

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 13, 2003

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 02-1468

Cir. Ct. No. 01-CV-53

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**KRISTEN C. JOHNSON, A MINOR, BY STEPHEN R.
BUGGS, HER GUARDIAN AD LITEM, ROBERT M. JOHNSON
AND CHERYL JOHNSON,**

PLAINTIFFS-APPELLANTS,

v.

VILLAGE OF BENTON AND GARY MCCREA,

DEFENDANTS-RESPONDENTS,

WEA INSURANCE GROUP,

SUBROGATED DEFENDANT.

APPEAL from a judgment of the circuit court for Lafayette County:
VIRGINIA WOLFE, Reserve Judge. *Affirmed.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 PER CURIAM. Kristen, Robert and Cheryl Johnson appeal a judgment dismissing their personal injury complaint against the Village of Benton and its president, Gary McCrea. The issue is whether the defendants are immune from suit because the village president was performing a discretionary act. We conclude they are and affirm.

¶2 The amended complaint contains the following allegations: Kristen was injured by a dog bite in the Village of Benton, and her parents Robert and Cheryl incurred medical expenses as a result. Defendant Gary McCrea was the village president at the time. Before Kristen was bitten, McCrea had been notified that the dog was running loose in the village and was dangerous. McCrea had an affirmative duty to capture the dog and prevent it from harming persons in the village. McCrea at one point, “had actual physical control” of the dog, but then released it and allowed it to roam free in the village.

¶3 The defendants moved for summary judgment. They argued that they were immune from suit by virtue of WIS. STAT. § 893.80(4) (1999-2000),¹ which provides:

No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 The Johnsons responded that McCrea’s duty arose from WIS. STAT. § 174.042(3), which provides: “An officer shall attempt to capture and restrain any dog running at large and any untagged dog.” They argued that the village president is an “officer” for the purpose of this statute because village presidents are peace officers by operation of WIS. STAT. § 61.31(1), and that the duty imposed by § 174.042(3) is not discretionary. The court ruled that the duty was discretionary, rendering McCrea and the village immune from suit.

¶5 Summary judgment methodology is well established. *See, e.g., Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). On review, we apply the same standard the circuit court is to apply. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶6 On appeal, the parties repeat the arguments they made in circuit court. Because the defendants have not disputed the proposition, we assume, without deciding, that a village president is an “officer” of the type referred to in WIS. STAT. § 174.042(3).

¶7 We conclude, however, that the duty at issue is a discretionary one, rather than a ministerial one. 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.’” *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶25, 253 Wis. 2d 323, 646 N.W.2d 314 (citation omitted). In this case, WIS. STAT. § 174.042(3) imposes only a discretionary duty because it does not prescribe a method, time, or manner for discharging the duty. In short, the statute leaves to the discretion of the officer the specific details of how to “attempt to capture and restrain” a dog. An officer

undertaking this duty is immune from suit for his discretionary acts in discharging the duty.

By the Court.—Judgment affirmed.

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

