

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 11, 2016

Diane M. Fremgen
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. 2015AP1209

Cir. Ct. No. 2014CV5

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ANDREW ENGEN AND TORI SEUBERT,

PLAINTIFFS-RESPONDENTS,

**STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES
AND MENZNER LUMBER AND SUPPLY COMPANY,**

INVOLUNTARY-PLAINTIFFS,

v.

WOOD COUNTY,

DEFENDANT-APPELLANT,

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY, SECURITY HEALTH
PLAN OF WISCONSIN, INC. AND WISCONSIN PHYSICIANS SERVICE
INSURANCE CORPORATION,**

DEFENDANTS.

APPEAL from an order of the circuit court for Wood County:
NICHOLAS J. BRAZEAU, JR., Judge. *Affirmed.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. Wood County appeals an order of the circuit court denying its motion for summary judgment. Andre Engen and Tori Seubert (collectively, the Plaintiffs) brought suit against Wood County, seeking to recover for damages they allegedly sustained when they drove over a portion of County Highway C in Wood County that was undergoing a culvert repair at the time. Wood County moved for summary judgment, asserting that the Plaintiffs' claims against it should be dismissed because Wood County has immunity under WIS. STAT. § 893.80(4) (2013-14).¹ We granted Wood County's petition for leave to appeal the court's non-final order. *See* WIS. STAT. RULE 809.50(3). For the reasons explained below, we conclude that Wood County is not entitled to summary judgment and, therefore, affirm the circuit court's order denying Wood County's motion for summary judgment.

BACKGROUND

¶2 The Plaintiffs brought suit against Wood County to recover for damages they allegedly sustained on or about June 15, 2011, when the vehicle they were riding in traveled over a portion of County Highway C in the Town of Rudolph, Wisconsin, that was undergoing the replacement of a drainage culvert. The Plaintiffs alleged that the portion of Highway C which caused their injuries

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

was negligently repaired and/or maintained by Wood County, that Wood County had failed to properly warn motorists of the unsafe condition of the highway, and that Wood County had failed to properly execute a ministerial duty.

¶3 Wood County moved for summary judgment, arguing that it is immune from liability under WIS. STAT. § 893.80(4). The circuit court denied Wood County's motion. We granted Wood County leave to file this interlocutory appeal.

DISCUSSION

¶4 Wood County contends the circuit court erred in denying its motion for summary judgment.

¶5 We review a grant or denial of summary judgment de novo. *Mach v. Allison*, 2003 WI App 11, ¶14, 259 Wis. 2d 686, 656 N.W.2d 766. A moving party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). In determining whether any factual issues exist, we review the summary judgment submissions, which can include the pleadings, depositions, answers to interrogatories, admissions on file and any affidavits, to determine whether the moving party has made a prima facie case for summary judgment. *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), *abrogated on other grounds by Meyers v. Bayer AG, Bayer Corp.*, 2007 WI 99, 303 Wis. 2d 295, 735 N.W.2d 448; *see* WIS. STAT. § 802.08. If a prima facie case is made, we examine the opposing party's affidavits and other proofs to determine whether there are any disputed issues of material fact, or disputed material facts from which reasonable alternative inferences may be drawn, that are sufficient to entitle the opposing party to a trial. *Grams*, 97 Wis. 2d at 338.

¶6 Wood County’s motion for summary judgment is based on its assertion of governmental immunity under WIS. STAT. § 893.80(4). If Wood County is entitled to governmental immunity, then there is nothing to litigate at trial even though factual disputes may exist. See *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶16, 253 Wis. 2d 323, 646 N.W.2d 314. The application of § 893.80(4) involves the application of legal standards to a set of facts, which is a question of law. *Id.*, ¶17.

