COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2736 **Cir. Ct. No. 2009CV746**

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

JAA'LA EDWARDS, A MINOR, BY AND THROUGH HER PARENTS MICHEL'E EDWARDS AND BRENT EDWARDS, MICHEL'E EDWARDS AND BRENT EDWARDS,

PLAINTIFFS-APPELLANTS,

WISCONSIN MEDICAID,

INVOLUNTARY-PLAINTIFF,

V.

BARABOO SCHOOL DISTRICT AND EMPLOYERS MUTUAL CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed*.

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 VERGERONT, P.J. Jaa'la Edwards and her parents Michel'e and Brent Edwards (collectively, the plaintiffs) appeal from the order granting summary judgment in favor of the Baraboo School District on the basis of governmental immunity. The plaintiffs argue that two exceptions to the immunity doctrine apply: the ministerial duty exception and the clear and compelling danger exception. We agree with the circuit court that neither applies. Accordingly, we affirm.

BACKGROUND

¶2 The relevant facts are undisputed for purposes of this appeal. On September 2, 2008, Jaa'la Edwards fell in the hallway while walking between classes at Jack Young Middle School in Baraboo. She was injured as a result of this fall.

¶3 Jaa'la[1] was born with osteogenesis imperfecta, commonly known as brittle bone disease. This condition makes her more vulnerable to fractures, and as a result, she has limited muscle development, poor muscle tone, difficulty walking, an abnormal gait, balance problems, and muscle fatigue. Because of her condition, she has been identified as a student with disabilities under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-82. Pursuant to the Disabilities Education Act, the school district prepared an individualized education plan for Jaa'la. *See* 20 U.S.C. §§ 1401(14), 1414(d). The education plan includes supplemental services for Jaa'la, including additional passing time in the hallways. At the time of the accident, Jaa'la also had a health care plan

[1] For clarity, when we refer to Jaa'la individually, we use her first name.

prepared by the school district. We discuss the education and health care plans in more detail later in the opinion.

¶4 The plaintiffs sued the Baraboo School District and its insurer alleging that on the date of the accident the school district negligently failed to follow the mandates of Jaa'la's education plan. The school district moved for summary judgment on the ground that it was immune from suit pursuant to WIS. STAT. § 893.80(4) (2009-10).[2] The plaintiffs opposed this motion, arguing that the school district was not entitled to immunity because both the ministerial duty exception and the known and compelling danger exception apply.

¶5 The circuit court granted summary judgment in favor of the school district. The court concluded that the school district was immune from liability pursuant to WIS. STAT. § 893.80(4) and that neither of the two exceptions apply.

DISCUSSION

¶6 On appeal the plaintiffs contend that the circuit court erroneously granted summary judgment in favor of the school district on governmental immunity grounds because, they assert, both the ministerial duty exception and the known and compelling danger exception to immunity apply.

¶7 We review de novo the grant of summary judgment, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled to summary

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

judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶8 WISCONSIN STAT. § 893.80(4) provides, in relevant part:

> No suit may be brought against any … [governmental subdivision] or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

This statute immunizes governmental bodies and their employees from liability for acts involving the exercise of discretion or judgment. *See* ***Noffke v. Bakke***, 2009 WI 10, ¶41, 315 Wis. 2d 350, 760 N.W.2d 156. The immunity defense assumes negligence and focuses on whether the governmental action or inaction upon which liability is premised is entitled to immunity. ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314. Though this statute provides broad immunity from suit, there are exceptions. As relevant here, there is no immunity for acts associated with "(1) performance of ministerial duties imposed by law; [and] (2) known and compelling dangers that give rise to ministerial duties on the part of public officers or employees.…" ***Noffke***, 315 Wis. 2d 350, ¶42.

¶9 The application of the governmental immunity statute and its exceptions to the facts in this case presents a question of law, which we review de novo. ***Id.***, ¶9.

