

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 12, 2009

David R. Schanker
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. 2008AP324

Cir. Ct. No. 2007SC3481

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MICHA'EL JOHNSON,

PLAINTIFF-APPELLANT,

V.

CAPTAIN GILBERT AND CO II SHERMAN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, P.J.¹ Micha'el Johnson, an inmate at the Wisconsin Secure Program Facility (WSPF) in Boscobel, Wisconsin, at the times

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

relevant to this action, appeals pro se an order granting the motion of the defendants, Michael Sherman and Timothy Gilberg, for summary judgment and dismissing his action. We affirm.

¶2 On January 12, 2006, Johnson submitted a written request to Correctional Officer II Michael Sherman, the property officer at WSPF, asking that a collection of legal papers be sent out of the facility on a visit, or, as a second choice, be mailed out at his expense. WISCONSIN ADMIN. CODE § DOC 309.20(4) requires that each prison facility adopt policies and procedures relating to the disposal of the personal property of inmates. WSPF policy adopted pursuant to § DOC 309.20(4) states that an inmate's property may be disposed of by either (1) destruction of the property, (2) sending the property out on a visit, or (3) sending property out via mail. WSPF Policies and Procedures Manual, No. 530.02(IV.)A. Inmates seeking to dispose of property must fill out a form specifying their requested method for disposal and a second choice method of disposal. WSPF Manual, No. 530.02(IV.)F.

¶3 Sherman processed Johnson's request; the papers, weighing approximately forty-six pounds, were removed from Johnson's cell to await visitor pick-up. On February 2, 2006, Johnson submitted a written request asking Sherman to return the papers to him to assist other inmates with ongoing legal matters. Sherman responded in writing that Johnson needed to direct his request to Captain Timothy Gilberg, which Johnson did. Gilberg responded in writing that Johnson needed to submit documentation of the ongoing legal matters before the papers would be returned to him. WISCONSIN ADMIN. CODE § DOC 309.20(3)(f) provides that "[t]he department shall allow an inmate legal materials which are necessary for that inmate's legal actions or the actions of another inmate whom the first inmate is assisting." Gilberg informed Johnson that without documentation of

the on-going legal matters the papers would be mailed out at Johnson's expense if they were not picked up on a visit.

¶4 Johnson did not provide documentation of any ongoing legal matters. Instead, he submitted a complaint to the Institution Complaint Examiner's Office alleging that staff improperly refused to return his papers and requesting their immediate return. On February 13, 2006, more than thirty days after Johnson made his initial disposal request, *see* No. 530.02(IV.)F. & H. of the WSPF Policies and Procedures Manual,² Sherman attempted to mail the papers but found Johnson's account had insufficient funds to cover the postage. On February 15, 2006, Sherman notified Johnson in writing that the papers would be destroyed unless they were picked up or sufficient funds were provided to mail them out. On February 24, 2006, the Warden dismissed Johnson's inmate complaint. That day, Sherman sent Johnson a second written warning that the papers would be destroyed unless they were picked up or sufficient funds were provided for postage. WISCONSIN ADMIN. CODE § 309.20(4)(d)3. requires that inmates be given written notice within ten days of the disposal of any personal property.

¶5 On February 28, 2008, Sherman destroyed Johnson's papers. On March 22, 2007, Johnson filed a small claims action against Sherman and Gilberg to recover damages for the destruction of his papers. Johnson filed a motion for summary judgment, and Sherman and Gilberg also moved for summary judgment, asserting sovereign immunity and public officer immunity. After a December 18,

² Number 530.02(IV.)F. of the WSPF Policies and Procedures Manual provides that "[i]f the item is designated to be sent out on a visit the inmate will indicate what his second choice is for disposal of the property **if it is not** sent out on a visit within the 30-day time limit."

2007 hearing on both motions, the circuit court granted Sherman and Gilberg's summary judgment motion and dismissed Johnson's claims. Johnson appeals.

¶6 We review a circuit court's grant of summary judgment de novo, applying the same methodology as the circuit court. *State v. Bobby G.*, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We draw all reasonable inferences from the evidence in the light most favorable to the non-moving party. *Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781 (citation omitted).

¶7 The resolution of the motion for summary judgment turns on the question of whether Sherman and Gilberg are immune from suit as public officers under WIS. STAT. § 893.80(4). Whether the immunity statute applies in a given case involves the application of legal standards to a set of facts, a question of law which we review de novo. *Voss v. Elkhorn Area Sch. Dist.*, 2006 WI App 234 ¶12, 297 Wis. 2d 389, 724 N.W.2d 420.