¶7 WISCONSIN STAT. § 893.80(4) sets forth the circumstances under which the general rule of government liability does not apply. *Legue v. City of Racine*, 2014 WI 92, ¶38, 357 Wis. 2d 250, 849 N.W.2d 837. Section 893.80(4) provides that units of local government and their officers and employees are immune from liability “for legislative, quasi-legislative, judicial, and quasi-judicial acts, which have been collectively interpreted to include any act that involves the exercise of discretion and judgment.” *Lodl*, 253 Wis. 2d 323, ¶¶20-21. Section 893.80(4) is subject to a number of exceptions, both judicially created and statutory. See *id.*, ¶¶17, 24 (addressing judicially created exceptions) and *Morris v. Juneau Cty.*, 219 Wis. 2d 543, 550, 579 N.W.2d 690 (1998) (addressing statutory exception).² On appeal, the parties’ briefs-in-chief focus on whether one of the following two judicially created exceptions apply: the ministerial duty exception and the known danger exception. We directed the parties to file supplemental letter briefs on the issue of whether WIS. STAT. § 893.83(1) (2009-

² In *Morris v. Juneau Cnty.*, 219 Wis. 2d 543, 579 N.W.2d 690 (1998), the court discusses WIS. STAT. § 81.15. Section 81.15 was renumbered as WIS. STAT. § 893.83 without substantive changes by 2003 Wis. Act 214, § 136.

10), a statutory exception to immunity under § 893.80(4), applies to the Plaintiffs' claims.³ Section 893.83(1) (2009-10)⁴ provides:

If damages happen to any person or his or her property by reason of the insufficiency or want of repairs of any highway ... that any county by law or by agreement with any town, city, or village is bound to keep in repair ... the county is liable for the damages and the claim for damages shall be against the county.

If a plaintiff's claim is actionable under 893.83(1) (2009-10), a governmental entity is not afforded immunity under § 893.80(4). *Morris*, 219 Wis. 2d at 559.

¶8 In its supplemental brief, Wood County does not argue, nor does it make a showing, that there is no factual dispute as to whether the Plaintiffs' damages stemmed, at least in part, from "insufficiency or [the] want of repairs" of County Highway C, which Wood County was obligated to keep in repair. And the summary judgment submissions show that there is a factual dispute as to this. In a notice of claim and injury, attached to an affidavit offered by the Plaintiffs, Engen claims that a "large section" of Highway C was missing, approximately "12-16 [inches] deep" where a culvert had recently been replaced and that after hitting the missing portion, the vehicle in which Engen was driving "went airborne" and the vehicle sustained damages. However, in an affidavit submitted in support of Wood County's motion for summary judgment, the affiant averred that he observed the portion of Highway C being repaired shortly after the Plaintiffs'

³ Wood County argues that the Plaintiffs have forfeited the right to assert that WIS. STAT. § 893.83(1) (2009-10) applies. Forfeiture is a rule of judicial administration, not jurisdiction. *LaBeree v. LIRC*, 2010 WI App 148, ¶33, 330 Wis. 2d 101, 793 N.W.2d 77. Even if the Plaintiffs forfeited this issue, we exercise our discretion to address it on the merits. *See State v. Kaczmariski*, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702.

⁴ WISCONSIN STAT. § 893.83 was substantially amended by 2011 Wis. Act 132. However, the amendments to § 893.83 did not take effect until April 5, 2012.

vehicle drove over it and “the drop-off from the paved area of the roadway to the gravel area [was] approximately two or three inches,” and Wood County had received no prior complaints of damage as a result of the culvert repair. We conclude that from the evidence submitted on summary judgment, viewed most favorably from the standpoint of the non-moving party, the Plaintiffs, it could reasonably be inferred that the Plaintiffs’ damages were caused by an “insufficiency” or “want of repair[]” of Highway C.

