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DISTRICT II

April 15, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP391 Eileen Grandolfo v. Village of Pleasant Prairie (L.C. #2018CV137)

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

The Village of Pleasant Prairie appeals from an order denying its motion for summary judgment. The Village asserted governmental immunity as a defense under WIS. STAT. § 893.80(4) (2017-18)[1] to Eileen Grandolfo's trip and fall negligence action, in which she

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

asserted a violation of Wisconsin's safe place statute, WIS. STAT. § 101.11. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We conclude that the Village's decisions or acts related to its alleged negligence were discretionary, as opposed to ministerial, in nature, entitling the Village to governmental immunity. Accordingly, we reverse and remand with directions to the circuit court to grant the Village's motion on immunity grounds.

The following facts are undisputed. In May 2017, Grandolfo attended an ice show to watch her grandson perform at the Village's recreation complex. After the show, Grandolfo passed through a crowded walkway heading toward the exit when she fell on an unmarked concrete curb, resulting in injuries. The curb and walkway were constructed in 2004.

Grandolfo sued the Village, alleging it negligently: (1) "failed to adequately and properly inspect the curb," (2) failed to timely repair "the unsafe layout in the curb and walkway in order to prevent an unlevel surface and tripping hazard," (3) "failed to warn of the dangerous and unsafe condition presented by the curb and walkway." She also alleged a violation of Wisconsin's safe place statute.

The Village moved for summary judgment, seeking dismissal of all claims under WIS. STAT. § 893.89(2), the statute of repose, and under WIS. STAT. § 893.80(4), governmental immunity. The circuit court denied the Village's motion. It determined that the statute of repose does not apply because Grandolfo alleged the incident was caused by various unsafe conditions, rather than by a structural defect. The court also determined that governmental immunity does not apply because the safe place statute imposes a duty upon the Village to keep the area reasonably safe, which the court deemed to be a ministerial duty as opposed to a discretionary

one. The Village petitioned for leave to appeal from a nonfinal order. We granted the petition. *See* WIS. STAT. RULE 809.50(3).

We independently review a grant or denial of summary judgment, using the same methodology as the circuit court. *See* ***Secura Ins. v. Super Prods. LLC***, 2019 WI App 47, ¶11, 388 Wis. 2d 445, 933 N.W.2d 161. Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). Because there are no material facts in dispute here, the determination of whether governmental immunity applies is one of law, which we review de novo.[2] ***DeFever v. City of Waukesha***, 2007 WI App 266, ¶6, 306 Wis. 2d 766, 743 N.W.2d 848.

We start with the statutes. The statute providing governmental immunity, WIS. STAT. § 893.80(4), states as follows:

> No suit may be brought against any volunteer fire company organized under [WIS. STAT.] 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 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.

[2] As will be discussed, the discretionary immunity issue is dispositive of this appeal. Accordingly, we need not address the statute of repose issue. *See* ***Lake Delavan Prop. Co. v. City of Delavan***, 2014 WI App 35, ¶14, 353 Wis. 2d 173, 844 N.W.2d 632 (court need not address other issues when one is dispositive).

Acts that are legislative, quasi-legislative, judicial or quasi-judicial are discretionary in nature and are therefore cloaked with immunity. ***Spencer v. County of Brown***, 215 Wis. 2d 641, 647, 573 N.W.2d 222 (Ct. App. 1997). In effect, the statute immunizes an owner or employer for acts that are discretionary, as opposed to ministerial. For purposes of immunity, an act is discretionary if it involves an exercise of judgment when applying rules to the facts. ***DeFever***, 306 Wis. 2d 766, ¶7. In contrast, an act is ministerial 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." ***Caraher v. City of Menomonie***, 2002 WI App 184, ¶18, 256 Wis. 2d 605, 649 N.W.2d 344 (citation omitted).[3] When a purported ministerial duty arises from a statute or express policy, we will evaluate the language to discern "whether the duty and its parameters are 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.

Wisconsin's safe place statute sets forth a heightened duty on employers and owners of public buildings to construct, repair, or maintain buildings safely. WIS. STAT. § 101.11; *see* ***Mair v. Trollhaugen Ski Resort***, 2006 WI 61, ¶19, 291 Wis. 2d 132, 715 N.W.2d 598. The statute states in part as follows:

> Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of

[3] We have recognized four exceptions to governmental immunity under WIS. STAT. § 893.80(4). Immunity does not apply to the performance of: (1) ministerial duties; (2) duties to address a "known danger"; (3) actions involving medical discretion (*see* ***Scarpaci v. Milwaukee County***, 96 Wis. 2d 663, 686-88, 292 N.W.2d 816 (1980)); and (4) actions that are "malicious, willful, and intentional." ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 90-97 & n.8, 596 N.W.2d 417 (1999) (citation omitted). Grandolfo has only argued in support of the first of these—that this was a ministerial duty.

> employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.

Sec. 101.11(1).

The Village relies on ***Spencer*** in support of its contention that the safe place statute, as applied to the facts here, does not create a ministerial duty. The Village asserts that its responsibility with respect to the curb and walkway was discretionary, entitling it to immunity. We agree.

In ***Spencer***, the plaintiff fell in the shower area of the county jail and alleged that the county was negligent with respect to the safety procedures and control relating to the shower facilities, to the training and supervision of employees, and to the inspection, maintenance and repair of the facilities. ***Spencer***, 215 Wis. 2d at 644, 648. Spencer argued that governmental immunity did not apply because the duty created under the safe place statute was ministerial: the county should have "adopt[ed] and use[d] methods and processes reasonably adequate to make the shower area safe," such as by providing railings or skid-proof floors. ***Id.*** at 648-49, 654. We rejected Spencer's argument, reasoning that the statute, while heightening the standard of care above ordinary negligence, did not prescribe any particular actions or methods that the county was mandated to take with respect to the safety of the shower area. ***Id.*** at 651. We stated as follows:

> We conclude the duty imposed by the safe-place statute, [WIS. STAT.] § 101.11 … is discretionary. Under the safe-place statute,

> defendants are required to use *reasonably adequate methods* to make the shower area safe, and to do every other thing *reasonably necessary* to protect the safety of individuals like Spencer. (Emphasis added.) This language implies the exercise of discretion and judgment by government officials in determining what measures are reasonably necessary to make the shower facilities safe. Section 101.11 does not impose the duty to perform an act with specificity as to time, mode and occasion "with such certainty that nothing remains for judgment or discretion."

Spencer, 215 Wis. 2d at 651 (citation omitted). The ***Spencer*** court further explained that whether and how to improve the safety of the shower facilities would entail consideration of multiple factors, such as inmate safety, facility security, and the implementation of shower procedures, all of which involve the exercise of judgment and discretion. ***Id.*** at 652.

Spencer applies here. In addition to the alleged failure to inspect, repair, or maintain, Grandolfo contends the Village should have provided warnings or demarcations to direct patrons away from the unmarked curb. As noted in ***Spencer***, under the safe place statute, a building owner is required to undertake reasonably adequate methods and measures to make the curb and walkway safe. However, the statute does not mandate that the Village take any particular protective actions, processes or measures with any specificity as to "time, mode and occasion." *See* ***Caraher***, 256 Wis. 2d 605, ¶18. Grandolfo does not cite to any other statute, administrative rule, or written policy that imposes such a duty, much less a duty and its parameters "expressed so clearly and precisely, so as to eliminate the official's exercise of discretion." ***Pries***, 326 Wis. 2d 37, ¶26. We see no reason to distinguish between measures that are reasonably necessary to make shower facilities safe and measures that are reasonably necessary to make a curb and walkway safe; such measures both entail and require judgment and discretion. Under the circumstances of this case, the Village's alleged duty under the safe place statute was discretionary, not ministerial.

Grandolfo primarily relies on ***Anderson v. City of Milwaukee***, 199 Wis. 2d 479, 544 N.W.2d 630 (Ct. App. 1996) (***Anderson I***), *rev'd*, 208 Wis. 2d 18, 559 N.W.2d 563. ***Anderson I*** does not apply, as was explained in ***Spencer***, where under the circumstances it is clear that there is no statutory duty imposed on the Village to take any particular protective measure with regard to the curb and walkway as to time, mode, and occasion with such certainty that nothing remains for judgment or discretion.[4] *See* ***Spencer***, 215 Wis. 2d at 651.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed, pursuant to WIS. STAT. RULE 809.21, and the cause is remanded with directions.

IT IS FURTHER ORDERED that this summary disposition order will not be published

Sheila T. Reiff
Clerk of Court of Appeals

[4] Grandolfo argues that subsection (2)(a) of the safe place statute provides explicit instructions as to what should be done, as it states: "[N]o such employer shall fail to furnish, provide and use safety devices and safeguards." WIS. STAT. § 101.11(2)(a). Again, we are not persuaded that determining what safety devices and safeguards are reasonably necessary requires any less discretion or judgment than is required for maintaining a prison shower floor in a safe condition. ***Spencer*** is thus not distinguishable in any meaningful manner.