COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP791 **Cir. Ct. No. 2002CV1749**

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

KAYLEIGH M. NAGEL, A MINOR, BY HER GUARDIAN AD LITEM, JEFFREY J. MARTINSON AND HEATHER L. NAGEL,

PLAINTIFFS-APPELLANTS,

V.

GREEN BAY AREA PUBLIC SCHOOL DISTRICT,

DEFENDANT-RESPONDENT,

TOUCHPOINT HEALTH PLAN,

DEFENDANT.

APPEAL from a judgment of the circuit court for Brown County: DONALD R. ZUIDMULDER, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kayleigh Nagel appeals a summary judgment dismissing her negligence claims against the Green Bay Area School District. Kayleigh argues the circuit court erred by concluding the school district is entitled to governmental immunity. We reject Kayleigh's arguments and affirm the judgment.

BACKGROUND

¶2 When Kayleigh was almost four years old, she was injured after falling from a climber toy in her Head Start class at Keller School in Green Bay. At the time of her injury, the students were engaged in "Center Time"—an unstructured part of the day where the students play with each other in different areas of the classroom. None of the supervising adults actually saw Kayleigh fall from the climber. Kayleigh's teacher, Corrine Neumeyer, averred at deposition that the last time she saw Kayleigh before her fall, Kayleigh and another student were sitting on top of the climber. Kayleigh filed suit against the school district alleging, in relevant part, that its employees were negligent in supervising children's play by failing to provide adequate safety measures, controls, provisions and equipment. The circuit court granted summary judgment in favor of the school district, concluding that the district is entitled to governmental immunity. This appeal follows.

DISCUSSION

¶3 This court reviews summary judgment decisions independently, applying the same standards as the circuit court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party

is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶4 Whether the school district is immune from suit under WIS. STAT. § 893.80(4)[1] is a question of law that we review independently. *See* ***Kimps v. Hill***, 200 Wis. 2d 1, 8, 546 N.W.2d 151 (1996). The statute provides political subdivisions and public officials with immunity for acts done in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions. WIS. STAT. § 893.80(4); *see also* ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, ¶15, 262 Wis. 2d 127, 663 N.W.2d 715. The terms "legislative, quasi-legislative, judicial or quasi-judicial" are synonymous with the term "discretionary." ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 288, 531 N.W.2d 357 (Ct. App. 1995). Thus, the statute affords immunity for discretionary acts, as opposed to ministerial acts, for which there is no immunity. ***Id.*** at 288-89. A ministerial act is one that is absolute and imperative, involving the performance of a specific task that is imposed by law with such certainty that nothing remains for judgment or discretion. ***Id.*** at 289.

¶5 Here, Kayleigh contends that Neumeyer had a ministerial duty to enforce her own classroom safety rules and the district had a ministerial duty to transfer Kayleigh to a different classroom. Kayleigh thus argues that the failure to

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

perform these ministerial duties deprived the school district of governmental immunity.[2] We are not persuaded.

¶6 It is undisputed that Neumeyer had the discretion to create classroom safety rules for her students. Citing ***Foss v. Town of Kronenwetter***, 87 Wis. 2d 91, 273 N.W.2d 801 (Ct. App. 1978), Kayleigh claims that once Neumeyer exercised her discretion in creating these rules, Neumeyer had a ministerial duty to act once a rule was broken. ***Foss*** involved the placement of road signs and light poles and stands for the proposition that "once a municipality makes a discretionary decision to place a sign or light pole, the actual placement of the object and its maintenance are ministerial in nature and thus not entitled to immunity." ***Kimps***, 200 Wis. 2d at 16. The holding of ***Foss***, however, is inapplicable where, as here, there was no specific task undertaken "such that certainty attached to the time, mode, and occasion for its completed performance." ***Id.*** at 17. The placement of highway signs and light posts involved a specific order or legislative directive. In contrast, there was no corresponding legal requirement for Neumeyer to act in a prescribed manner. Rather, Neumeyer was required to exercise her discretion and judgment, using reasonable precautions to protect her students.

¶7 Kayleigh nevertheless intimates that summary judgment was inappropriate because there is a dispute of fact regarding the classroom safety rules. While one teacher averred that children were forbidden from either sitting

[2] On appeal, Kayleigh has abandoned her argument that the climber satisfied the "known danger" exception to governmental immunity. *See* ***Reiman Assocs., Inc. v. R/A Advertising, Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (issues not briefed are deemed abandoned).

or standing on top of the climber, Neumeyer averred that children were forbidden only from standing on the climber. Regardless of the various teachers' interpretations of the unwritten classroom safety rules, however, the ultimate execution of those rules was discretionary. Even assuming Neumeyer believed Kayleigh was violating a classroom safety rule by merely sitting on top of the climber, it was within Neumeyer's discretion to determine when, how and whether to enforce the rule, depending on the classroom situation in existence at that time.[3]

¶8 Kayleigh also claims the school district violated its ministerial duty to transfer her to a different classroom. On November 16, 2000, Kayleigh was referred for special education testing, which ultimately indicated that Kayleigh's needs were not being met in the regular classroom "as currently structured." It was further determined that Kayleigh required "intervention with a trained professional in the area of speech and language to develop her articulation and expressive language skills." Kayleigh argues that the school district had a ministerial duty to transfer her to a classroom with a higher level of supervision once testing determined that such a move was appropriate. The evaluation report, however, does not mandate a transfer to another classroom. To the extent the report indicated that Kayleigh required professional intervention in the area of speech and language, Neumeyer's deposition testimony indicates that there were options for obtaining special education that did not necessarily mandate

[3] To the extent Kayleigh attempts to compare the facts of the present case to those of ***Auman v. School Dist. of Stanley-Boyd***, 2001 WI 125, 248 Wis. 2d 548, 635 N.W.2d 762, ***Auman*** involved application of the recreational immunity statute to an injury caused after a fall from a snow pile. Kayleigh cites a concurring opinion from that case that discusses a "duty of reasonable care for schools and school districts." *See* ***id.***, ¶24. However, that discussion is within the context of those statutes directed toward keeping the school building and grounds in good repair and is thus inapplicable here.

Kayleigh's removal from the regular classroom. Counsel inquired: "Kayleigh can't receive [the] speech and language services in the classroom you had?" Neumeyer averred:

> They can do both. And to my understanding, it was depending on the services that they wanted to provide each student, and then where they felt the student would best receive the services depending on the individual educational plan and what the goals were and how many hours per class and where that student could best get the services.

¶9 Kayleigh nevertheless cites the "90-day rule" of WIS. STAT. § 115.78(3), arguing that she would not have suffered injury if the school district had timely implemented the evaluation results. The statute provides, in relevant part: "The local educational agency shall notify the parents of the educational placement of their child within 90 days after the local educational agency receives a special education referral for the child." WIS. STAT. § 115.78(3)(a). Although the statute imposes a notification requirement, it does not mandate implementation of the evaluation results.

¶10 Because these decisions regarding the execution of classroom safety rules and implementation of special education test results were discretionary, not ministerial, the school district is immune from suit pursuant to WIS. STAT. § 893.80(4).

By the Court.—Judgment affirmed.

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