I. Ministerial Duty Imposed by Law

¶10 The plaintiffs first contend that the school district is not immune from liability in this case because it violated a ministerial duty imposed by the education plan. They argue that the education plan is "law" for purposes of this

exception and that the education plan requires Jaa'la's teachers to dismiss her from each class separately from the rest of the students so that she is not in the hall when other students are passing between classes. Because the school district did not follow this requirement, they contend, the district violated a ministerial duty imposed by law.

¶11 The ministerial duty exception to governmental immunity recognizes 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 one that has been "positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon … judgment or discretion." ***Id.***, ¶26 (citation omitted).

¶12 The parties debate whether Jaa'la's education plan constitutes "law" for purposes of the ministerial duty exception. We do not address this issue because, assuming for purposes of argument that the education plan does constitute "law," we conclude the education plan does not impose a ministerial duty.

¶13 In determining whether a written law or policy establishes a ministerial duty, we look to the language of the writing to determine whether the duty is "expressed so clearly and precisely, so as to eliminate the official's exercise of discretion." ***Pries v. McMillon***, 2010 WI 63, ¶26, 326 Wis. 2d 37, 784 N.W.2d 648. A ministerial duty is one 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 discretion." ***Lodl***, 253 Wis. 2d 323,

¶25 (citation omitted). Under this definition, "many governmental actions, even those done under a legal obligation, qualify as discretionary because they implicate some discretion." ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, ¶28, 262 Wis. 2d 127, 663 N.W.2d 715.

¶14 The plaintiffs' argument focuses on sections I-4 and I-9 of the education plan. However, neither section, whether considered separately or in the context of the entire education plan and the health care plan, meets the requirement for imposing a ministerial duty.

¶15 First, section I-9 of the education plan, governing "Services," does not eliminate discretion. This section states that the listed "Supplemental Aids and Services" are "aids, services, and other supports provided to or on behalf of the student in regular education or other educational settings." Provided "services" include "[e]xtended passing time" of three minutes, eight times per day, in the "hallway between classrooms" to be offered from "10/22/2007-10/14/2008," a time period covering the date of the injury at issue. There is nothing in this section indicating that the school district must require Jaa'la to use this provided "service." Furthermore, there is no indication of *when* Jaa'la is to receive this extended passing time, and thus her teachers have discretion under section I-9 to dismiss her earlier or later than the rest of the students. This section does not confer an "absolute, certain and imperative" duty on the district.

¶16 Second, section I-4 of the education plan, "Present Level of Academic Achievement and Functional Performance," fails to establish an "absolute, certain and imperative" duty. As relevant here, this section provides:

> Curretly (sic) there is a Health Plan in place for Jaa'La which includes extended passing times, weight and physical activity restrictions, preferential seating, field trip

> assistance, etc. Jaa'La has been selective in following through with the plan. She is following the health plan approximately 75% of the time. For example, she is to *leave 5 minutes early for class* to avoid the jostling of peers in the hallway, but she never chooses to do this. *This option was adjusted so that Jaa'La now leaves later than her peers and it is not on a voluntary basis*. [Emphasis added.]

The plaintiffs contend that the phrase "not on a voluntary basis" eliminates discretion and confers a ministerial duty on the district. They rely on ***Pries***, 326 Wis. 2d 37. In ***Pries***, the supreme court determined that the State Fair instructions for disassembling horse stalls gave rise to a ministerial duty, primarily because the instructions required that workers "*[a]lways* have someone holding up the piece you are taking down." ***Id.***, ¶34. The supreme court determined that the word "always" indicated that following this instruction was not discretionary. ***Id.*** The plaintiffs contend that the quoted portion of section I-4 is similarly mandatory and eliminates discretion. This argument is flawed because the plaintiffs focus on the phrase "not on a voluntary basis" while ignoring the beginning of the sentence, which states that "[t]his *option* was adjusted…." The use of the word "option" indicates that use of this provided service was not mandatory.

