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February 24, 2021

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

2020AP1117 Maureen Sylvester v. The City of Cedarburg (L.C. #2019CV170)

Before Neubauer, C.J., Gundrum and Davis, JJ.

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).

Maureen Sylvester appeals from an order granting the City of Cedarburg's motion for summary judgment. The City asserted governmental immunity as a defense under WIS. STAT.

§ 893.80(4) (2017-18)[1] to Sylvester's trip-and-fall negligence action. 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 City's decisions or acts related to its alleged negligence were discretionary, as opposed to ministerial, entitling the City to governmental immunity. Accordingly, we affirm.

The following facts are undisputed. On December 2, 2016, Sylvester tripped and fell on a sidewalk in Cedarburg. Sylvester believed the incident occurred when she struck her toe on the sidewalk and fell forward. Sylvester sued the City, alleging it negligently maintained the public sidewalk.

Cedarburg's assistant City Engineer, Michael Wieser, was responsible for oversight of the City's sidewalks. Wieser testified that remediation work on the City's sidewalks was completed pursuant to the City's Defective Sidewalk Repair/Replacement Policy (Sidewalk Policy).

The City moved for summary judgment, seeking dismissal of all claims under WIS. STAT. § 893.80(4), governmental immunity. The circuit court granted the City's motion. Sylvester appeals. Additional facts will be discussed below.

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,

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

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).

Where a defendant is entitled to statutory immunity, summary judgment may be appropriate even where there is a factual dispute as to negligence. ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶16, 253 Wis. 2d 323, 646 N.W.2d 314. The court "assumes negligence, focusing instead on whether the municipal action (or inaction) upon which liability is premised is entitled to immunity under the statute, and if so, whether one of the judicially-created exceptions to immunity applies." ***Id.***, ¶17. Because there are no material facts in dispute here as it pertains to immunity, the determination of whether governmental immunity applies is one of law, which we review de novo. *See* ***id.***; ***DeFever v. City of Waukesha***, 2007 WI App 266, ¶6, 306 Wis. 2d 766, 743 N.W.2d 848.

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.

We have recognized four exceptions to governmental immunity under § 893.80(4). *See* ***Engelhardt v. City of New Berlin***, 2019 WI 2, ¶29, 385 Wis. 2d 86, 921 N.W.2d 714. 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)

(citations omitted). Sylvester has only developed arguments in support of the first and second of these—that implementing the City's Sidewalk Policy was a ministerial duty and the raised sidewalk was a known danger.[2]

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 a municipality 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. Discretionary acts are those that are entrusted to public officials with the power to determine how a general rule should be applied or how a general policy should be carried out. ***Lifer v. Raymond***, 80 Wis. 2d 503, 511-12, 259 N.W.2d 537 (1977).

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). 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

[2] Sylvester also seems to argue that the exception created by ***Scarpaci v. Milwaukee County***, 96 Wis. 2d 663, 686-88, 292 N.W.2d 816 (1980), applies to all actions of "professional discretion" and not just "medical discretion" and, as such, immunity does not attach. She does not fully develop this argument, however, nor does she explain why we should interpret the exception to apply here. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we do not consider unsupported arguments).

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.

The Sidewalk Policy adopted by the City[3] provides that the "goal of the program is to establish uniform guidelines for inspection and repair/replacement of defective sidewalk that could cause a pedestrian injury." It provides for an annual inspection of twenty percent of the sidewalks for defects. It then sets forth "guidelines that assist the Director of Engineering and Public Works or designee to identify a sidewalk that may need repair or replacement." It lists some circumstances of when a sidewalk may need repair, but there is no mandate as to whether, where or when that is to happen.[4]

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[3] The City asserts that its policy was authorized under WIS. STAT. § 66.0907(3), which affords discretion to municipalities in the repair of sidewalks:

> (b) *Board of public works.* The board of public works may order any sidewalk which is unsafe, defective or insufficient to be repaired or removed and replaced with a sidewalk in accordance with the standard fixed by the council.

[4] The policy reads in relevant part as follows:

> DEFECTIVE SIDEWALK REPAIR/REPLACEMENT POLICY
>
> General: The objective of this policy is to establish a sidewalk repair/replacement program. The **goal** of the program is to establish uniform **guidelines** for inspection and repair/replacement of defective sidewalk that could cause a pedestrian injury.
>
> Procedure: 1. Inspection: The Director of Engineering and Public Works shall establish a yearly regular inspection program of existing sidewalk. The yearly inspection program will include approximately twenty-percent of the City. Sidewalk shall be inspected for defects as established in this policy. The Public Works Commission shall establish a yearly defective sidewalk repair/replacement program based on the inspection of the Director of Engineering and Public Works or designee.

Both the policy and his testimony establish that Wieser had the discretion to determine how and when City sidewalks were to be repaired in accordance with the Sidewalk Policy guidelines. Wieser used a map to make decisions based upon his experience, the conditions of the sidewalks, potential repairs, and the budget.