¶8 Under WIS. STAT. § 893.80(4), governmental bodies and their officers and employees are immune from suit for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."³ The terms

³ WISCONSIN STAT. § 893.80(4) provides as follows:

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

(continued)

“quasi-judicial or quasi-legislative” and “discretionary” are synonymous. *Sheridan v. City of Janesville*, 164 Wis. 2d 420, 425, 474 N.W.2d 799 (1991). A quasi-judicial or quasi-legislative act involves the exercise of discretion and judgment. *Id.* A discretionary act is one that “involves the exercise of judgment in the application of a rule to specific facts.” *Willow Creek Ranch v. Town of Shelby*, 2000 WI 56, ¶25, 235 Wis. 2d 409, 611 N.W.2d 693.

¶9 A well-established exception to the rule of immunity holds that an officer is liable for negligence in the performance of a ministerial duty. *See Lister v. Board of Regents of Univ. of Wis. Sys.*, 72 Wis. 2d 282, 300-01, 240 N.W.2d 610 (1976). A duty is considered 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 Johnson first argues that immunity is inappropriate because Sherman and Gilberg were not acting in their “official capacity” when they refused to return his papers. We disagree. In essence, Johnson argues that Sherman and Gilberg could not have been acting in their official capacity because they did not correctly follow procedures. Johnson misunderstands the meaning of official capacity. It is undisputed that Sherman and Gilberg’s actions leading up to the destruction of Johnson’s papers were carried out in the course of their duties as employees of the Wisconsin Department of Corrections and were within the scope of that employment. Accordingly, Sherman and Gilberg were acting in their official

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.

capacity at the time. Whether a governmental officer properly applied procedures is irrelevant to the question of whether the officer was acting within his or her official capacity.

¶11 Johnson next appears to argue that discretionary immunity does not apply because Sherman and Gilberg had a ministerial duty under No. 530.02(IV.)F. of the WSPF Policies and Procedures Manual to preserve his papers. We disagree.

¶12 The officials' disposal of Johnson's papers was the result of multiple discretionary acts involving the application of WSPF and DOC regulations to Johnson's situation. Gilberg requested documentation from Johnson before returning the legal papers to Johnson to confirm that Johnson was, in fact, assisting other inmates with ongoing legal cases. This request was a discretionary action taken pursuant to WIS. ADMIN. CODE § DOC 309.20(3)(f), which provides that an institution is required to allow inmates to store only those "legal materials which are necessary for that inmate's legal actions or the actions of another inmate whom the first inmate is assisting."

¶13 When Johnson failed to provide the requested documentation, Sherman warned Johnson in writing, as required by WISCONSIN ADMIN. CODE § 309.20(4)(d)3., that the papers would be destroyed if he failed to provide such documentation, or if the papers were not picked up or sufficient funds were provided to mail them. Sherman's disposal of Johnson's papers after Johnson failed to provide the requested documentation, which followed two warnings that if Johnson failed to take action the papers would be destroyed, was a discretionary act based on the application of WSPF and DOC rules. Contrary to Johnson's claims, this act did not violate a ministerial duty because, "[b]y definition, acts that

require the determination of what law, rule or regulation is to be followed or the application of a law, rule or regulation to a particular set of facts are nonministerial acts.” *Kierstyn v. Racine Unified Sch. Dist.*, 221 Wis. 2d. 563, 570, 585 N.W.2d 721 (Ct. App. 1998).

¶14 Finally, Johnson argues that Sherman and Gilberg should be judicially estopped from asserting immunity under WIS. STAT. § 893.80(4) apparently because the officers made different arguments at various points in the litigation supporting their claim of immunity. Johnson’s argument is vague and fails to show that the officers’ positions here are inconsistent with those taken earlier in the litigation. *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2007 WI 98, ¶24, 303 Wis. 2d 258, 735 N.W.2d 93 (courts apply judicial estoppel to prevent parties from asserting inconsistent positions in a legal proceeding). We therefore do not apply judicial estoppel here.

¶15 For the forgoing reasons, we conclude that Sherman and Gilberg are immune from suit under WIS. STAT. § 893.80(4) and are therefore entitled to summary judgment.⁴ Accordingly, we affirm the circuit court’s order.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁴ Any additional arguments Johnson makes are insufficiently developed and we therefore do not address them. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (appellate court “cannot serve as both advocate and judge” by developing arguments for the parties). Moreover, our conclusion that Sherman and Gilberg are immune from suit is dispositive. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n. 1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue disposes of an appeal, we generally do not address other issues raised).

