

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 12, 2005**

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. 2004AP2666**

**Cir. Ct. No. 2003CV1039**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**LEO DUNLAP,**

**PLAINTIFF-APPELLANT,**

**v.**

**CITY OF KENOSHA, KENOSHA YACHT CLUB, AND  
CINCINNATI INSURANCE COMPANY,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Kenosha County:  
WILBUR W. WARREN, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. The circuit court dismissed on summary judgment Leo Dunlap's claims against the City of Kenosha and the Kenosha Yacht Club for injuries he suffered when he stepped into a hole in a concrete walkway located on

property owned by the City and leased by the Yacht Club. We agree with the circuit court that the City is not liable to Dunlap because the walkway does not fall within the definition of a sidewalk under WIS. STAT. § 81.15 (2001-02)<sup>1</sup> for purposes of municipal liability. We further agree that the Yacht Club is immune from liability on recreational immunity grounds under WIS. STAT. § 895.52(2). Therefore, we affirm.

¶2 In July 2001, Dunlap decided to go fishing on property owned by the City and leased by the Yacht Club. Dunlap parked his vehicle in a parking lot next to the Yacht Club, retrieved his fishing pole from his vehicle, and walked across a grassy area toward the concrete walkway that abuts a seawall.<sup>2</sup> Dunlap stood on the seawall to survey the area and as he stepped off the wall, he stepped into a hole in the concrete walkway.

¶3 Dunlap sued the City for his injuries. Dunlap alleged that the walkway constituted a sidewalk under WIS. STAT. § 81.15, making the City liable for his injuries. Dunlap also sued the Yacht Club and its insurer, Cincinnati Insurance Company.

¶4 The City and the Yacht Club moved for summary judgment. Among other arguments, the City claimed that the walkway did not constitute a sidewalk

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted. Effective January 1, 2005, WIS. STAT. § 81.15 was renumbered to WIS. STAT. § 893.83(1). 2003 Wis. Act 214, § 136. Because Dunlap's claim arose in 2001, we will refer to § 81.15. We recognize that § 81.15 does not provide a definition of the term "sidewalk" and that this section refers to highways rather than sidewalks. However, subsequent case law has interpreted the term "highway" to include a sidewalk. See *Bystery v. Village of Sauk City*, 146 Wis. 2d 247, 251, 430 N.W.2d 611 (Ct. App. 1988).

<sup>2</sup> Dunlap's summary judgment materials describe the seawall as a ledge or bulkhead.

under WIS. STAT. § 81.15 such that the City would be liable for its state of disrepair. The Yacht Club asserted recreational immunity.<sup>3</sup> The circuit court agreed. Dunlap appeals.

¶5 We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

¶6 WISCONSIN STAT. § 81.15 addresses municipal liability for damages caused by highway defects and provides in pertinent part:

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.

“Highway” under § 81.15 includes sidewalks. *Bystery v. Village of Sauk City*, 146 Wis. 2d 247, 251, 430 N.W.2d 611 (Ct. App. 1988). The question in this case is whether the concrete walkway constitutes a sidewalk under § 81.15.

¶7 The definitions of “highway” and “sidewalk” suggest that to fall within WIS. STAT. § 81.15, the walkway must be associated with vehicular use. WISCONSIN STAT. § 340.01(22) defines “highway” as “all public ways and thoroughfares and bridges on the same. It includes the entire width between the

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<sup>3</sup> It is undisputed that Dunlap was engaged in a recreational activity at the time he fell on the walkway.

boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel.” Section 340.01(58) defines “sidewalk” as “that portion of a highway between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, constructed for use of pedestrians.”

¶8 In its summary judgment materials, the City offered the affidavit of a City engineer who stated that the walkway is not within the boundary lines of any public street or highway. The primary purpose of the area adjacent to the seawall is to facilitate the use of the harbor by boaters. The Commodore of the Yacht Club stated in his affidavit that the public is given access to the property leased by the Yacht Club for purposes of recreation, including docking boats along the seawall and fishing. The seawall is on property leased by the Yacht Club and no road adjoins it. In his summary judgment materials, Dunlap essentially argued that because the walkway is made out of concrete, it is necessarily a sidewalk under WIS. STAT. § 81.15.

¶9 In *Crowbridge v. Village of Egg Harbor*, 179 Wis. 2d 565, 567, 508 N.W.2d 15 (Ct. App. 1993), we held that a municipal boat pier is not a sidewalk under WIS. STAT. § 81.15. We so held because notwithstanding its use by pedestrians, a pier is defined as providing “a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft.” *Crowbridge*, 179 Wis. 2d at 571 (citation and emphasis omitted). We further distinguished sidewalks and piers as follows: “Sidewalks and piers are thus constructed for different users; sidewalks are primarily built for pedestrians while piers are primarily built for the convenience of users of watercraft.” *Id.* We concluded: “[T]he fact that recreational facilities, including piers, can be walked upon does not convert them into sidewalks.” *Id.*

¶10 The summary judgment record in this case reveals that the concrete walkway was part of an area used for recreational activities such as fishing and boating, and it is not located between the boundary lines identified in WIS. STAT. § 340.01(22) (highways) or 340.01(58) (sidewalks). There is no associated vehicular use. We therefore reject Dunlap's contention that because the walkway is made of concrete, it is necessarily a sidewalk under WIS. STAT. § 81.15.

¶11 Dunlap does not contest the circuit court's ruling that the Yacht Club enjoys recreational immunity under WIS. STAT. § 895.52(2). It is undisputed that Dunlap was engaging in a recreational activity, fishing, as defined in § 895.52(1)(g). The immunity provisions of § 895.52(2) apply.

*By the Court.*—Order affirmed.

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

