COURT OF APPEALS DECISION DATED AND RELEASED

May 1, 1997

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.**

NOTICE

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

No. 96-2507

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

JOHN T. MORRIS AND JEANNE MORRIS,

PLAINTIFFS-APPELLANTS,

V.

JUNEAU COUNTY, A MUNICIPAL CORPORATION AND WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Juneau County: PATRICK TAGGART, Judge. *Reversed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

VERGERONT, J. This appeal concerns a county's amenability to suit for injuries allegedly caused by defects in a highway. John Morris, who was injured when the automobile he was driving collided with another automobile, and

Jeanne Morris appeal the grant of summary judgment in favor of Juneau County and its insurer, Wisconsin County Mutual Insurance Corporation. We conclude that the county is subject to suit under § 81.15, STATS.,[1] and that the bar to suits against officials for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions" under § 893.80(4), STATS.,[2] does not apply in a suit under § 81.15. We also conclude that there are disputed issues of material

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[1] Section 81.15, STATS., provides in part:

> Damages caused by highway defects; liability Damages caused by highway defects; liability of town and county. If damages happen to any person or his or her property by reason of the insufficiency or want of repairs of any highway which any town, city or village is bound to keep in repair, the person sustaining the damages has a right to recover the damages from the town, city or village. If the damages happen by reason of the insufficiency or want of repairs of a highway which any county by law or by agreement with any town, city or village is bound to keep in repair, or which occupies any land owned and controlled by the county, the county is liable for the damages and the claim for damages shall be against the county. … The amount recoverable by any person for any damages so sustained shall not exceed $50,000. The procedures under s. 893.80 shall apply to the commencement of actions brought under this section. No action may be maintained to recover damages for injuries sustained by reason of an accumulation of snow or ice upon any bridge or highway, unless the accumulation existed for 3 weeks.

[2] Section 893.80(4), STATS., 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 employes nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

fact concerning the existence and nature of the defects and the negligence of the county, making summary judgment inappropriate. We reverse.[3]

BACKGROUND

The accident occurred on February 23, 1994, when a car driven by Jean Williams, crossed the center line and collided with John Morris's car on State Highway 82 in Juneau County. The complaint alleged that the collision was proximately caused in part by Williams's negligence[4] and in part because of highway defects resulting from the County's negligent failure of maintenance and repair. The Morrises' claim, developed more specifically after discovery, is that there was a pothole on the paved surface of the highway next to the shoulder and a drop-off[5] from the paved surface to the shoulder where the aggregate gravel of the shoulder had worn away, either or both of which caused Williams's car to be pulled to the right; when she tried to turn her car back to the center of her lane, she went over the centerline and collided with the Morris car.

The County denied the allegations in the complaint pertaining to it and moved for summary judgment on the ground that it was immune from suit because the acts of maintaining and repairing the highway were discretionary and

[3] The Morrises also appealed the award of photocopy and facsimile costs. The County concedes that ***Kleinke v. Farmers Coop Supply and Shipping***, 202 Wis.2d 138, 148, 549 N.W.2d 714, 718 (1996), decided after the trial court's decision, holds that such costs are not recoverable in an award of costs under § 804.04(2), STATS. Because we reverse the grant of summary judgment, we do not discuss this issue further.

[4] Williams reached an out-of-court settlement with the Morrises and is not a party to this lawsuit.

[5] This "drop-off" is also sometimes referred to as a "rut" by witnesses. In order to accurately describe testimony, we use both terms in this opinion when referring to the depression in the shoulder immediately adjacent to the paved surface of the highway. We use "pothole" to refer to the depression in the paved surface immediately adjacent to the shoulder.