¶17 Third, there are internal inconsistencies relating to extended passing time within the education plan and between that plan and the health care plan, referred to in several sections of the education plan. Within the education plan, section I-9 indicates an extended passing time of three minutes while section I-4 states that Jaa'la is allowed five extra minutes. Comparing the education plan to the health care plan, the education plan states that the option in Jaa'la's health care plan "to leave 5 minutes early for class … was adjusted so that Jaa'la now leaves later than her peers." However, the health care plan continues to state that Jaa'la "will be allowed to leave her classes 5 minutes early." It is impossible for the

district to follow each of these inconsistent plans, and resolving these inconsistencies necessarily implicates discretion. The plaintiffs concede that the district has discretion as to whether to dismiss Jaa'la before or after the rest of the students, but they argue that this discretion is not relevant to the negligent act of dismissing Jaa'la with the rest of the students. However, the plaintiffs' concession that the district has discretion is irreconcilable with the requirement that, in order to impose a ministerial duty, a law must define "the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." ***Lodl***, 253 Wis. 2d 323, ¶25 (citation omitted).

¶18 Finally, the education plan establishes goals for Jaa'la, not duties for the district. Section I-6, "Annual Goals and Objectives," includes the goal that "Jaa'la will demonstrate improved responsibility for self-advocacy by following the health plan 95% of the time." According to this section, the procedure for measuring Jaa'la's progress towards this goal is teacher observation. The plaintiffs contend that the only reasonable way to read this provision of the education plan, together with the phrase "not on a voluntary basis" in section I-4, is that, in the expected five percent of the time when Jaa'la does not voluntarily comply with her health care plan, teachers will take note of this and enforce her separate dismissal times. We do not agree. Section I-6 clearly indicates that teacher observation is the procedure for *measuring* Jaa'la's progress toward her goal, not a method of enforcing her compliance with her health care plan. Because this section addresses only Jaa'la's goals, we conclude that it does not create a ministerial duty.

¶19 We conclude that, because Jaa'la's education plan provides the school district with discretion, it does not establish a ministerial duty to dismiss her separately from the rest of the students.

II. Ministerial Duty Arising Out of a Known and Compelling Danger

¶20 The plaintiffs also argue that Jaa'la's medical condition qualifies for the known and compelling danger exception to governmental immunity. They contend that Jaa'la's propensity to fall and to suffer severe injury due to falls makes congested hallways exceptionally dangerous for her and that this danger is well known to the school district. According to the plaintiffs, this known and compelling danger gives rise to a ministerial duty to dismiss her from class at a different time than the rest of the students and to prevent her from leaving with the rest of the students regardless of her wishes.

¶21 The known and compelling danger exception arises when "there exists 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." ***Lodl***, 253 Wis. 2d 323, ¶38 (citing ***C.L. v. Olson***, 143 Wis. 2d 701, 717, 422 N.W.2d 614 (1988)). In order for this exception to apply, the circumstances must be "sufficiently dangerous so as to give rise to a ministerial duty—not merely a generalized 'duty to act' in some unspecified way, but a duty to perform the particular act upon which liability is premised…." ***Id.***, ¶45. In other words, under this exception, there is a ministerial duty to do a particular act in a particular time and manner that arises "not by operation of law, but by virtue of particularly hazardous circumstances" that are both known and "sufficiently dangerous to require an explicit, non-discretionary municipal response." ***Id.***, ¶39.

¶22 Where a situation is dangerous but the danger is of such a nature that the municipal officer or employee could reasonably respond in more than one way, this exception does not apply. *See* ***Lodl***, ¶¶46-47. Thus, in ***Lodl*** the court

held that the exception did not apply to impose a ministerial duty upon a responding police officer to manually direct traffic at an intersection where traffic control lights were inoperable due to a storm. ***Id.*** The circumstances were known and dangerous, the court held, but they did not compel that particular response. ***Id.*** Rather, the court decided, "[t]he officer could reasonably conclude, in his judgment, that the situation at the intersection was not conducive to manual control by a single officer, or he could choose to address the danger in another way (*e.g.*, portable signs, flares, flashing squad lights)." ***Id.***, ¶47. *See also* ***Noffke***, 315 Wis. 2d 350, ¶56 (known and compelling danger exception did not apply where there was more than one action coach could have taken to prevent injury during the performance of cheerleading stunt and coach did exercise discretion in providing a spotter to help prevent injury).

