**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

May 20, 1997

**NOTICE**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**No. 96-2834**

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

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**LARRY C. OLSON,**

**PLAINTIFF-RESPONDENT,**

**v.**

**CHARLES H. THOMPSON AND EUGENE MC DONALD,**

**DEFENDANTS-APPELLANTS,**

**WILLIAM NIEMI, HOFFMAN CONSTRUCTION COMPANY, AND REUBEN JOHNSON & SON, INCORPORATED,**

**DEFENDANTS.**

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APPEAL from judgment of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Reversed and cause remanded with directions.*

Before LaRocque, Myse and Fox, JJ.

PER CURIAM. This personal injury action arises out of a one-car auto accident. Charles Thompson, Secretary of the Department of Transportation, and Eugene McDonald, District Director of the Department of Transportation, appeal a judgment awarding damages to Larry Olson. Thompson and McDonald argue that they are entitled to dismissal of the complaint because, as public officers, they are immune from liability. Although they raise other issues, we conclude this issue is dispositive. We agree. We reverse the judgment and remand with directions to dismiss the complaint.

Larry Olson was injured in November 1993, when he lost control of his vehicle on State Highway 53 and skidded into the end of a guardrail. Pursuant to § 893.82, STATS., Olson filed a notice of claim with the attorney general, naming as officers or employees responsible for his injuries, Thompson and McDonald (the "appellants"). The claim was denied and Olson initiated this action alleging negligence on the part of the appellants.[1]

The appellants answered the complaint alleging that it failed to state a claim upon which relief can be granted. The appellants moved for a summary judgment of dismissal on the basis of public officer immunity. *See* ***Kimps v. Hill***, 200 Wis.2d 1, 9, 546 N.W.2d 151, 155 (1996). The trial court denied their motions.

At trial, the jury returned a verdict of no liability on the part of the appellants. Because the jury also struck the amounts stipulated as damages for medical expenses incurred, the trial court set aside the verdict as perverse and

[1] Olson also named other individuals as defendants including the construction project engineer. The trial court dismissed the action against them and the dismissal is not challenged on appeal.

granted a new trial. At the second trial, the appellants timely renewed their motion to dismiss, which the trial court denied. The jury returned a verdict in favor of Olson. Upon motions after verdict, the appellants' motions for dismissal were denied.

The appellants argue that the trial court erroneously denied their motions to dismiss on the basis of public officer immunity.[2] We agree. "The general rule is that a public officer is not personally liable to one injured as a result of an act performed within the scope of his official authority and in the line of his official duty." ***Lister v. Board of Regents,*** 72 Wis.2d 282, 300, 240 N.W.2d 610, 621 (1976). "[T]he general rule for state employees is immunity and an exception must be demonstrated in order for this rule not to apply." ***Kimps,*** 200 Wis.2d at 18-19, 546 N.W.2d at 159 (footnote omitted).

A complaint fails to state a claim unless it pleads an exception to this general rule. ***C.L. v. Olsen,*** 143 Wis.2d 701, 706, 422 N.W.2d 614, 615 (1988). "'The objection of an officer's civil immunity, affecting as it does his substantive liability for damages, is properly presented by a demurrer on the ground that the complaint fails to state a cause of action.'" ***Id.*** (citing ***Lister,*** 72 Wis.2d at 299, 240 N.W.2d at 621).

"The most generally recognized exception to the immunity rule is that [a public] officer is liable for damages resulting from his negligent performance of a purely ministerial duty." ***Lister,*** 72 Wis.2d at 300-01, 240

[2] "An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon." Section 809.10(4), STATS. An order denying a motion for summary judgment is not final because it does not terminate litigation between the parties.

N.W.2d at 621-22. A duty 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." ***Kimps,*** 200 Wis.2d at 10-11, 546 N.W.2d at 156 (citations omitted).

