COURT OF APPEALS
DECISION
DATED AND RELEASED

October 16, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2720

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

NICHOLAS R. BALL, BY HIS GUARDIAN AD LITEM, DOUGLAS J. ONDRASEK, BRENDA L. BALL AND WILLIAM D. BALL,

PLAINTIFFS-APPELLANTS,

STATE OF WISCONSIN,

INVOLUNTARY-PLAINTIFF,

V.

COOPERATIVE EDUCATIONAL SERVICE AGENCY NO. 6; EMPLOYERS INSURANCE OF WAUSAU, A MUTUAL COMPANY, WAUPUN SCHOOL DISTRICT AND EMPLOYERS MUTUAL CASUALTY CO.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. Nicholas R. Ball and his parents, Brenda L. Ball and William D. Ball, appeal from a judgment dismissing their complaint. The issues relate to pleading the defense of governmental immunity, and to the exception to that defense for compelling and known dangers. We affirm in part, reverse in part, and remand.

We begin by stating the facts which are relevant to the first issue, which is whether defendant Cooperative Educational Service Agency No. 6 (CESA) waived the defense of governmental immunity by failing to plead it specifically in its answer. CESA's answer did not specifically claim immunity under § 893.80(4), STATS., which provides that suit may not be brought for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions. However, one of CESA's pleaded affirmative defenses was that the plaintiffs "may have failed to state a cause of action upon which relief can be granted." After the time for amending the pleadings had passed, CESA moved for summary judgment on the ground of governmental immunity. The plaintiffs argued that the defense had been waived, but the trial court rejected the argument and granted the motion.

On appeal, the plaintiffs renew their argument that the defense was waived by failure to plead. CESA responds that it adequately raised the defense when it pleaded that the plaintiffs may have failed to state a cause of action upon which relief can be granted.

Recent case law makes it clear that the defense of governmental immunity is waived if not pleaded. ***Anderson v. City of Milwaukee***, 208 Wis.2d 18, 34-35, 559 N.W.2d 563, 570 (1997). The question before us is whether the

defense is sufficiently pleaded by an answer which states that the plaintiffs may have failed to state a cause of action upon which relief can be granted. ***Anderson*** does not directly answer this question, but its analysis compels the conclusion that such a pleading is not sufficient.

In deciding that the defense of governmental immunity is waived if not raised in a responsive pleading or by motion, the supreme court relied on a sovereign immunity case, ***Cords v. State***, 62 Wis.2d 42, 46, 214 N.W.2d 405, 407 (1974). *See* ***Anderson***, 208 Wis.2d at 34-35, 559 N.W.2d at 570. The court described ***Cords*** as holding that "sovereign immunity must be specifically raised or deemed waived." ***Id***. The ***Cords*** opinion is significant to the present case because the court expressly held that sovereign immunity is not raised by pleading that the plaintiff failed to state a cause of action. ***Cords***, 62 Wis.2d at 46, 214 N.W.2d at 407.

On appeal, CESA does not acknowledge ***Cords***, but instead argues that two cases decided after ***Cords*** have held that governmental immunity is properly raised by pleading failure to state a cause of action. *See* ***Lister v. Board of Regents,*** 72 Wis.2d 282, 299, 240 N.W.2d 610, 621 (1976) and ***C.L. v. Olson,*** 143 Wis.2d 701, 706, 422 N.W.2d 614, 615 (1988). Neither of those cases acknowledges or overrules ***Cords***. Thus, it appears that the law before ***Anderson*** was that sovereign immunity is *not* raised by pleading failure to state a claim (***Cords***), but governmental immunity *is* raised by such a pleading (***Lister*** and ***C.L.***). This duality is apparent in ***Lister***, where in one part of the opinion the court acknowledged that sovereign immunity is not raised by such a pleading, *see* ***Lister***, 72 Wis.2d at 297, 240 N.W.2d at 620, even while saying that governmental immunity is so raised. *See* ***id.*** at 299, 240 N.W.2d at 621.

However, we conclude that the duality was eliminated by the supreme court's use of ***Cords*** in ***Anderson***. By relying on ***Cords*** in a case about governmental immunity, the court effectively removed the distinction between the two types of immunity for purposes of pleading this defense. We understand the rule after ***Anderson*** to be that both types of immunity must be "specifically raised or deemed waived." ***Anderson***, 208 Wis.2d at 34-35, 559 N.W.2d at 570. The court obviously considered ***Cords*** to be good law which applies to the defense of governmental immunity, and ***Cords*** states that an answer which pleads failure to state a cause of action is not specific enough to raise governmental immunity. Therefore, we conclude that CESA waived the defense by failing to plead it, and the judgment dismissing the complaint against CESA must be reversed.

The circuit court also dismissed the plaintiffs' claims against the Waupun School District on the ground of governmental immunity. The District properly pleaded this defense, and so the waiver issue discussed above does not apply. The plaintiffs argue on appeal that the court erred by concluding that the District was immune from suit. We disagree.

The plaintiffs argue that this case falls under the exception to the immunity doctrine which allows a suit to proceed when there was a compelling and known danger which the governmental employee failed to respond to. *See* ***Kimps v. Hill***, 200 Wis.2d 1, 15, 546 N.W.2d 151, 158 (1996). They argue that the court should not have granted the District's summary judgment motion because there is a dispute of material fact. However, the plaintiffs do not point to any specific historical fact which is in dispute. Instead, they appear to regard the disputed fact as being whether there was a compelling and known danger. In doing so, they mischaracterize the nature of that issue. Determination of the scope of immunity is a question of law, not fact. *See* ***id.*** at 8, 15-16, 546 N.W.2d at 155,

158. In the absence of a dispute of historical fact, it was appropriate for the trial court to decide the issue.

This exception exists only when the nature of the danger is compelling and is known to the officer and is of such force that the public officer has no discretion not to act. ***Id.*** at 15, 546 N.W.2d 158. The exception has previously been applied to allow a suit against the manager of a state-owned park who failed to warn of the dangerous condition posed by a path open for night hiking that ran within inches of a drop into a gorge. *See* ***id.*** However, it has been rejected in the case of an injury caused by separation of the metal base from a volleyball standard, ***id.*** at 6, 15-16, 546 N.W.2d at 154, 158, and in the case of a sexual assault committed by a parolee whose parole officer had allowed him to drive. *See* ***C.L.,*** 143 Wis.2d 701, 422 N.W.2d 614.

The undisputed facts regarding the plaintiffs' claims against the District are that five-year-old Nicholas Ball was injured when an employee of CESA, who was assisting a special education student, fell on him during an exercise known as "run backwards slowly." The physical education instructor directing the class, Diane Burg, was an employee of the District. The plaintiffs argue that it was a compelling and known danger to have the CESA employee participating in this exercise, and that Burg should have alerted her students or the CESA employee of the danger of having an adult walking backwards while focusing her attention on her special needs student, especially when Burg acknowledged that kindergarten students commonly did not run straight backwards.

We conclude the exception does not apply in this case. The danger of a situation becomes more obvious once an accident occurs, but the facts of this

case do not show a danger that is comparable to that posed by a treacherous path along a gorge. It was not of such force that Burg had no discretion not to act.

Therefore, we affirm dismissal of the complaint against the Waupun School District, but reverse dismissal as to CESA, and remand for further proceedings.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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