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**DISTRICT IV**

December 23, 2021

*To*:

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Circuit Court Judge
La Crosse County Courthouse
Electronic Notice

Pamela Radtke
Clerk of Circuit Court
La Crosse County Courthouse
Electronic Notice

Scott M. Butler
Electronic Notice

Samuel C. Hall Jr.
Electronic Notice

Timothy M. Johnson
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James W. Richgels
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You are hereby notified that the Court has entered the following opinion and order:

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2021AP1449 Nicole Nontelle v. City of La Crosse (L.C. # 2020SC706)

Before Kloppenburg, J.[1]

**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).**

Nicole Nontelle tripped and fell on rusted metal bolts that were exposed due to a missing bollard on the sidewalk parallel to 5th Street in the City of La Crosse. The City of La Crosse and Wisconsin Municipal Mutual Insurance Company (collectively, the City) appeal a circuit court order that was entered, after a bench trial, awarding $5,000 (plus $570.25 for statutory attorney

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

fees and costs) for damages sustained by Nontelle as a result of the fall. After reviewing the briefs and record, I conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. I summarily affirm.

Nontelle filed a small claims complaint alleging that the City negligently maintained the sidewalk in the area of the exposed bolts into which she "collided." The circuit court held a bench trial at which Nontelle and the City Streets Superintendent testified.

Nontelle testified in pertinent part as follows. At about 10:00 at night on October 17, 2019, she was walking on the sidewalk along 5th Street in downtown La Crosse to her mother's house, when she tripped over exposed metal bolts. She was bleeding and in pain, and her mother took her to the hospital for treatment. She had not seen the exposed bolts before and did not know how long they were exposed. She took a picture of the bolts immediately after she fell which was admitted at trial. The picture showed three bolts protruding about three to four inches above the sidewalk with varying degrees of rust on them. The exposed bolts were in front of a co-op near a park that was also the site of a weekly summer farmer's market. Two to three days after she fell, Nontelle reported the exposed bolts to the City, along with the existence of exposed bolts at two other locations in downtown La Crosse, which she learned of on social media. The bolts where she fell were removed five days later.

The City Streets Superintendent testified in pertinent part as follows. The bolts had secured a decorative bollard consisting of a three-foot high post with a ball on top. The City had installed a number of these bollards, secured by bolts, in downtown La Crosse to "beautify" the City. The rust on the bolts does not indicate how long the bolts were exposed. The City had not been notified of the exposed bolts before Nontelle fell.

The circuit court admitted a photograph of the co-op that showed that the bollard that had been installed over the bolts where Nontelle fell was in place in front of that business in August 2019.

The circuit court issued an oral ruling at the conclusion of the trial, stating as follows. The City "took on" the obligation to maintain the bollards, and the bolts that secured them, which the City had installed "in an area that is frequented by the public," to attract people to walk and shop in downtown La Crosse. The exposed bolts were an "open, clear, dangerous situation in a heavily used commercial area. Once there was one of these that was exposed, the City should have inspected the downtown area, found any others, and taken care of it." It was unreasonable "for the City to deal with the structures that they put in in a downtown area trying to attract people to come down here and shop … [by] say[ing] , well, that's okay; we'll just leave all those exposed bolts until somebody tells us about it." The court found "the City woefully negligent disregarding [its] duty to protect the health and welfare and safety of those who [it] ha[s] invited downtown for the purpose of commerce."

The City argues on appeal that it is entitled to governmental immunity because its decisions in maintaining its sidewalks are discretionary and the exposed bolts were not a known and compelling danger. The City also argues that Nontelle's negligence claim fails because she did not prove that the bolts were exposed "for a quantum of time sufficient to support a finding of constructive notice," citing ***Correa v. Woodman's Food Market***, 2020 WI 43, ¶18, 391 Wis. 2d 651, 943 N.W.2d 535.