In short, the undisputed facts make clear that the City was under no duty to repair the sidewalk that was "absolute, certain and imperative, involving merely the performance of a

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> 2. Repair/Replacement: The yearly repair/replacement program as established by the Public Works Commission shall be carried out by the Director of Engineering and Public Works or designee. An official notice shall be published and affected property owners shall be notified by letter, including construction cost for repair/replacement if completed under contract by a City hired contractor.
>
> 3. The items below are **guidelines** that assist the Director of Engineering and Public Works or designee to identify a sidewalk that **may** need repair or replacement:
>
> a. Differential Settlement or heaving at walk joints of more than one (1) inch at any point along joint.
>
> b. Settled sidewalk of more than two (2) inches.
>
> c. Negative pitched sidewalk (drains toward house), if in the judgment of the Director of Engineering and Public Works, it is deemed to create a safety hazard.
>
> d. Spalled surface (scaling, pitting or pocketing) or excessive racking that is deemed to create a safety hazard in the judgment of the Director of Engineering and Public Works.
>
> e. A slab that slopes more than one (1) inch per foot in any direction.
>
> f. Other situations which, in the opinion of the Director of Engineering and Public Works, create a potential public safety hazard.

(Emphasis added.)

specific task." *See* ***Caraher***, 256 Wis. 2d 605, ¶18 (citation omitted). There was no requirement or obligation to repair the sidewalk in the City's Sidewalk Policy that imposed, prescribed or defined "the time, mode and occasion for its performance with such certainty that nothing remain[ed] for judgment or discretion." *See* ***id.*** The Sidewalk Policy did not impose a duty with parameters "expressed so clearly and precisely, so as to eliminate the official's exercise of discretion." *See* ***Pries***, 326 Wis. 2d 37, ¶26. Rather, its "goal" to establish "guidelines" and the use of "may" as it pertained to repairs embodied the exercise of discretion and judgment by government officials in determining whether, where, and when repairs were to be undertaken.[5]

The "known danger" exception to immunity requires that a plaintiff show that "the nature of the danger is compelling and known to the officer and is of such force that the public officer has no discretion not to act." ***Id.***, ¶44 (Abrahamson, C.J., concurring); *see also* ***Knoke v. City of Monroe***, 2021 WI App 6, ¶54, ___ Wis. 2d ___, ___ N.W.2d ___ ("The known and compelling danger exception has been reserved for situations that are more than unsafe, where the danger is so severe and so immediate that a response is demanded.") (Citation omitted.)

The exception is aptly exemplified in ***Cords v. Anderson***, 80 Wis. 2d 525, 529, 259 N.W.2d 672 (1977), in which the manager of a state-owned park failed to take steps to warn of the dangerous condition posed by a path open for night hiking that ran within inches of a precipitous drop into a ninety-foot gorge. Because the park manager knew of the dangerous terrain, was in a position to do something about it, yet did nothing, immunity did not apply. ***Id.*** at 541. The facts

[5] Sylvester contends that the City's "shaving" of one of the sidewalk's edges prior to her fall established a ministerial duty to complete other repairs in the vicinity. We disagree as there is nothing in the City's policy that one repair mandates others, much less at a particular time. Again, decisions as to whether, when and where to make repairs were subject to the City officials' judgment and discretion.

established a "duty so clear and so absolute that it falls within the definition of a ministerial duty." *See* ***Kierstyn***, 228 Wis. 2d 81, 95-96 (citation omitted).

We agree with the circuit court that the facts here showing a slight rise in the sidewalk area, a sight unfortunately all too common given Wisconsin's weather conditions and limited municipal budgets, do not present a "known danger" giving rise to a clear and absolute duty to immediately repair the sidewalk.[6] A slightly uneven sidewalk is not the functional equivalent of known conditions that were likely to cause a ninety-foot fall. *See, e.g.*, ***Knoke***, 2021 WI App 6, ¶¶53-56, ___ Wis. 2d ___ (known and compelling danger exception to immunity inapplicable to commonplace accumulation of ice and snow on side of street; municipality exercised discretion in determining how and when to respond to potentially unsafe snow and ice conditions).

Upon the foregoing reasons,

[6] Sylvester raises challenges to the application of government immunity on public policy grounds and points to case law that largely has been abrogated by WIS. STAT. § 893.80(4) and subsequent cases addressing the nature and scope of discretionary acts. We are not at liberty to ignore the immunity statute and subsequent case law on public policy grounds.

In addition, as the City points out, in 2011, the Wisconsin Legislature repealed WIS. STAT. § 81.15, thereby abrogating city liability for sidewalk defects. *See* 2011 Wis. Act 132; ***Webster v. Klug & Smith***, 81 Wis. 2d 334, 339, 260 N.W.2d 686 (1978) (finding that the word "highway" in the statute includes sidewalks). We need not address the import of this statutory change, as our analysis under the immunity statute is dispositive. *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).

IT IS ORDERED that the circuit court's order granting summary judgment is affirmed as immunity applies to the City pursuant to WIS. STAT. § 893.80(4).

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

Sheila T. Reiff
Clerk of Court of Appeals