not ministerial acts and therefore came within the bar for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions" under § 893.80(4), STATS. In support of its motion, the County submitted affidavits, which, taken together, aver in pertinent part as follows. Juneau County is under contract with the state Department of Transportation (DOT) to perform specific and general maintenance of the highway where the accident occurred. General maintenance includes repairing potholes and maintaining shoulders. Juneau County, with input from DOT, decides what general maintenance it will perform, when, and in what manner, taking into account the amount allocated by DOT for this purpose. It is not uncommon for the aggregate in shoulders to become pushed away from the asphalt, due to traffic and weather, and the portion of the shoulder immediately adjacent to the shoulder then becomes lower than the asphalt. The County can address this condition by using a "maintainer" to bring up the level of the aggregate on the shoulder but that cannot be done successfully when the ground is frozen. The practice is to use the maintainer in late fall and early spring. This was done on September 20, 1993, and again on March 4, 1994, on the section of the shoulder where the accident occurred. Another way to address the problem is to pave the shoulder. Several years ago, DOT began identifying, in conjunction with the counties, sections of highway where aggregate in the shoulders frequently was pushed away from the pavement and the counties, or private contractors, began paving them as funding became available. The section of highway where the accident occurred was a candidate for paving, but had a lower priority than other locations in Juneau County and was not paved until 1994.

The DOT policy applicable to counties in maintaining highway shoulders provides in part that "shoulders shall be maintained as close as possible … with structure and support to be even or level with the adjacent pavement …."

Policy 45.10, STATE HIGHWAY MAINTENANCE MANUAL. With respect to maintaining aggregate shoulders, the DOT policy provides in part that "routine maintenance grading shall be performed as soon as possible when aggregate shoulders are approximately two inches below the pavement edge or when the shoulder surface needs smoothing." ***Id.*** DOT Area Maintenance Supervisor for Juneau County, William Anderson, averred that he was aware that the aggregate shoulder where the accident took place periodically got pushed back from the asphalt; he has been in regular contact with the Juneau County Highway Department; and in his opinion, its practices have been consistent with the spirit and intent of DOT Policy 45.10.

In opposition to the motion, the Morrises argued that suit for the County's negligence was not barred and there were factual disputes concerning its negligence. The materials submitted in support of its position include the following. Juneau County Deputy John Weger, the officer who responded to the accident, deposed that at the site of the accident there was a drop-off between the pavement and the gravel, which he referred to as a rut. He was aware of it before the accident because his car ran into it on his way to work that day or within three days before the accident and he felt his car pull to the right. In his opinion, the area where the accident occurred was always somewhat of a problem, but that winter more cars went off the highway there than in other winters. When he felt his car going into a rut there, he thought the rut was the reason for the problem. The rut was four to six inches deep at the beginning, becoming less deep; eight to ten inches wide; and between forty and sixty inches in length. In his opinion, the cause of the accident was sixty percent attributable to the rut and forty percent attributable to Williams's response to it.

Rick Potter, patrol superintendent for Juneau County, deposed that he was called to the accident site just after the accident. Weger showed him where the low shoulder was, but he either could not see it because of the snow and ice or he did not recall seeing it at his deposition. He knew there was a problem with the gravel on the shoulder getting pushed back there in the summertime, but it was not a serious problem.

Anderson deposed that he was also, by chance, in the area on the day of the accident and went with Potter to the accident site. His notes from that day say, "Will add blacktop shoulder paving next summer. Maybe gravel earlier if get thaw." That decision was made that day. He recalls being told by the deputies or Potter that there was a tendency to rut or problems in that area, but he could not remember the details. Based on his observation that day, the disparity between the asphalt and the shoulder was not more than two inches. In July 1994, he was at the site again to investigate At that time he observed, in the approximate area where Williams went off the road, a hole in the pavement at the edge of the paved surface, approximately four to five inches in width and two feet in length. He did not see this hole in the pavement on the day of the accident but, given the way potholes typically develop, in all likelihood it was there at the time of the accident. Potholes can be repaired in winter with a cold mix.

