COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2001

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. 00-0093

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

CHAD BOYLES,

PLAINTIFF-CO-APPELLANT,

MANPOWER INTERNATIONAL, INC.,

INVOLUNTARY-PLAINTIFF,

V.

MILWAUKEE COUNTY, MILWAUKEE COUNTY DEPARTMENT OF PUBLIC WORKS AND WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION,

DEFENDANTS-RESPONDENTS,

JONES & JONES ARCHITECTS & LANDSCAPE ARCHITECTS AND SECURITY INSURANCE COMPANY OF HARTFORD,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Marva Boyles and Jones & Jones Architects & Landscape Architects appeal from the trial court's order dismissing Boyles's negligence and safe-place action against Milwaukee County. They argue that the trial court erred in concluding that Milwaukee County was immune from liability under WIS. STAT. § 893.80(4).[1] We affirm.

I. BACKGROUND

¶2 Marva Boyles fell and sustained injuries after her foot became trapped in the roots of a concrete, tree-like structure located in the Milwaukee County Zoo's Primate House. Boyles sued both Milwaukee County and the architects who designed the exhibit, claiming negligence founded on an alleged violation of the safe-place statute. Milwaukee County, asserting governmental immunity, moved to dismiss Boyles's complaint for failure to state a claim upon which relief could be granted. The trial court granted the motion, concluding that the County's actions were discretionary in nature, and therefore, the County was immune from liability under WIS. STAT. § 893.80(4).

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[1] WISCONSIN STAT. § 893.80(4) provides, as material here:

> **Claims against governmental bodies or officers, agents or employes; notice of injury; limitation of damages and suits.** No suit may be brought against any … governmental subdivision or any agency thereof … for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

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

II. DISCUSSION

¶3 Boyles and the architects argue that the County was not entitled to governmental immunity because the safe-place statute imposed a ministerial duty on the County to design a safe structure and, therefore, the trial court erroneously granted the County's motion to dismiss.[2] Whether a complaint states a claim upon which relief can be granted presents a question of law that we review *de novo*. ***Weber v. City of Cedarburg***, 129 Wis. 2d 57, 64, 384 N.W.2d 333, 338 (1986). We will affirm a motion to dismiss, however, "only if, upon a review of the allegations contained therein, it appears to a certainty that no relief can be granted under any set of facts which plaintiffs could prove in support of them." ***Quesenberry v. Milwaukee County***, 106 Wis. 2d 685, 690, 317 N.W.2d 468, 471 (1982).

¶4 A county is immune from discretionary acts, but not from ministerial acts. WIS. STAT. § 893.80(4); ***Kimps v. Hill***, 200 Wis. 2d 1, 10 n.6, 546 N.W.2d 151, 156 n.6 (1996); *see also* ***Bauder v. Delavan–Darien Sch. Dist.***, 207 Wis. 2d 310, 313, 558 N.W.2d 881, 882 (Ct. App. 1996) (the terms "legislative," "quasi-legislative," "judicial" and "quasi-judicial" are synonymous with the term "discretionary"). A discretionary act is one that "involves the exercise of discretion of judgment in determining the policy to be carried out or the rule to be

[2] WISCONSIN STAT. § 101.11(1), the safe-place statute, provides as material here:

> **Employer's duty to furnish safe employment and place. (1)** 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 … shall so construct, repair or maintain such place of employment or public building as to render the same safe.

followed [and] the exercise of discretion and judgment in the application of a rule to specific facts." ***Spencer v. County of Brown***, 215 Wis. 2d 641, 648, 573 N.W.2d 222, 225 (Ct. App. 1997) (quoted source omitted). In contrast, a ministerial act is one which 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."[3] ***Lister v. Board of Regents***, 72 Wis. 2d 282, 301, 240 N.W.2d 610, 622 (1976); ***Bauder***, 207 Wis. 2d at 314, 558 N.W.2d at 882.

¶5 The parties disagree on what authority controls the outcome of this case. Boyles and the architects urge us to follow ***Anderson v. City of Milwaukee***, 199 Wis. 2d 479, 544 N.W.2d 630 (Ct. App. 1996) (***Anderson I***), *rev'd on other grounds*, 208 Wis. 2d 18, 559 N.W.2d 563 (1997) (***Anderson II***). They maintain that ***Anderson I***'s holding, that the safe-place statute imposes a ministerial duty, was never specifically reversed and retains precedential value. The County, on the other hand, urges us to follow ***Spencer***, which held that the duty under the safe-place statute was discretionary. Because we agree with the County that ***Spencer*** controls this analysis, we conclude that the County was immune from liability under the safe-place statute.