Because the appellants made successive motions for dismissal based upon public officer immunity, we begin our review with an examination of the ruling on their first motion for summary judgment. When a party moves for summary judgment, the first step is to determine whether the complaint states a claim upon which relief may be granted. ***Grams v. Boss,*** 97 Wis.2d 332, 338, 294 N.W.2d 473, 483 (1980). It is the plaintiff's duty to allege sufficient facts in his complaint to make a prima facie cause of action. ***Price v. Ross***, 45 Wis.2d 301, 307, 172 N.W.2d 633, 636 (1969). When testing the sufficiency of the complaint, the court reviews the allegations contained within its four corners. *See* ***id.*** at 331, 172 N.W.2d at 638. Upon review of a summary judgment ruling, the appellate court follows the same steps in § 802.08, STATS., as the trial court. ***Clark v. Erdmann***, 161 Wis.2d 428, 441, 468 N.W.2d 18, 23 (1991). Summary judgment review presents a question of law that we review de novo. ***Id.*** at 442, 468 N.W.2d at 23.

We first examine the sufficiency of the complaint to determine whether it states an exception to public officer immunity. ***C.L.***, 143 Wis.2d at 706, 422 N.W.2d at 615. The complaint identifies Thompson as the secretary of the DOT and McDonald as the DOT's district director. It alleges that Olson's "injuries were proximately caused by the negligence of each of the Defendants, and their officers, officials, agents and employees." The complaint does not allege any exception to public officer immunity. Given the most liberal interpretation, it

permits no inference of any exception to the public officer immunity rule. Because it identifies the appellants as public officers and fails to allege any exception to public officer immunity, we hold that the complaint fails to state a claim upon which relief may be granted. *See* ***id.*** at 707, 422 N.W.2d at 615. We therefore reverse the judgment and remand with directions to dismiss the complaint.

We observe that the appellants renewed their dismissal motion at several stages throughout the proceedings. We do not need to address each one, because the first one is dispositive. Also, our conclusion that the appellants are immune from personal liability on the basis of public officer immunity would be the same at each stage of the proceedings. Nonetheless, we will address Olson's arguments with respect to public officer immunity.

Olson argues that two exceptions apply. One is the "known and present danger exception." Applying this language to the action of a state park manager who failed to place signs warning of dangerous conditions on a nature trail, and who failed to advise his superiors of such conditions, our supreme court "held such a duty to be so clear and so absolute that it fell within the definition of a ministerial duty. … Anderson knew the terrain at the glen was dangerous particularly at night; he was in a position as a park manager to do something about it; but failed to do anything about it.'" ***Domino v. Walworth County,*** 118 Wis.2d 488, 490-91, 347 N.W.2d 917, 919 (Ct. App. 1984) (quoting ***Cords v. Anderson,*** 80 Wis.2d 525, 541, 259 N.W.2d 672, 680 (1977)). A public officer's duty becomes ministerial where, as in ***Cords***, 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.*** at 491-92, 347 N.W.2d at 919-20.

Olson argues that the appellants' responsibilities include a duty to maintain highways in as safe a condition as can be done to ensure safety of the motorists. He contends that because McDonald was familiar with the area of the highway in question and because he knew that the blunt end of the guardrail was neither tapered nor sloped down, the duty with respect to guardrail maintenance is ministerial. We disagree. In another setting, our supreme court concluded that a duty to keep school grounds "safe" was not ministerial. ***Meyer v. Carman,*** 227 Wis. 329, 331-32, 73 N.W.2d 514, 515 (1955). It is the categorization of the specific act upon which negligence is based, and not the categorization of the overall general duties of a public officer that will dictate whether the officer is immune. ***Scarpaci v. Milwaukee County,*** 96 Wis.2d 663, 685, 292 N.W.2d 816, 826-27 (1980). As secretary and director of the DOT, the appellants made no decisions regarding the design of the guardrail at the location of the accident. Even if they had known of the design at the location in question, the design is matter of discretion exercised by those in charge of engineering.

There are major distinctions between ***Cords*** and this case. In ***Cords***, the state employee not only knew of the dangerous condition but knew that hikers regularly used a hiking trail at night that passed within a step of the hazard. Thus, the likelihood of injury was clearly possible. Here, the nature of the claimed hazard was not obvious nor was the likelihood of injury clearly foreseeable. With respect to dangerous intersections, we have observed: "The ***Cords*** court was confronted with a very unusual set of facts having nothing whatsoever to do with the regulation of traffic at the thousands of intersections throughout the state." ***Hjerstedt v. Schultz,*** 114 Wis.2d 281, 286, 338 N.W.2d 317, 319-20 (Ct. App. 1983). We reach the same conclusion with respect to the guardrail here. The

decisions regarding the nature of the design, repair and location of the guardrail involved the exercise of judgment on the part of traffic engineers.

