COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2443

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

RILLA HOWARD,

PLAINTIFF-APPELLANT,

V.

MILWAUKEE AREA VOCATIONAL, TECHNICAL AND ADULT EDUCATION DISTRICT, A QUASI-MUNICIPAL CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: LOUISE TESMER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Rilla Howard appeals from a summary judgment dismissing her personal injury action against Milwaukee Area Technical College

(MATC). Howard argues that the trial court erred in concluding that MATC was immune under § 893.80(4), STATS.[1]

BACKGROUND

On March 30, 1994, as Howard was walking by a cashier's booth in MATC's sixth floor cafeteria, the half-door enclosing the booth fell off its hinges and struck her in the leg and ankle, causing injuries. Sandy Iwanski, a cashier on duty that day, testified at her deposition that a few days before the incident, she had had problems with the door. She stated that she informed her supervisor, Lee Vines, that the door was poorly attached to its hinges and that after she complained, Vines attempted to screw the door back on its hinges. Despite Vines's effort, however, the door was still loose, and Vines advised her to be cautious using it. Vines also told her that he would contact MATC's Building Services to fix it. At the motion for summary judgment, the trial court ruled in favor of MATC, concluding that MATC's actions in maintaining the cashier's door were discretionary and, therefore, that MATC was immune under § 893.80(4), STATS.

ANALYSIS

Howard argues that the trial court erred in granting summary judgment to MATC. Relying on this court's decision in ***Anderson v. City of Milwaukee***, 199 Wis.2d 479, 544 N.W.2d 630 (Ct. App. 1996) (***Anderson I***),

[1] Section 893.80(4), STATS., provides, in pertinent part:

> No suit may be brought against any . . . political corporation, governmental subdivision or any agency thereof . . . or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

rev'd, 208 Wis.2d 18, 559 N.W.2d 563 (1997) (***Anderson II***), Howard argues that, under the safe-place statute,[2] once Vines endeavored to repair the door, maintaining its safety was ministerial rather than discretionary and, therefore, that MATC no longer enjoyed immunity under § 893.80(4), STATS.

Section 802.08, STATS., governs summary judgment methodology. That methodology has been set forth many times, *see, e.g.,* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980), and need not be repeated here. Summary judgment is appropriate if the submissions establish "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." Section 802.08(2), STATS. Our review of a trial court's grant of summary judgment is *de novo.* *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987).

Under § 893.80(4), STATS., municipal entities, employees, and officials are immune from personal liability for injuries resulting from discretionary acts performed within the scope of their duties. *See* ***Kimps v. Hill***, 200 Wis.2d 1, 10 n.6, 546 N.W.2d 151, 156 n.6 (1996). Discretionary acts involve a choice or a judgment. *See* ***id.*** at 10-11, 546 N.W.2d at 156. This shield of immunity dissolves, however, if the municipality or public officer negligently

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[2] Section 101.11 (1), STATS., provides in relevant part:

> Every employer . . . shall adopt and use methods and processes *reasonably adequate* to render such . . . places of employment safe, and shall do every other thing *reasonably necessary* to protect the life, health, safety, and welfare of such employes and frequenters. . . . [E]very owner of . . . 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.

(Emphasis added.)

performs a ministerial duty or engages in malicious, willful or intentional conduct. *See* ***id.*** at 10 n.7, 546 N.W.2d at 156 n.7. "A public officer's duty is 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." ***Lister v. Board of Regents***, 72 Wis.2d 282, 301, 240 N.W.2d 610, 622 (1976). A known and dangerous condition may also create a ministerial duty. *See* ***Kimps***, 200 Wis.2d at 15, 546 N.W.2d at 158.

Howard argues that MATC was not immune because, under ***Anderson I***, the safe-place statute imposes a ministerial duty on MATC to make repairs in a timely manner. Given this court's recent decision in ***Spencer v. County of Brown***, 215 Wis.2d 635, 573 N.W.2d 222 (Ct. App. 1997), we cannot agree.

In ***Spencer***, this court revisited the issue presented in ***Anderson I*** of whether the safe-place statute imposes a ministerial duty on municipal entities and their employees. *See* ***Spencer***, 215 Wis.2d at 640-46, 573 N.W.2d at 224-27. In ***Spencer***, we noted that although the supreme court had not overruled ***Anderson I*** on the ministerial duty/safe-place statute issue, the supreme court did "emphasize that [its] decision should not be taken as approval of the reasoning of the Court of Appeals on that issue." ***Id.*** at 645, 573 N.W.2d at 226 (internal quotation marks and quoted source omitted). Therefore, in ***Spencer***, "we decline[d] . . . to apply the reasoning" of ***Anderson I*** on that issue. ***Id.*** Instead, we conducted a separate analysis to determine whether Brown County's duty to maintain jail shower facilities was ministerial or discretionary under the safe-place statute. *See* ***id.*** We concluded that "the duty imposed by the safe-place statute . . . is discretionary." ***Id.*** We noted that the safe-place statute "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.'" ***Id.*** (citation omitted). Accordingly, we concluded "that while the safe-place statute imposes a duty on owners of public buildings to maintain safe premises for employees and frequenters, the duty set forth in § 101.11, STATS., does not rise to the level of imposing a ministerial duty for purposes of analysis under § 893.80(4), STATS." ***Id.*** at 646, 573 N.W.2d at 227.

Consistent with ***Spencer***, we conclude that MATC's efforts to repair the door were not acts to be performed with "specificity as to time mode and occasion 'with such certainty that nothing remains for judgment or discretion.'" ***Id.*** at 645, 573 N.W.2d at 226. Thus, despite Vines's allegedly negligent effort to repair the door and failure to immediately arrange for its repair, MATC did not loose its immunity because the method and timing of Vines's actions continued to be discretionary. Accordingly, MATC was immune.

Howard next argues that a ministerial duty arose when Vines failed to repair a known and compelling danger. Her argument is based on ***Cords v. Anderson***, 80 Wis.2d 525, 259 N.W.2d 672 (1977), in which the supreme court found that the facts of the case warranted a special exception made to the general rule of public employee immunity. In ***Cords***, the ranger of a state park was held liable for failing to warn of the dangerous condition posed by a path open for night hiking that ran within inches of a ninety-foot precipitous drop. The court held that because the ranger knew of the dangerous condition, his duty to alleviate the danger was clear and absolute. *See* ***id.*** at 542, 259 N.W.2d at 680. The facts in ***Cords*** presented a "duty so clear and so absolute that it falls within the definition of a ministerial duty." ***Id.*** Our supreme court has clarified, however, that a public officer's duty becomes ministerial only "where … the danger is compelling and

known the to the officer and is of such force that the public officer has no discretion not to act." ***C.L. v. Olson***, 143 Wis.2d 701, 715, 422 N.W.2d 614, 619 (1988).

The nature of the danger posed here cannot be equated with that in ***Cords***; a dangling door cannot be equated with the compelling and known danger posed by a path passing within inches of a cliff. Vines took the actions he deemed appropriate to address the problem. He had no "clear and absolute" duty to act in any other manner. Therefore, neither MATC nor Vines breached a ministerial duty created by a known danger. Accordingly, we affirm the trial court's grant of summary judgment.

By the Court.—Judgment affirmed.

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