DOT Policy 43.21 states that "[periodic inspection of the pavement surface to indicate potholes] must be done on a frequent and regular basis. As a minimum the periodic inspection should be at least twice weekly during the major part of the year and more frequently during the spring break up." The policy also describes how to patch potholes. Robert Koscal, the patrolman for the County Highway Department for the section of highway where the accident occurred, deposed that when he sees a pothole such as that in the picture Anderson took in

July 1994, he fixes it any time of the year. But he has no memory of the particular pothole.

The affidavit of Jeanne Morris avers that a day or two after the accident while driving by the accident site, she saw a rut and a big chunk of pavement broken off at the beginning of the rut. According to their depositions, neither Potter nor Weger observed on the day of the accident a hole in the pavement such as that in the photograph Anderson took in July.

The County replied to the Morrises' materials by submitting the depositions of Williams and of Jeanne Morris. Williams deposed that she felt her right front wheel drop off the asphalt and her car being pulled to the right and in trying to get the car back on the road in the ice and snow she went over the centerline in a "fish tail." She never saw the drop-off and described it as two, maybe three inches. In Jeanne Morris's deposition, taken before her affidavit was prepared, she stated that driving past the accident site after the accident she observed a "rut … in the side of the road and the shoulder of the road [that] is about as wide as a tire" and she estimated it was fifteen feet long.

The trial court concluded that there were no disputed issues of fact and the County was entitled to immunity under § 893.80(4), STATS., as a matter of law because the duties imposed by DOT Policy 45.10 involved the exercise of discretion and were not ministerial.[6] The court decided that § 81.15, STATS., was not applicable because the drop-off from the paved surface to the shoulder was not

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[6] The terms quasi-legislative and quasi-judicial in § 893.80(4), STATS., are synonymous with discretionary. ***Turner v. City of Milwaukee***, 193 Wis.2d 412, 422, 535 N.W.2d 15, 18 (Ct. App. 1995). Municipalities are not immune from suit for damages resulting from the negligent performance of ministerial, as opposed to discretionary duties. ***Turner***, 193 Wis.2d at 422-23, 535 N.W.2d at 18.

part of the traveled surface of the highway, because it was not a defect, and because the County kept the highway in a reasonably safe condition. The court did not discuss the pothole in its decision.

We review summary judgments *de novo*, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Generally, summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

DISCUSSION

Relationship Between § 81.15, STATS., *and* § 893.80(4), STATS.

We first address the relationship between § 81.15, STATS., and the immunity provisions under § 893.80(4), STATS. The Morrises argue that the defense of immunity available under § 893.80(4) is not available to counties when they are sued under § 81.15 for damages caused by the insufficiency or want of repairs of highways which they are obligated to keep repaired. The County responds that § 81.15 is a limitation upon the Morrises' right to recover, not an alternative avenue. We understand the County to mean that if duties are considered discretionary and therefore there is immunity under § 893.80(4), suit under § 81.15 is also barred. We disagree and conclude that if § 81.15 is otherwise applicable, a county's negligence is actionable under § 81.15 for damages by reason of the insufficiency or want of repairs of a highway without regard to whether the county's acts were discretionary under § 893.80(4).

Prior to the abrogation of common law municipal immunity in ***Holytz v. City of Milwaukee***, 17 Wis.2d 26, 115 N.W.2d 618 (1962), § 81.15,

STATS., was a major exception to the rule of nonliability. ***Weiss v. Milwaukee***, 79 Wis.2d 213, 224, 255 N.W.2d 496, 499 (1977). After ***Holytz***, the legislature enacted the predecessor to § 893.80, STATS.,[7] imposing certain limitations on municipal liability. One of the limitations in § 893.80, besides immunity for discretionary acts, is a notice requirement. *See* § 893.80(1).[8] At the time, the first predecessor to § 893.80 was enacted, § 81.15 also had a notice requirement, but it was more stringent: certain of the notice requirements under § 893.80(1) can be

[7] Section 331.43, STATS., was enacted by Laws of 1963, ch. 198. Section 331.43 was renumbered to § 895.43 by Laws of 1975, ch. 218. Section 895.43 was renumbered to § 893.80 by Laws of 1979, ch. 323, § 29.

