COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2442 **Cir. Ct. No. 2012CV330**

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

AMBER P. MALEAN,

PLAINTIFF-APPELLANT,

STATE OF WISCONSIN - DEPARTMENT OF HEALTH SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

MIKE SMITH,

DEFENDANT-RESPONDENT,

JAMES UHLIR, DEB WIK AND DEAN A. SANKEY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Amber Malean appeals a summary judgment dismissing her negligence claim against Mike Smith, the grounds supervisor for the University of Wisconsin—Stout (Stout). We conclude the circuit court properly determined Smith was protected by public officer immunity. Accordingly, we affirm.

BACKGROUND

¶2 On January 30, 2012, Malean, then a Stout student, slipped and fell on a patch of ice located on or near a sidewalk that led to a campus building. Malean sustained an ankle fracture that required surgery.

¶3 Malean commenced this suit against Smith and others.[1] Malean acknowledges that Smith is a state employee and entitled to public officer immunity as long as no exceptions to immunity apply. In response to Smith's summary judgment motion, Malean asserted that the ministerial duty and known and compelling danger exceptions abrogated the public officer immunity to which Smith was otherwise entitled.

¶4 It is undisputed that Smith's job requires him to supervise the grounds crew.[2] According to Smith, there are no written instructions or policies

[1] The remaining defendants were dismissed by stipulation of the parties.

[2] At deposition, Smith stated it is his job to make sure snow and ice removal gets done. Malean interprets this as a requirement that Smith personally engage in ice removal if necessary. There is no evidence Smith was personally involved in ice removal on January 30, 2012. However, because we view the facts, or reasonable inferences from those facts, in the light most favorable to the non-moving party, we assume, without deciding, that Smith had some personal responsibility to engage in ice removal when necessary. *See* ***AccuWeb, Inc. v. Foley & Lardner***, 2008 WI 24, ¶16, 308 Wis. 2d 258, 746 N.W.2d 447.

that govern snow or ice removal.[3] When snow has not fallen overnight, the grounds crew will check the campus for re-freezing after a morning meeting. There is no specific route the groundskeepers use, although they may check high-traffic areas first. An inspection takes approximately one and one-half hours, and groundskeepers use a variety of materials to treat ice they encounter depending on the weather conditions.

¶5 The circuit court granted Smith's summary judgment motion in a written decision. It concluded Smith was protected by public officer immunity, and the exceptions for ministerial duties and known and compelling dangers did not apply. Malean appeals.

DISCUSSION

¶6 We review a grant of summary judgment de novo. ***Umansky v. ABC Ins. Co.***, 2009 WI 82, ¶8, 319 Wis. 2d 622, 769 N.W.2d 1. Summary judgment is appropriate if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2).[4] If Smith is entitled to public officer immunity, there is nothing to try even though factual disputes may exist regarding the negligence issue.[5] *See* ***Lodl***

[3] Dismissed defendants James Uhlir, Stout's executive director for health and safety, and Dean Sankey, Stout's director of safety and risk management services, each testified at deposition that neither of their respective departments have any written policies or procedures related to snow and ice removal.

[4] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[5] For purposes of immunity analysis, we assume the public officer has acted negligently, and we focus on whether any exception applies to abrogate immunity. ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314.

v. Progressive N. Ins. Co., 2002 WI 71, ¶16, 253 Wis. 2d 323, 646 N.W.2d 314. "The proper scope of the common law doctrine of discretionary act immunity, when there are no disputed facts, is a question of law." ***Meyers v. Schultz***, 2004 WI App 234, ¶10, 277 Wis. 2d 845, 690 N.W.2d 873.

¶7 The general rule in Wisconsin is that state officers and employees are "immune from personal liability for injuries resulting from acts performed within the scope of their official duties." ***Kimps v. Hill***, 200 Wis. 2d 1, 10, 546 N.W.2d 151 (1996). This rule is grounded in the common law and is based on several public policy considerations, including the danger that a potential lawsuit will influence public officers in the performance of their functions, the deterrent effect the threat of personal liability might have on those considering public service, the drain on valuable time caused by such actions, and the unfairness of subjecting public officials to personal liability for the acts of their subordinates. ***Id.*** at 9-10.

¶8 The rule of public officer immunity is, however, subject to exceptions that represent 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. ***Umansky***, 319 Wis. 2d 622, ¶10 (citing ***Lister v. Board of Regents***, 72 Wis. 2d 282, 300, 240 N.W.2d 610 (1976)). To date, our supreme court has recognized four exceptions to immunity: (1) ministerial duties; (2) duties to address a "known danger;" (3) actions involving medical discretion; and (4) "malicious, willful, and intentional" actions. *See* ***Willow Creek Ranch, L.L.C. v. Town of Shelby***, 2000 WI 56, ¶26, 235 Wis. 2d 409, 611 N.W.2d 693. Malean argues the exceptions for ministerial duties and known dangers are applicable here, and it is her burden to demonstrate these exceptions apply. *See* ***Kimps***, 200 Wis. 2d at 18-19.