Appellate courts review a circuit court's factual findings at a bench trial under the clearly erroneous standard. WIS. STAT. § 805.17(2) ("Findings of fact shall not be set aside unless

clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). Consistent with this standard:

> Findings of fact by the [circuit] court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence. The evidence supporting the findings of the [circuit] court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. In addition, when the [circuit court] judge acts as the finder of fact, and where there is conflicting testimony, the [circuit court] judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.

***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979) (citations sources omitted).

"The application of the immunity statute and its exceptions involves the application of legal standards to a set of facts, which is a question of law" that this court reviews de novo. ***Lodl v. Progressive Northern Ins. Co.***, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314.

WISCONSIN STAT. § 893.80(4) immunizes units of local government and their officers and employees from liability "for legislative, quasi-legislative, judicial, and quasi-judicial acts, which have been collectively interpreted to include any act that involves the exercise of discretion and judgment."[2] ***Lodl***, 253 Wis. 2d 323, ¶¶20-21. As pertinent to this case, ***Lodl*** explains that "[t]here is no immunity against liability associated with … known and compelling dangers that give rise to ministerial duties on the part of public officers or employees." ***Id.***, ¶24. The known

[2] WISCONSIN STAT. § 893.80(4) provides: "No suit may be brought against any [governmental subdivision] ... or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."

and compelling danger exception arises when "there exists a known present danger of such force that the time, mode and occasion for performance [are] evident with such certainty that nothing remains for the exercise of judgment and discretion." ***C.L. v. Olson***, 143 Wis. 2d 701, 717, 422 N.W.2d 614 (1988); *see also* ***Heuser ex rel. Jacobs v. Community Ins. Corp.***, 2009 WI 151, ¶23, 321 Wis. 2d 729, 774 N.W.2d 653 ("when a danger known to a public officer or employee is of such a compelling force, it strips that person of discretion or judgment and creates an absolute, certain and imperative duty to act."). The application of the known and compelling danger exception to governmental immunity is by nature "case-by-case." ***Lodl***, 253 Wis. 2d 323, ¶38.[3]

The City argues that the exposed bolts did not establish a known and compelling danger sufficient to trigger a ministerial duty to repair because the City "would be unduly burdened if the law required it to constantly monitor every sidewalk." The City bases this argument on the program it has in place "for maintenance and what areas to inspect its approximately 1,920 blocks with sidewalks" and on its reliance "on [this] program of inspection and reports or complaints of allegedly dangerous situations." However, this argument disregards the circuit court's focus on the downtown area in which the City installed the bollards secured by bolts, specifically to encourage people to walk and shop in that area. It was in the context of that

[3] The parties' arguments on appeal also address a second exception to immunity from liability, for "the performance of ministerial duties imposed by law." ***Lodl v. Progressive Northern Ins. Co.***, 2002 WI 71, ¶24, 253 Wis. 2d 323, 646 N.W.2d 314. "A ministerial duty is one that '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.***, ¶25 (quoted source omitted). I do not address the ministerial duties exception because I conclude that the known and compelling danger exception is sufficient to decide this appeal. *See* ***Barrows v. American Family Ins. Co.***, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) ("An appellate court need not address every issue raised by the parties when one issue is dispositive.").

circumscribed area and those bollards that the City had specifically installed that the court ruled that the exposed bolts presented a known and compelling danger that the City had a non-discretionary duty to repair. With respect to that circumscribed area and those bollards, the circuit court implicitly relied on the evidence of rust on the bolts and their location in a heavily used area to infer that the bolts had been exposed for a sufficient time that the dangerous condition was known to the City.

In its reply brief, the City argues that it presented testimony that at least some of the rust likely accumulated when the bolts were covered by the bollard. Specifically, the City Streets Superintendent acknowledged that two of the three bolts shown in the photograph taken just after Nontelle fell were "totally rusted" along the bottoms with the tops "showing some silver." He opined that, because the bollards did not have "an airtight seal to the concrete," "moisture ha[d] penetrated underneath and rusted" the bottoms of those two bolts. He did not testify about the third bolt, which the photograph showed was more rusted. His testimony does not suffice to refute the inference from the evidence of rust on the bolts and their location in a heavily used area that the bolts had been exposed for a sufficient time for the dangerous condition to be known to the City.