¶19 We read Wood County’s supplemental brief as arguing, that regardless of any “insufficiency” or “want of repair[]” in Highway C, WIS. STAT. § 893.83(1) (2009-10) cannot apply in this case because repair work on the highway was ongoing at the time the Plaintiffs sustained their alleged damages. Wood County relies on *Morris* in support of its argument. In *Morris*, our supreme court held that the term “highway” in § 893.83(1) (2009-10) encompasses the shoulder adjacent to the paved portion of the highway, and that the plaintiff, who alleged that his injuries occurred after a driver lost control of a vehicle due to a rut on the shoulder of the highway, had stated an actionable claim under § 893.83(1) (2009-10). As best we can tell, Wood County is arguing that § 893.83(1) (2009-10) should be interpreted as not applying when a defect in a highway is present during ongoing construction work because there was no ongoing construction work in *Morris* when the plaintiffs there hit the rut and lost control. We reject Wood County’s argument. *Morris* does not make a distinction between defects that are temporary because of ongoing repair work and other defects. More to the point, nothing in *Morris* suggests that it matters whether there is ongoing repair work. Furthermore, the plain language of § 893.83(1) (2009-10) does not impose any limitations that relate to whether or not the defect in the highway is the result of ongoing repairs.

¶10 Wood County also cites this court to *Dusek v. Pierce Cty.*, 42 Wis. 2d 498, 167 N.W.2d 246 (1969),⁵ in support of its argument that WIS. STAT. § 893.83(1) (2009-10) does not apply to accidents occurring while ongoing repair work is being performed on a roadway. However, *Dusek* does not provide support for such a conclusion.

¶11 In *Dusek*, the plaintiff sought to recover for damages sustained after his vehicle collided with another vehicle at a T-intersection. *Id.* at 500. The plaintiff in *Dusek* alleged that the accident resulted because the plaintiff's view of the road was obscured by a hill to the north of the intersection and by mounds of earth adjacent to the road, and because the defendant county failed to erect signs warning of the hazardous intersection. *Id.* The court concluded that WIS. STAT. § 893.83(1) (2009-10) did not apply because the summary submissions established that the accident occurred not from an "insufficiency" or "want of repair[]" in the roadway, but instead because "the county failed to erect a sign warning ... of the likelihood of approaching traffic on the intersecting roadway." *Id.* at 504-05.

¶12 Nothing in *Dusek* can be construed as holding, or even suggesting, that WIS. STAT. § 893.83(1) (2009-10) does not apply when a defect in a roadway is the alleged cause of damages.

¶13 Because we conclude that it can be reasonably inferred from the evidence on summary judgment that the Plaintiffs' damages resulted from an "insufficiency" or "want of repair[]" on Highway C, and because Wood County presents no viable reason why WIS. STAT. § 893.83(1) (2009-10) does not apply

⁵ In *Dusek v. Pierce Cty.*, 42 Wis. 2d 498, 167 N.W.2d 246 (1969), the court discusses WIS. STAT. § 81.15. As explained in footnote 2, § 81.15 was renumbered as WIS. STAT. § 893.83.

here, we conclude that a genuine issue of material fact exists on the question of whether the Plaintiffs' claim is actionable under § 893.83(1) (2009-10). Accordingly, we affirm the order denying Wood County's motion for summary judgment.⁶

CONCLUSION

¶14 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

⁶ We conclude above that Wood County does have potential liability for damages the Plaintiffs allegedly sustained after driving over the culvert repair on Highway C because of an “insufficiency” or “want of repair[]” in the roadway at the time the Plaintiffs allegedly sustained damages. *See* WIS. STAT. § 893.83(1) (2009-10). Accordingly, we do not address Wood County's other arguments related to that claim by the Plaintiffs.

We note that despite additional requests for briefing, Wood County has not presented this court with a developed argument as to why WIS. STAT. § 893.83(1) (2009-10) does not apply to any claim of negligence made by the Plaintiffs related to inadequate warning of an “insufficiency” or “want of repair[]” on Highway C. Accordingly, we decline to address that issue, and additionally decline to address any arguments by Wood County as to the applicability of the ministerial duty and known danger exception to any such claim.