1. Ministerial duty exception

¶9 "The most generally recognized exception to the rule of immunity is that an officer is liable for damages resulting from his negligent performance of a purely ministerial duty." ***Lister***, 72 Wis. 2d at 300-01. A public officer's duty is ministerial only when it 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.*** at 301.

¶10 To qualify as ministerial, the duty must be one imposed by law. ***Meyers***, 277 Wis. 2d 845, ¶¶15-16. That is, the duty must be "specifically mandated by the government." ***Id.***, ¶17. Thus, our first task is to determine "whether a source of law 'imposes, prescribes, and defines the time, mode and occasion for [the] performance [of a specific task].'" ***Umansky***, 319 Wis. 2d 622, ¶16 (quoting ***C.L. v. Olson***, 143 Wis. 2d 701, 711, 422 N.W.2d 614 (1988)) (brackets in original). That source of law may be statutes or regulations, *see* ***id.***, written government policies, or even job descriptions, *see* ***Pries v. McMillon***, 2010 WI 63, ¶31, 326 Wis. 2d 37, 784 N.W.2d 648 (collecting cases).

¶11 Here, Malean has not satisfied her burden of identifying a ministerial duty imposed by law or some other valid source. It is undisputed that there is no law or regulation mandating ice removal on the Stout campus. It is also undisputed that Stout does not have a written policy or procedure regarding ice removal on campus.

¶12 Malean asserts there was, in fact, a policy in place regarding ice removal from the Stout campus. However, she concedes that the policy was not

written, and that no existing case law addresses whether an unwritten policy can provide the basis for a ministerial duty.[6]

¶13 We conclude the undisputed facts do not establish the existence of a formal policy regarding ice removal, let alone one specific enough to give rise to a ministerial duty. According to Smith, groundskeepers would simply go out in the morning when there had not been snowfall and check for refreezing. The groundskeepers did not have specific routes, although they often prioritized high-traffic areas. Abatement was left to the individual groundskeeper's discretion, and he or she would use salt, brine, calcium chloride, or sand, depending on the weather. At most, this evidence establishes a generic, self-initiated practice of ice removal, undertaken by groundskeepers without specific directions or guidance. Even if this general practice could be viewed as a formal policy, it is not sufficiently specific to confer a ministerial duty upon Smith.

¶14 Malean asserts Smith's job description imposes a ministerial duty. It appears a sufficiently specific job description may give rise to a ministerial duty. *See* ***Kimps***, 200 Wis. 2d at 14-15; ***Larsen v. Wisconsin Power & Light Co.***, 120 Wis. 2d 508, 518, 355 N.W.2d 577 (Ct. App. 1984), *modified by* ***Olson***, 143 Wis. 2d at 714-15 (both concluding a public officer's job description was insufficiently specific to create a ministerial duty).

[6] We need not decide whether an unwritten policy may impose a ministerial duty, as we conclude that any unwritten directive in this case did not amount to a policy governing ice removal, and it was insufficiently specific to remove discretion. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) ("An appellate court should decide cases on the narrowest possible grounds.").

¶15 However, like the job descriptions in ***Kimps*** and ***Larsen***, the one at issue here is insufficiently specific. Smith's job description requires him to supervise the grounds crew and remove ice from campus sidewalks. It does not indicate when removal is to occur, the methods to be used, what areas are to be cleared and in what order, whether responsibility for removal is triggered only upon notification, or whether regular inspections are required. Thus, "the appropriate corrective action to be taken remained totally within [Smith's] judgment and discretion." *See* ***Kimps***, 200 Wis. 2d at 15.

¶16 ***Umansky*** provides a good example of the specificity required to impose a ministerial duty. There, the supreme court determined that a ministerial duty was created by a federal regulation requiring the use of a specific type of railing on open-sided floors, platforms, and runways four or more feet above the floor. ***Umansky***, 319 Wis. 2d 622, ¶¶16-18. The railing requirement was absolute, certain and imperative, and left no room for judgment or discretion; the platform in ***Umansky*** required a railing pursuant to federal law, but had none. *See* ***id.***, ¶17. Here, there was no policy requiring anyone (let alone Smith) to remove ice from the area in question, and certainly nothing directing that it be done in a way that eliminated all discretion.

2. Known danger exception

¶17 "This exception to immunity 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 ex rel. Swenson v. Bakke***, 2009 WI 10, ¶52, 315 Wis. 2d 350, 760 N.W.2d 156. Particularly hazardous circumstances known to the public officer may give rise to a duty "so clear and so absolute that it falls within the definition

of a ministerial duty." *See* ***Lodl***, 253 Wis. 2d 323, ¶38; ***Cords v. Anderson***, 80 Wis. 2d 525, 542, 259 N.W.2d 672 (1977).