Olson also argues that because his injuries resulted from a failure to maintain rather than install a guardrail, the duty is ministerial. With respect to a motorcycle accident at the end of an allegedly unmarked and unbarricaded road, we noted in ***Foss v. Town of Kronenwetter***, 87 Wis.2d 91, 273 N.W.2d 801 (Ct. App. 1978): "In a series of cases involving immunity with respect to highway signs, the supreme court has established a general rule that once a legislative or quasi-legislative decision *to place a highway sign is made, negligence in placement may be and negligence in maintenance is actionable;* however, the cases distinguish placement from maintenance." ***Id.*** at 101, 273 N.W.2d at 806 (emphasis added; footnotes deleted). ***Foss*** concluded that the town was not entitled to immunity with respect to allegations that a barrier had been removed from the end of a road to facilitate dumping fill and was not replaced. ***Id.*** at 101-02, 273 N.W.2d at 806.

We conclude that ***Foss*** is distinguishable on its facts. Olson does not suggest that he was injured because the guardrail had been removed and he slid down an unprotected embankment. To the contrary, he argues that the unsafe design and location of the guardrail caused his injuries. "Ministerial duties of a government official are mandatory, imposed by law, and require no judgment or discretion." ***Wilmot v. Racine County,*** 128 Wis.2d 138, 150, 382 N.W.2d 442, 447 (Ct. App. 1985), *rev'd on other grounds*, 136 Wis.2d 57, 400 N.W.2d 917 (1987). [T]here is no substantive liability for damages resulting from mistakes in judgment where the officer is specifically empowered to exercise such judgment[,]" in the absence of willful or malicious misconduct. ***Lister,*** 72 Wis.2d at 301-02, 240 N.W.2d at 622. Because Olson's allegations concern issues of

allegedly negligent design and engineering discretion, they do not implicate ministerial duties.

At trial, it was disputed whether the railing had been cut and repaired at the location of the accident to permit access for trucks hauling gravel during a construction project. It was also disputed whether the configuration of the guardrail contributed to Olson's injuries. The resolution of these factual disputes is immaterial. Even if there were a ministerial duty to repair or redesign a guardrail, the failure to do so would have been the negligence of a subordinate that cannot be imputed to the appellants. "[A] public officer or agent is not responsible for the misfeasance or positive wrongs, or the nonfeasances or negligence or omissions of duty, of the subordinates or servants or other persons properly employed by him or under him, in the discharge of his official duties." ***Robertson v. Sichel,*** 127 U.S. 507, 515-16 (1887); *see also* ***Meyer***, 227 Wis. at 332, 73 N.W.2d at 516.

Olson does not challenge the appellants' contentions that they are not responsible for the negligence of subordinates. Instead, he argues that the real issue is whether "substantial and credible evidence in the record" supports the jury's findings of negligence against the appellants. We disagree.

Olson mischaracterizes the issue. The appellants do not challenge the jury's findings with respect to negligence. The issue on appeal is not whether the record discloses the appellants breached a duty of care. The issue on appeal concerns the nature of the duty owed; whether it is ministerial or discretionary. Olson claims the appellants' official duties include a duty to ensure the safety of the highways. This general description of the nature of their public offices falls short of establishing that the secretary and the district director of the DOT had an

absolute and specific obligation on the day in question to know of the condition of this particular guardrail to determine whether it presented a known and present danger and to effectuate the redesign or repair allegedly called for. Because Olson does not demonstrate that designing and repairing guardrails is a function of the offices of the secretary and district director of the DOT, his argument must fail.

We conclude that the complaint fails to state an exception to the general rule of public officer immunity. Therefore, it fails to state a claim upon which relief may be granted and the appellants are entitled to a judgment of dismissal.

*By the Court.*—Judgment reversed and cause remanded with directions to dismiss the complaint.

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