[8] Section 893.80(1), STATS., provides:

> (1) Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employe of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:
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> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employe under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employe; and
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> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.

avoided if there is not actual prejudice, whereas § 81.15 then contained no such provision. ***Weiss v. Milwaukee***, 79 Wis.2d at 224, 255 N.W.2d at 499.[9]

Before ***Holytz*** and the enactment of the predecessor to § 893.80, STATS., municipalities would typically argue that damages were not caused by highway defects, because at that time the municipality was immune from suit. ***Id.*** After ***Holytz*** and the passage of the predecessor to § 893.80, plaintiffs who could not meet the actual notice requirement of § 81.15, STATS., would typically argue that the damages were not caused by a highway defect, so that they could bring suit under the more liberal notice requirements of the predecessor to § 893.80. ***Weiss v. Milwaukee***, 79 Wis.2d at 224. Conversely, municipalities would argue that the damages were caused by a highway defect so that the more stringent notice requirements of § 81.15 would apply and preclude suit. ***Id.*** It is in this context that the language in ***Foss v. Town of Kronewetter***, 87 Wis.2d 91, 273 N.W.2d 801 (Ct. App. 1978), on which the County relies, must be understood. When the court refers to the "preconditions and limitations on the right to recover

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[9] Section 81.15, STATS. (1963), provided in relevant part:

> No such action shall be maintained unless within 120 days after the happening of the event causing such damages, notice in writing signed by the party, his agent or attorney shall be given to the county clerk of the county, a supervisor of the town, one of the trustees of the village or mayor or city clerk of the city, against which damages are claimed, stating the place where such damages occurred, and describing generally the insufficiency or want of repair which occasioned it and that satisfaction therefore is claimed of such county, town, city or village. No notice given here shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the time, describing the place or the insufficiency or want of repairs which caused the damages for which satisfaction is claimed, if it appears that there was no intention on the part of the person giving the notice to mislead the other party and that such party was not in fact misled thereby.

from municipalities" imposed by § 81.15 it is referring to "the more stringent notice requirements of sec. 81.15, STATS. [as compared to § 893.80, STATS.]." ***Id.*** at 98-99 n.8, 273 N.W.2d at 805. The same is true of the reference in ***Lang v. City of Cumberland***, 18 Wis.2d 157, 165, 118 N.W.2d 114, 118 (1962), to the "limitations" imposed by the version of § 81.15 then in effect.

Section 81.15, STATS., was amended by Laws of 1977, ch. 285 to remove the notice requirements and replace them with this sentence: "The procedures under 895.43 [now § 893.80, STATS.] shall apply to the commencement of actions brought under this section." The prefatory note makes clear that the purpose of this amendment was to make uniform the procedures for prosecuting a claim against counties and other municipalities by including listed procedures relating to notice of injury, notice of claim, disallowance of claim and time limits for the various steps before filing an action.[10] There is no indication in

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[10] The prefatory note to Laws of 1977, ch. 285, § 11 provides:

> At present various provisions of the Wisconsin statutes contain a variety of procedural steps to follow when bringing a claim against a county, town, city, school district or other municipality.
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> This bill consolidates these procedures [SECTIONS 1 to 10 and 12] and makes them uniform by repealing and recreating s. 895.43, Wis. Stats., [SECTION 11] to include the following procedures when prosecuting a claim against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof or against any officer, official, agent or employe of such corporation, subdivision or agency or volunteer fire company for acts done in their official capacity or in the course of their agency or employment:
>
> a) A 120-day period for filing written notice of injury. However, the failure to give the required notice will not bar an action if the appropriate body had actual notice and failure to provide written notice was not prejudicial to the defendant.
>
> b) No time limit for filing a claim.

(continued)

either the language of amended § 81.15 or the prefatory note to the amendment that the immunity provisions of § 893.80(4) are to apply in actions under § 81.15.

