COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 1998

Marilyn L. Graves
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* § 808.10 and RULE 809.62, STATS.

No. 97-3549

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

STEVEN E. MARIADES, INDIVIDUALLY, AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PATRICIA A. MARIADES, DECEASED; JACQUELYN MARIADES, A MINOR BY HER GUARDIAN AD LITEM, JOAN A. OLSEN; CHRISTINA MARIADES, A MINOR, BY HER GUARDIAN AD LITEM, JOAN A. OLSEN, AND STEPHEN E. MARIADES, JR., A MINOR, BY HIS GUARDIAN AD LITEM, JOAN A. OLSEN,

PLAINTIFFS-APPELLANTS,

V.

MARQUETTE COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Reversed and cause remanded with directions.*

Before Eich, Vergeront and Frankel,[1] JJ.

EICH, J. The estate of Patricia Mariades ("Mariades") sued Marquette County, claiming the County's negligence maintaining a highway caused an automobile accident resulting in her death. Mariades appeals from an order granting the County's motion for summary judgment dismissing the action.

While she was driving on a Marquette County highway, the wheels of Mariades's vehicle edged off the roadway onto the shoulder, which, due to ongoing repairs, was some two inches lower than the road surface. As a result, her car swerved back onto the highway, crossing the centerline and colliding with an oncoming vehicle. Mariades and the occupants of the other vehicle were killed.

The trial court granted summary judgment dismissing the action based on its conclusion that the County was immune from suit under § 893.80(4), STATS. The statute states that no action may be maintained against public agencies or employees for "acts done in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions." The quoted terms have long been recognized as synonymous with "discretionary acts"—acts involving the exercise of discretion and judgment. ***Estate of Cavanaugh v. Andrade***, 191 Wis.2d 244, 252, 528 N.W.2d 492, 495 (Ct. App. 1995), *rev'd on other grounds*, 202 Wis.2d 290, 550 N.W.2d 103 (1996). A nonimmune "ministerial" act, on the other hand, is one where the duty is absolute, certain and imperative, involving merely the performance of a specific task, and the time, mode and occasion for its performance are defined with such certainty that nothing remains for the exercise of judgment or discretion. ***Id.***

[1] Dane County Circuit Judge Mark A. Frankel is sitting as a court of appeals judge by special assignment under the judicial exchange program.

The court's order also stated that a related statute, § 81.15, STATS.—which states that "[a] county is liable for … damages" incurred by any person "by reason of the insufficiency or want of repairs of a [county] highway"—was inapplicable.

Mariades appealed, and we held our decision in abeyance pending issuance of the supreme court's opinion in a case raising similar issues regarding the application and interaction of §§ 893.80(4) and 81.15, STATS. That case, ***Morris v. Juneau County***, 219 Wis.2d 544, 579 N.W.2d 690 (1998), has now been resolved and we are satisfied it controls the instant case and requires reversal of the trial court's order.

The County's motion for summary judgment was based on its argument that all of the highway insufficiencies alleged in Mariades's complaint related to "discretionary" acts on the part of County officials and employees and that, as a result, the County was immune from Mariades's suit under § 893.80, STATS. It also argued that § 81.15, STATS., didn't apply because the alleged "defects" had to do with the highway shoulder, which should not be considered part of the "highway" within the meaning of the statute. Alternatively, the County argued that there was no dispute as to the condition of the highway and shoulder and asked the court to rule as a matter of law that the shoulder drop-off was not a defect—an "insufficiency or want of repairs"—under § 81.15. Mariades, arguing against summary judgment, contended that a factual question existed as to the "nature of the defect." The trial court, apparently agreeing with Mariades, denied the motion on grounds that material facts regarding "the nature of the danger" were in dispute.

Several months later, as the jury trial was about to begin, the court, after an off-the-record discussion with counsel, dismissed the jury, and counsel for

both parties, stating that they "[didn't] think there are any real factual issues involved," stipulated to the physical facts—the nature of the drop-off, how long it had been there, the County's intent to repair it in the fall, the warning signs the County had placed on the road, etc. The attorneys then told the court they were also "in a position to stipulate as to what each of the experts would testify to concerning whether or not this was a hazard and whether or not the drop-off was a cause of the accident." Counsel went on to summarize what each side's expert witnesses would testify to. Mariades's expert would testify that a two-inch drop off was a "recognized hazard" and was a cause of the accident. The County's expert would testify to the opposite effect: that the drop-off was neither a hazard nor a cause of the accident; and that other factors, including Mariades's own negligence in managing and controlling her vehicle when it went onto the shoulder, were causal. Counsel agreed that other "expert" opinions would indicate that it was common practice for counties to defer "graveling" the shoulders of repaired highways to bring them up to grade, and that it would have been feasible for the County to have done so prior to this accident. There would also be testimony that even if the work had been done, it wouldn't have made any difference with respect to the accident, because the same thing would have happened if Mariades's car had gone onto a gravel, at-grade shoulder. Counsel then filed the witnesses' depositions with the court.

The court then stated that, in its view, § 81.15, STATS., was inapplicable, although it didn't say why it felt that way, other than to state that "under the agreed facts … the court has to concern itself with a question of duty on the part of the county" under the immunity statute, § 893.80, STATS. It went on to state that, on the facts agreed to by counsel, any such duty was "discretionary," rather than "ministerial," and, as a result: "the county does not have the duty

because the danger was not so apparent as to become a ministerial duty … [and] there is no duty here that the plaintiffs can peg the negligence on and, considering the acts most favorably to the plaintiff—I think it would probably be like a nonsuit, wouldn't it, what we used to call a nonsuit?" To which both counsel replied: "Summary judgment." The court then said that, in its view, "the standard for looking at the evidence would be about the same … you have to have a prima facie case on nonsuit, and you wouldn't have a prima facie case if the court rules that it is non-duty. One way or the other, the plaintiff's case is dismissed." Counsel for the plaintiff then asked whether the court was ruling that § 81.15 was inapplicable. The court did not respond to the question and eventually asked the County's attorney to prepare an appropriate order.