¶23 We conclude that in this case, while there was certainly a danger to Jaa'la if she was in the hallway at passing time, it was not so certain and immediate as to impose a duty on the school district to act in one particular non-discretionary way. That is, it did not impose a ministerial duty on the school district to dismiss Jaa'la at a different time than the rest of the students and to prevent her from leaving at the same time regardless of her wishes. That was one reasonable precaution, but there were others. For example, the school district could instead have required someone to escort her in the hallways between classes. Or the school district could have reasonably chosen, as it did, to allow Jaa'la to leave earlier or later than the rest of the students and encourage her to exercise this option. The precautions the school district did take were within the "range of acts" the district could have taken to address the danger of Jaa'la being injured while walking in a crowded hallway. *See* ***id.***

¶24 The plaintiffs rely on three cases: ***Cords v. Anderson***, 80 Wis. 2d 525, 259 N.W.2d 672 (1977), ***Voss v. Elkhorn Area School District***, 2006 WI App 234, 297 Wis. 2d 389, 724 N.W.2d 420, and ***Heuser v. Community Insurance Corp.***, 2009 WI App 151, 321 Wis. 2d 729, 774 N.W.2d 653. We conclude that these cases do not support the plaintiffs' argument because, whereas the government officials in the three cases failed to take action in situations where action was required, the Baraboo School District took some action to address the danger to Jaa'la. In ***Cords***, a park manager was aware of a public hiking trail without a guard rail alongside a ninety-foot gorge, but failed to either place warning signs on the trail or advise his superiors of the unsafe condition. ***Cords***, 80 Wis. 2d at 541-42. In ***Voss***, a teacher continued to use "fatal vision goggles" that replicated a .10 blood alcohol concentration even though the activity was inherently dangerous and several students had already been injured. ***Voss***, 297 Wis. 2d 389, ¶¶2, 20. In ***Heuser***, similar to ***Voss***, a teacher continued with a lab plan in which the students used scalpels; even after two students were cut, the teacher did not make any alterations or take any precautions**.** ***Heuser***, 321 Wis. 2d 729, ¶¶2-7, 34.

¶25 The plaintiffs rely in particular on ***Heuser***, in which we described the three-part factual sequence of the known and compelling danger exception as follows:

> 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.

Id., ¶28. We explained in ***Heuser*** that in ***Voss*** and ***Cords*** and, ultimately, in the situation before us in ***Heuser,*** the actor did not address the danger with a precautionary measure but instead did nothing. ***Id.***, ¶¶29-32, 34.

¶26 The plaintiffs contend that the facts here satisfy the first two steps in the factual sequence described in ***Heuser*** and that, at the third step, the school district failed to take the "necessary precautionary measure" of dismissing Jaa'la at a different time than the rest of the students. We disagree. As we have already explained, the school district did not fail to act in response to the danger. To the extent the plaintiffs argue that the school district chose the wrong precautionary measures, this is a negligence argument rather than an argument that the danger to Jaa'la gave rise to a ministerial duty. ***Noffke***, 315 Wis. 2d 350, ¶57.

¶27 We also observe that in ***Heuser*** we concluded, as we had in ***Voss***, that the circumstances in those cases were such that there was only one reasonable choice: for the teacher to "stop the activity the way it was presently conceived." ***Heuser***, 321 Wis. 2d 729, ¶34 (citing ***Voss***, 297 Wis. 2d 389, ¶20). As we have already explained, the circumstances here were not so compellingly dangerous as to deprive the school district of all discretion.