The City cites several cases concerning sidewalk defects, but, as explained above, here the circuit court focused not on the City's general maintenance of sidewalks throughout the City

but on the sidewalks in the downtown area where the City had installed bollards for the specific purpose of attracting people to walk and shop.[4]

The City argues that it is not sufficient that the exposed bolts were "dangerous enough to require the City to 'do something' about" them, because the "doing something" is too generic to establish a ministerial duty. However, the evidence at trial established that the only response to the exposed bolts was to remove them, thereby indicating that the exposed bolts required only one mode of repair. The City argues that the circuit court incorrectly found that the City did nothing for five days after receiving Nontelle's report of the exposed bolts. However, that finding is consistent with the testimony at trial. The City cites an affidavit presented in support of its pretrial motion for summary judgment, but the facts averred in that affidavit were not presented to the court at trial.[5]

[4] The City compares the facts here to an icy patch that this court determined was not a known and compelling danger because the sidewalk was often travelled without incident and is an expected and "omnipresent" condition in winter in Wisconsin. *See* ***Malean v. Smith***, No. 2013AP2442, unpublished slip op. ¶20, (WI App July 29, 2014). The City erroneously relies on this opinion. First, it is an unpublished per curiam opinion that may not be cited in any Wisconsin court, with exceptions not present here, and counsel is admonished for doing so. *See* WIS. STAT. RULE 809.23(3)(a) and (b). Second, the cited case is easily distinguished in that exposed bolts are not an expected condition in any season and here the bolts secured a bollard that went missing after having been specifically installed in a heavily used area of the downtown.

[5] The City filed a pretrial motion for summary judgment that the circuit court denied in an oral ruling. The City appears to challenge this ruling in its reply brief. I do not consider that challenge for several reasons. First, the challenge comes too late. *See* ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶20 n.7, 292 Wis. 2d 212, 713 N.W.2d 661 ("It is a well-established rule that we do not consider arguments raised for the first time in a reply brief."). Second, and relatedly, the City does not in its notice of appeal reference that ruling or in its statement of issues in its initial appellants' brief identify that ruling as erroneous. Third, there is no transcript of the hearing at which the circuit court issued its ruling, to allow proper review. *See* ***State v. Provo***, 2004 WI App 97, ¶19, 272 Wis. 2d 837, 681 N.W.2d 272 ("'It is the appellant's responsibility to ensure completion of the appellate record.'" (quoted source omitted)).

In sum, the City fails to show that the circuit court erred in rejecting its claim that it is entitled to governmental immunity.

The City argues that Nontelle's negligence claim fails because she did not prove that the bolts were exposed long enough to give the city constructive notice of their presence. However, the case on which the City primarily relies does not support its argument. In that case, the plaintiff slipped and fell on a slippery substance in a grocery store aisle, and a jury found the store had constructive notice of the substance on the floor. ***Correa***, 391 Wis. 2d 651, ¶¶3-6. The jury viewed a ten-minute surveillance video of the area which commenced several minutes before the fall and ended several minutes after. ***Id.***, ¶5 The video showed the plaintiff slipping and falling and an employee then wiping the substance off the floor, but nothing in the video showed when or how the substance came to be on the floor, and the video resolution was not high enough to show the substance. ***Id.*** From this evidence, our supreme court determined that it could be inferred that the substance was on the floor for at least ten minutes, sufficient to give the store constructive notice of the unsafe condition. ***Id.***, ¶2. Similarly, here, from the rust on the bolts it could be inferred that the bolts were exposed for a sufficient time to give the City constructive notice of the danger. That Nontelle did not know how long the bolts had been exposed does not invalidate that inference.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

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

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*Sheila T. Reiff*
*Clerk of Court of Appeals*