That order, as entered by the court, is captioned "Order Granting Summary Judgment," and it recites the court's rulings: (1) that § 81.15, STATS., is inapplicable; (2) that the County is immune from suit under § 893.80, STATS., "as being engaged in a discretionary, as opposed to a ministerial, function"; and (3) that the "known and compelling danger" exception to immunity did not apply.[2]

We first consider the interplay between §§ 893.80 and 81.15, STATS. As indicated, under § 893.80, a municipality is generally immune from suits for damage resulting from its performance of "discretionary" acts. Section 81.15, however, renders a municipality liable for injuries resulting from an insufficiency or want of repair of a municipally-maintained highway. And the supreme court

[2] A municipality is not immune under the "discretionary-act" concept, "where there exists a known present danger of such force that the time, mode and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion." ***Harkness v. Palmyra-Eagle Sch. Dist.***, 157 Wis.2d 567, 575, 460 N.W.2d 769, 772 (Ct. App. 1990), *overruled on other grounds by* ***DNR v. City of Waukesha***, 184 Wis.2d 178, 515 N.W.2d 888 (1994).

held in ***Morris*** that, because § 81.15 is specific, and § 893.80 general, in scope, the former "takes precedence" over the latter, with the result that "§ 81.15 provides an exception to the general grant of immunity found in § 893.80(4)." In other words:

> [I]f a plaintiff's injuries occurred by reason of insufficiency or want or repairs of any highway, that is, [if] the plaintiff states an actionable claim under … § 81.15, a governmental entity is not afforded immunity under … § 893.80(4).[3]

As indicated, after initially concluding that a factual question existed with respect to the existence of a defect or lack of repairs on the highway within the meaning of § 81.15, STATS., the court, after accepting the diametrically opposing deposition testimony of the parties' experts, later ruled, without explanation, that § 81.15 did not apply, and the County was immune under § 893.80, STATS. Granting summary judgment in the face of conflicting material facts is, of course, antithetical to summary judgment procedure.[4]

Morris tells us that the initial question in this case is whether § 81.15, STATS., applies, because, if it does, it forecloses any claim of § 893.80, STATS., immunity on the part of the County. And because the trial court granted

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[3] The court also held in ***Morris***—contrary to the position taken by the County in this case—that the term "highway," as it appears in § 81.15, STATS., "includes the shoulder of the highway."

[4] We have long recognized that summary judgment is not a "short cut to avoid a trial," and that the summary-judgment methodology was developed to prevent trial by affidavit or deposition. ***State Bank of La Crosse v. Elsen***, 128 Wis.2d 508, 511, 383 N.W.2d 916, 918 (Ct. App. 1986). Indeed, we have held quite plainly that "the summary judgment methodology of sec. 802.08, Stats., prohibits a trial court from making 'findings' of fact" or otherwise resolving factual issues. ***Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.***, 175 Wis.2d 527, 533-34, 499 N.W.2d 282, 284 (Ct. App. 1993). Finally, we have cautioned that a trial court may not base a ruling on a motion for summary judgment on its own assessment of the weight or credibility of conflicting evidence, but "must deny summary judgment … if the [opposing party] presents any evidence upon which a jury could reasonably find in [that party]'s favor." ***Pomplun v. Rockwell Int'l Corp.,*** 203 Wis.2d 303, 307, 552 N.W.2d 632, 633 (Ct. App. 1996).

the County's motion for summary judgment on immunity grounds, after apparently resolving a factual dispute in the expert witnesses' testimony on issues related to the application of § 81.15, we are constrained to reverse and remand for trial of those factual issues, and any others that may exist in the case.[5]

By the Court.–Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

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[5] The County suggests in its brief that we should treat the trial court proceedings not as a motion for summary judgment, but as a trial on stipulated facts. It states in its brief, for example, that

> [t]his matter was not submitted in the form of a summary judgment motion with opposing papers. It was submitted to the Court upon a recitation of what the evidence would show which was agreed to by both parties. There were no factual determinations to make. The Court was asked to consider what was mutually agreed the expert witnesses would say. [It] was then asked to make a determination of whether or not the evidence presented constituted a defect subjecting the county to potential liability under § 81.15.

While the County now claims the court wasn't deciding a summary-judgment motion, the County's attorney drafted the order now before us, which is plainly captioned 'ORDER GRANTING SUMMARY JUDGMENT," recites that it is being issued upon the County's motion for summary judgment and that the motion was fully briefed, heard, argued and granted by the trial court. And while it is also true that Mariades's counsel stipulated to the "facts"—the condition of the highway and shoulder, the presence of signs, etc.—the County has not referred us to any place in the record where counsel stipulated that that condition constituted a defect within the meaning of § 81.15, STATS.

We also acknowledge that both attorneys agreed to submit their experts' conflicting opinions with respect to the existence of a § 81.15, STATS., "defect" to the court. In its oral decision, however, the court never referred to the proceedings as a trial on stipulated facts, and never made any statement or declaration suggesting that it was finding as a matter of law, based on its adoption of the County's experts' opinions over those of Mariades's experts, that the shoulder drop-off was not a highway defect or insufficiency within the meaning of § 81.15. It simply ruled that the drop-off doesn't fit the "open and obvious danger" exception to the immunity rule of § 893.80, STATS. While it may be that the parties—and perhaps even the trial court—had something else in mind, all signs, including the plain terms of the court's written order, point to summary judgment; and we hesitate to uphold the dismissal of an action on such an unclear record.