The County has provided us with no authority for the proposition that if § 81.15, STATS., applies, the immunity provisions of § 893.80(4), STATS., also apply. The court in ***Foss*** makes it clear that just the opposite is true, when it states:

> [A municipality's] negligence is actionable [assuming compliance with the applicable notice requirements] if plaintiffs' injuries happened by reason of an insufficiency or want of repair of any highway, *or* if the [municipality's] acts were not done in the exercise of legislative, quasi-legislative, or quasi-judicial functions pursuant to secs. 81.15, or [893.80(4)], STATS., *respectively*.

Foss, 87 Wis.2d at 98-99, 273 N.W.2d at 805 (emphasis added) (footnotes omitted). The later amendment to § 81.15, by its plain terms, concerns "the commencement of actions," making uniform the procedures for commencing actions under both § 81.15 and § 893.80. However, that amendment did not make the two statutes uniform with respect to the immunity provisions of § 893.80(4). Those remain inapplicable to suit under § 81.15.[11]

> c) A time limit of 120 days for disallowing a claim; the failure of an appropriate body to act on a claim within 120 days is treated as a disallowance.
>
> d) Notice of disallowance of a claim which shall include a statement of the date of disallowance and the time during which a claimant may commence a court action.
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> e) A requirement that suits be commenced within 6 months of the date of service of notice of disallowance.

[11] Because we decide the immunity provisions of § 893.80(4), STATS., do not apply to a suit under § 81.15, STATS., we do not address the arguments of the amicus curiae, Wisconsin Academy of Trial Lawyers, which relate exclusively to § 893.80(4).

Section 81.15, STATS.*,—Meaning of "Highway"*

With respect to the shoulder drop-off, the trial court held, and the County agrees, that § 81.15, STATS., does not apply because the shoulder is not the "traveled surface" of the highway. The Morrises dispute this interpretation of § 81.15, contending that a highway defect may be actionable under § 81.15 if it is "not so far outside the traveled portion that the traveler would have been obliged to actually leave the traveled track in order to reach it." The construction of a statute presents a question of law, which we review *de novo*. ***Tahtinen v. MSI Ins. Co.***, 122 Wis.2d 158, 166, 361 N.W.2d 673, 677 (1985). We conclude that a drop-off from, or a rut between, the paved surface of the highway and the gravel aggregate shoulder of the highway is located on the "highway" within the meaning of § 81.15.

The court and the County take the phrase of "traveled surface" from ***Foss*** and ***Weiss v. Milwaukee***. In ***Foss***, the plaintiff contended that the municipality was negligent in not putting a warning sign at the dead end of a road where construction was taking place for an extension. The court in ***Foss*** stated that ***Weiss v. Milwaukee:***

> [D]escribed the scope of negligence actionable under § 81.15, STATS., as limited to that involving physical defects existing in the traveled surface of the highway or absence or insufficiency of warnings of such defects, and has expressly withdrawn language that any defect in the maintenance or operation of traffic signals was an insufficiency or want of repair.

Foss, 87 Wis.2d at 100, 273 N.W.2d at 806. The court in ***Foss*** concluded that a dead end is not in the traveled portion of a highway, distinguishing a dead end

from obstructions along the sides of highways. ***Id.*** at 100 n.15, 273 N.W.2d at 806.[12]

In ***Weiss v. Milwaukee***, the court held that negligence in the placement of a stop sign did not constitute an insufficiency or want of repair of a highway, and it was in that context that the ***Weiss v. Milwaukee*** court made the statement cited in ***Foss***. ***Weiss v. Milwaukee***, 79 Wis.2d at 225, 255 N.W.2d at 500. Neither ***Foss*** nor ***Weiss v. Milwaukee*** are particularly helpful in resolving the issue of the applicability of § 81.15, STATS., to the shoulder drop-off because neither case had occasion to discuss the meaning of "traveled surface" in a similar factual context. However, we note that ***Foss***' distinction between the area beyond the dead end of the road and obstructions along the side of the highway appears helpful to the Morrises' position.