¶28 We conclude that the danger of Jaa'la being injured in the hallway during passing time was not so certain and immediate as to give rise to "a self-evident, particularized, and non-discretionary" duty to take only one course of action: dismissing Jaa'la from class at a different time than the rest of the students and preventing her from leaving with the rest of the students regardless of her wishes. *See* ***Lodl***, 253 Wis. 2d 323, ¶40. Accordingly, the known and compelling danger exception to governmental immunity does not apply.

CONCLUSION

¶29 The circuit court correctly determined that, based on the undisputed facts, the Baraboo School District is entitled to governmental immunity pursuant to WIS. STAT. § 893.80(4). Accordingly, we affirm the circuit court's grant of summary judgment in favor of the school district.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶30 SHERMAN, J. (*dissenting*). I agree with the majority that neither the health care plan nor the education plan create a clear ministerial duty that meets the exception to the immunity statute. However, it is hard to conceive of a clearer case of a known and compelling danger sufficient to impose a ministerial duty, and therefore I respectfully dissent.

¶31 The brittle bone disease (osteogenesis imperfecta) from which Jaa'la suffered caused her bones to be so abnormally fragile that by the time of this incident, at twelve years of age, she had suffered more than forty broken bones and sustained numerous severe injuries. According to her mother:

> 11. In her fifth grade year, Jaa'la fell during recess at the Gordon Wilson Elementary school.
>
> 12. Jaa'la's injuries from this fall were very serious, as she needed surgery for a compound break to her left leg, and also suffered a broken right wrist.
>
> 13. In addition, Jaa'la suffered from post-traumatic stress disorder as a result of her fall.
>
> 14. As a result of all of Jaa'la's injuries from this fall, Jaa'la missed the entire second semester of her fifth grade school year as she was homebound this entire time.

¶32 Clearly, a compelling danger exists. Every time Jaa'la sets out to walk on her own, she risks severe injury, sufficient to cause her to "miss[] many days of school, sometimes months at a time."

¶33 This danger was just as clearly known to the Baraboo School District, since prior incidents like the one described above have occurred while Jaa'la was a student in the Baraboo School District. In addition, the Baraboo

School District recognized that the danger exists by discussing it in both its Individual Education Plan (IEP) and its health care plan for Jaa'la. Indeed, Jaa'la "has been an IEP student within the [Baraboo] school district for most years" since she was first enrolled in that district in kindergarten.

¶34 The IEP provisions also demonstrate that the Baraboo School District was aware of the fact that certain situations, notably passing in the hallway between classes, present a particular and enhanced danger of severe injury to Jaa'la.

¶35 These facts satisfy the first two parts of the three-part factual sequence described by the majority in ¶25 above. The determinative issue seems to be the third part of the factual sequence, "the actor does nothing and lets the danger continue." ***Heuser***, 321 Wis. 2d 729, ¶28. The majority states in ¶26 of its opinion that the school district "did not fail to act in response to the danger." However, the majority opinion gives no specific explanation of what exactly it is that the school district did. The closest thing to taking action is the statement in the IEP and Health Care Plan that Jaa'La could leave class either early or late, but that left it up to her to decide whether or not to do so. Telling an endangered twelve-year-old child to take care of the problem herself is not taking action. It is not the wrong action; it is no action.

¶36 Except for the IEP, which described goals for Jaa'la herself to work toward, there does not seem to be a single thing which the school district itself did to take appropriate precautions to diminish the known danger of severe injury to this "kind, nice, well-behaved young lady." Given the extreme nature of the danger and the extent to which it was repeatedly brought to their attention, both in

IEP conferences and by events which occurred on their property, they certainly should have.

¶37 I would not have concluded that there were sufficient facts in the record to support summary judgment that the Baraboo School District was immune and that the known and compelling danger exception didn't apply. I would have concluded, conversely, that there are sufficient facts in the record that the known and compelling danger exception did apply and that the Baraboo School District is not immune from suit and would have reversed the circuit court and remanded for the lawsuit to proceed to trial. Therefore, I respectfully dissent.