¶18 Not every dangerous situation will give rise to a ministerial duty. ***Lodl***, 253 Wis. 2d 323, ¶40. It is not enough that the hazard is sufficiently dangerous to require the public officer to "do something" about it. ***Id.***, ¶43. "The generic 'doing' of 'something' cannot possibly be characterized as a ministerial duty." ***Id.*** A ministerial duty is not an undifferentiated duty to act, but a duty to act in a particular way. ***Id.***, ¶44.

¶19 Our case law is rife with examples of known and compelling dangers. For instance, in ***Cords***, 80 Wis. 2d at 538, 541-42, our supreme court concluded a park manager had a ministerial duty to erect a sign warning of the dangers presented by a ninety-foot cliff just inches from a trail that people regularly used. In ***Domino v. Walworth County***, 118 Wis. 2d 488, 490-92, 347 N.W.2d 917 (Ct. App. 1984), we concluded a sheriff's department dispatcher had a ministerial duty to send a squad to investigate reports of a downed tree across a road. And finally, in ***Linville v. City of Janesville***, 174 Wis. 2d 571, 587-88, 497 N.W.2d 465 (Ct. App. 1993), *aff'd*, 184 Wis. 2d 705, 516 N.W.2d 427 (1994), we concluded paramedics trained to perform rescue operations in emergency situations had a ministerial duty to attempt to rescue a child trapped in a submerged van.

¶20 Although we engage in a case-by-case analysis of the immunity rule, ***Cords***, ***Domino***, and ***Linville*** persuade us that the danger presented by an ice patch is not sufficiently obvious to warrant abrogating immunity. Ice is omnipresent in Wisconsin during certain times of the year, and is often traversed without incident. To be sure, there is a risk that a pedestrian may slip and fall, but that danger is not

"compelling" within the meaning of our case law. An injury is not inevitable, or even highly likely, simply because ice is present. *See* ***Olson***, 143 Wis. 2d at 723 (mere possibility of injury not sufficient). Therefore, we cannot conclude the presence of an ice patch on or near a sidewalk gives rise to a duty "so clear and so absolute that it falls within the definition of a ministerial duty." *See* ***Cords***, 80 Wis. 2d at 542.

¶21 Malean heavily relies on ***Voss ex rel. Harrison v. Elkhorn Area School District***, 2006 WI App 234, 297 Wis. 2d 389, 724 N.W.2d 420. In that case, the use of "fatal vision goggles" in a classroom to instruct students about the effects of consuming alcohol constituted a known and compelling danger that abrogated immunity. ***Id.***, ¶¶1-2. We concluded

> the nature of the goggles, which replicate the effects of alcohol consumption on the body, the exercises the teacher instructed the students to carry out while wearing the goggles, and the environment in which the teacher conducted those exercises, created a hazardous situation that admitted of only a single, self-evident response—the teacher should have called an end to the exercises.

Id., ¶1. The goggles caused disorientation, a sense of a loss of balance, and impaired depth perception, and the students were required, among other things, to travel about twenty-five feet between rows of desks made of metal and wood and retrieve a tennis ball thrown by the instructor. ***Id.***, ¶¶3-4, 19.

¶22 Malean believes that, like the classroom exercise in ***Voss***, the ice patch here was an accident waiting to happen. *See* ***id.***, ¶19. We observed in ***Voss*** that, like the conditions in ***Cords*** and ***Domino***, the exercise was "nearly certain to cause injury if not corrected …." ***Id.*** Indeed, the very point of the classroom exercise was to make students "lose their balance and slip or stumble while doing … simple tasks …." ***Id.*** As we have already observed, a simple patch of ice,

ubiquitous during Wisconsin winters and often traversed without incident, does not represent the same risk of injury. Accordingly, we do not find ***Voss*** persuasive.

¶23 In addition, there is no evidence Smith knew of the ice patch on which Malean was injured. A public officer's ministerial duties are triggered only when "the nature of the danger is compelling and *known to the officer* …." ***Olson***, 143 Wis. 2d at 715. It would be manifestly unfair to require a public official to react to a situation unknown to the official.

CONCLUSION

¶24 In sum, we conclude the circuit court properly granted Smith's summary judgment motion. The general principle of public officer immunity applies, and neither the exception for ministerial duties nor the exception for known and compelling dangers is applicable.[7]

By the Court.—Judgment affirmed.

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

[7] Because we conclude public officer immunity applies, we have no need to address Smith's alternative argument that summary judgment was appropriate because Malean has not shown he was personally responsible for ice abatement. *See* ***Castillo***, 213 Wis. 2d at 492.