COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-2305

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

KEIKO B., AND PAUL B.,

PLAINTIFFS-APPELLANTS,

V.

MADISON METROPOLITAN SCHOOL DISTRICT,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 PER CURIAM. Paul B. and his mother, Keiko B., appeal from a judgment dismissing their complaint against the Madison Metropolitan School District. The issue is whether the District is immune from suit. We conclude that

the acts of its employees were discretionary, and therefore the District is immune. We affirm.

¶2 The core of the complaint's allegations is that Paul B., while a special education student in a District school, was twice sexually molested by a fellow student and that the defendant's employees were aware of the risk the other student posed for such conduct. The District moved for summary judgment. The trial court granted the motion on the theory that the District is immune under WIS. STAT. § 893.80(4) (1997-98)[1] because the actions of its employees at the time of the assaults were discretionary. On appeal, there are no factual disputes, and the parties generally agree on the law to be applied and that we review the issue without deference to the trial court.

¶3 This case turns on the distinction between ministerial and discretionary duty. The nature of this distinction is long recognized in Wisconsin law and need not be repeated here. *See, e.g.*, ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 91, 596 N.W.2d 417 (1999). The plaintiffs appear to rely entirely on the cases that have held that an employee has a ministerial duty to act when faced with a "known danger." This theory is "a very limited one" and applies only when the nature of the danger is compelling, known to the officer, and of such force that the public officer has no discretion not to act. ***Id.*** at 95-96.

¶4 The plaintiffs rely on two cases in which this theory has been accepted. In one, the danger was a condition in a state conservation area that resulted in the plaintiff falling from a bluff. *See* ***Cords v. Anderson***, 80 Wis. 2d

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

525, 532, 259 N.W.2d 672 (1977). In the other, the danger was a tree that had fallen onto a road at night and was struck by a motorcyclist. *See* ***Domino v. Walworth County***, 118 Wis. 2d 488, 490, 347 N.W.2d 917 (Ct. App. 1984). These cases are examples of conditions that are nearly certain to cause injury if not corrected. In this case, however, while the other student obviously presented some possibility of danger, nothing in the record indicates that the threat was as compelling as the cases cited. Accordingly, we affirm the trial court's conclusion.

By the Court.—Judgment affirmed.

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