmer and Doolittle concede that their attempt to abrogate immunity under § 893.83 must fail under ***Grinnell Mutual Reinsurance Co. v. State Farm Mutual Automobile Insurance Co.***, 2004 WI App 32, 269 Wis. 2d 873, 676 N.W.2d 573, because the County conducted the road maintenance pursuant to a contract with the state, not a municipality specifically listed in the statute. However, Elmer and Doolittle contend that ***Grinnell*** was wrongly decided. That is a matter for the supreme court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1977) ("[O]nly the supreme court … has

the power to overrule, modify or withdraw language from a published opinion of the court of appeals.").

By the Court.—Judgment affirmed.

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