The court in ***Foss*** points out in another portion of its opinion—discussing whether the construction was an obstruction—that the phrase "traveled portion" comes from "several old cases." ***Foss***, 87 Wis.2d at 107 n.34, 273 N.W.2d at 809. These hold that it is a jury question whether a defect or obstacle in close proximity to a traveled track is on the highway.[13] The Morrises rely on one of these cases, ***Boltz v. Town of Sullivan***, 101 Wis. 608, 614-15, 77 N.W. 870,

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[12] The court in ***Foss*** went on to conclude that negligent reinstallation of the barrier at the dead end and maintenance without reflectors were actionable under § 893.80, STATS., because the municipality had not proved immunity. ***Foss***, 87 Wis.2d at 104, 273 N.W.2d at 808.

[13] ***Druska v. Western Wisconsin Telephone Co.***, 177 Wis. 621, 189 N.W.2d 152 (1922) (upholding jury finding of negligence for placement of telephone pole by telephone company where pole was outside traveled track but near to it); ***Neale v. State***, 138 Wis. 484, 120 N.W. 345 (1909) (jury question whether fence next to traveled track was obstruction); ***Jenewein v. Town of Irving***, 122 Wis. 228, 99 N.W. 346 (1904) (jury question whether culvert in close proximity to traveled track with no guard rails is defect in highway); ***Boltz v. Town of Sullivan***, 101 Wis. 608, 77 N.W. 870 (1899) (upholding jury verdict that stump near traveled track is defect in highway).

872 (1899), as well as a similar one, ***Sweetman v. City of Green Bay***, 147 Wis. 586, 590, 132 N.W. 1111, 1112 (1911). Both hold that defects outside the "traveled track" may be actionable under § 81.15, STATS., when "they are so connected with the traveled track as to affect the safety of the public using it in the ordinary way while exercising ordinary care." ***Sweetman***, 147 Wis. at 590, 132 N.W. at 1112; ***Boltz***, 101 Wis. at 615, 77 N.W. at 873. However, the vast difference in the physical nature of highways at the time these "several older cases" were decided, and the apparent absence of more recent cases that use this approach, persuade us that these cases do not provide a satisfactory definition of highway.[14]

Although § 81.15, STATS., does not contain a definition of highway, another statute governing DOT's obligation to inspect bridges on highways, § 84.179(1)(a), STATS., refers to the definition of highway in § 340.01(22), STATS. Section 340.01(22) provides: "'Highway' means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel." We conclude that this definition is the proper construction of "highway" in § 81.15. This is the same definition the court used in ***Weiss v. Milwaukee*** in deciding whether there was actionable negligence in the placement of the stop sign under § 895.43(1) [893.80], STATS. This is also the definition the court used in ***Weiss v. Holman***, 58 Wis.2d 608, 618, 207 N.W.2d 660, 664-65 (1973), in interpreting "highway" in § 182.017(2), STATS., which prohibits lines and systems for telecommunications from "obstruct[ing] or

[14] It was not necessary to the ***Foss*** court to decide what "traveled portion" or "traveled surface" meant. However, its reference to ***Boltz*** as one of "the several older cases" indicates that ***Foss*** did not overrule ***Boltz***, as the County contends.

incommod[ing] the public use of any highway ….” Applying the definition in § 340.01(22), the court in ***Weiss v. Holman*** concluded that a complaint that permitted a reasonable inference that the pole was on a highway shoulder stated a cause of action for obstructing the highway under § 182.017(2). Finally, the definition of highway in § 340.01(22) is consistent with the "traveled surface" and "traveled portion" references in ***Foss*** and ***Weiss v. Milwaukee***, but provides a more precise and therefore more useful definition.