[3] A known and dangerous condition may also create a ministerial duty. ***Kimps v. Hill***, 200 Wis. 2d 1, 15, 546 N.W.2d 151, 158 (1996). Although the issue of whether the design and construction of the Primate House constituted a "known and compelling danger" was raised in the trial court, neither of the appellants has raised that issue on appeal. We therefore deem the issue to be waived. *See* ***A.O. Smith Corp. v. Allstate Ins. Co.***, 222 Wis. 2d 475, 491–492, 588 N.W.2d 285, 292 (Ct. App. 1998) ("an issue raised in the trial court, but not raised on appeal, is deemed abandoned").

¶6 The trial court determined that "for all intents and purposes" ***Anderson I*** is no longer good law on the issue of safe-place immunity. We agree. In reversing ***Anderson I*** on different grounds, the supreme court stated:

> Since [our determination on other grounds] is dispositive and since, therefore, we do not reach the ministerial duty–safe place issue, we emphasize that our decision should not be taken as approval of the reasoning of the Court of Appeals on that issue.

Anderson II, 208 Wis. 2d at 37 n.17, 559 N.W.2d at 571 n.17. The general rule is that holdings not specifically reversed on appeal retain precedential value. ***State v. Byrge***, 225 Wis. 2d 702, 717 n.7, 594 N.W.2d 388, 394 n.7 (Ct. App. 1999). The ***Spencer*** court declined to apply this general rule to ***Anderson I***, however, based on the fact that the supreme court reversed ***Anderson I*** on a ground not addressed in ***Anderson I***, as well as its specific disavowal of ***Anderson I***'s reasoning on the ministerial duty/safe-place statute issue. ***Sweeney v. General Cas. Co. of Wisconsin***, 220 Wis. 2d 183, 192, 582 N.W.2d 735, 738–739 (Ct. App. 1998) (characterizing holding in ***Spencer***). Instead, ***Spencer*** conducted a separate analysis to determine whether a county's duty under the safe-place statute was discretionary or ministerial. ***Spencer***, 215 Wis. 2d at 651, 573 N.W.2d at 226. ***Spencer*** is therefore binding on us and accurately reflects the law. *See* ***State ex rel. Dicks v. Employe Trust Funds Bd.***, 202 Wis. 2d 703, 709, 551 N.W.2d 845, 848 (Ct. App. 1996) ("When the Court of Appeals construes a statute in a published opinion, that opinion binds every agency and every court until it is reversed or modified.").

¶7 According to ***Spencer***, although the safe-place statute imposes a mandatory duty to maintain safe premises, *how* an employer complies with this duty is discretionary:

> [T]he duty imposed by the safe-place statute … is discretionary. Under the safe-place statute [WIS. STAT. § 101.11], defendants are required to use *reasonably adequate methods* to … 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 [render the premises 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, 573 N.W.2d at 226 (citation omitted). We conclude that, under the safe-place statute, the actions of the County concerning the design of the Primate House were not acts to be performed "with specificity as to time, mode and occasion." ***Id.*** Immunity therefore applies in this case.

¶8 In a related but relatively undeveloped argument, Boyles and the architects claim that the trial court erred in dismissing the complaint because it can be reasonably inferred from the facts pleaded that the County failed to comply with the state building code "which imposes regulations that are ministerial in nature."[4] Thus, they argue, discovery should have proceeded before the motion to dismiss was granted. This argument was not made in the trial court.[5] Accordingly, we decline to address the issue. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140, 145 (1980) ("issues not raised or considered in the trial court will not be considered for the first time on appeal").

[4] Milwaukee County filed its motion to dismiss before any discovery had been conducted, so the only facts in the record are those pled in the complaint.

[5] The record reflects that the plaintiff received discovery approximately one week before the motion hearing took place. Plaintiff's counsel's only statement concerning "additional discovery" involved "conduct[ing] discovery in order to determine whether the [known and present danger] exception applies." As we have already noted, this exception was an issue abandoned on appeal.

By the Court.—Order affirmed.

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