Although there are factual disputes concerning the size and nature of the drop-off or rut, there is no dispute that it is in the shoulder of the highway immediately adjacent to the paved surface of the highway. We conclude as a matter of law that it is located in the highway for purposes of § 81.15, STATS., because the aggregate gravel shoulder is within the boundary lines of the way open to the public for purposes of vehicular travel.

The County does not argue that the pothole is not located in the highway. Rather, it argues that there is no pothole and that the Morrises' submissions do not create a genuine factual dispute on the existence of a pothole. As noted above, the trial court did not address the pothole in its decision. The County contends that Jeanne Morris's affidavit was submitted in bad faith because it is inconsistent with her deposition, which she gave first, and we should therefore disregard her affidavit.[15] Other than the failure of Jeanne Morris to mention the

[15] The County moved in the trial court to strike the portion of Jeanne Morris's affidavit relating to the pothole, to strike other portions for other reasons, and to strike accident reports of other accidents occurring on the same stretch of highway, which the Morrises' counsel submitted with an affidavit. The court did not rule on that motion, nor did the court rule on the Morrises' motion to strike the depositions of Jeannie Morris and Williams as untimely. Apparently the court did not rely on any other those submissions. We discuss only the County's argument that the portion of Jeanne Morris's affidavit relating to the pothole should be disregarded, because the resolution of the two motions in other respects is not necessary to our decision.

pothole in her deposition, the County points to nothing in the record indicating the affidavit was submitted in bad faith, and provides no authority that the inconsistency alone is a basis for a finding of bad faith. We therefore reject this argument.

The County also contends that even if we consider the affidavit of Jeanne Morris, there is insufficient evidence to create a genuine factual dispute on the existence of the pothole. On summary judgment, we are required to draw all reasonable inferences from the evidence in favor of the non-moving party. ***Grams v. Boss***, 97 Wis.2d 332, 339, 294 N.W.2d 473, 477 (1980). A reasonable inference from Jeanne Morris's description of the pothole she saw two days after the accident is that it existed on the date of the accident. In addition, Anderson testified that the pothole he observed in July, based on his knowledge of how potholes develop, was "in all likelihood" in existence at the time of the accident. This testimony is sufficient to create a genuine factual dispute on the existence of the pothole in the highway at the time of the accident. In effect, the County's argument is that the evidence that there was no pothole at the time of the accident is much more convincing. However, that is for the trier of fact to decide, as is the weight to give to Jeanne Morris's statement in her affidavit in light of her deposition testimony.

Negligence

The trial court concluded that even if the shoulder drop off was on the highway for purposes of § 81.15, STATS., summary judgment was nevertheless proper because the undisputed facts show that the County did not breach its duty to keep the

shoulder in a reasonably safe condition and there was no defect in the highway. The Morrises argue that there are genuine issues of material fact concerning the negligence of the County, both with respect to the shoulder drop-off and the pothole. We agree with the Morrises.

The trial court correctly noted that the County has a duty to maintain the highway in a reasonably safe condition. *See* ***Webster v. Klug & Smith***, 81 Wis.2d 334, 339, 260 N.W.2d 686, 689 (1978). Although there was evidence that the shoulder drop-off was less than two inches, there was also evidence that it was as great as six inches. We conclude a reasonable inference from Weger's testimony is that a drop-off of this size had existed some time before the date of the accident. Assuming that DOT Policy 45.10 defines the County's duty to keep the shoulder in a reasonably safe condition, which both the parties appear to agree is the case, there are factual disputes concerning whether the County breached that duty. The same is true with respect to the pothole. Assuming that DOT Policy 43.21 defines the County's duty with respect to potholes, as both parties appear to agree, and given our conclusion that there are factual disputes concerning the existence of the pothole, we conclude there are factual disputes concerning whether the County breached that duty.

In summary, the County is amenable to suit under § 81.15, STATS. Because there are genuine issues of material facts concerning whether there was a want of highway repair due to the County's negligence, which caused injury to John Morris, the County was not entitled to summary judgment.

By the Court.—Judgment reversed.

Recommended for publication in the official reports.