COURT OF APPEALS
DECISION
DATED AND FILED

January 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0321 **Cir. Ct. No. 99-CV-1277**

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

TIMOTHY BROWN AND KATHARINE BROWN, HUSBAND AND WIFE, SCOTT WESLEY COLBERT, AND RACHELLE DAWN LIEBL, MINORS, BY THEIR GUARDIAN AD LITEM, JIM SCHERNECKER,

PLAINTIFFS-APPELLANTS,

V.

DANE COUNTY, JOHN NORWELL, AND WISCONSIN MUNICIPAL MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed.*

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

¶1 PER CURIAM. The plaintiffs in a personal injury action appeal a judgment dismissing their complaint. The issue is whether the circuit court

properly granted summary judgment to the defendants because their allegedly negligent actions were discretionary acts of public officials and thus immune from suit. We conclude that they were and thus affirm.

BACKGROUND

¶2 Timothy and Katharine Brown and their minor children sued Dane County, its highway commissioner John Norwell, and the County's insurer.[1] Timothy and Katharine Brown were riding a motorcycle on Dane County Trunk Highway AB (CTH AB) and suffered injuries when they collided with a vehicle that entered the highway at its intersection with Elvehjem Road.

¶3 The Browns claim that the County was negligent in several respects. On appeal, the Browns limit their focus to two allegations, specifically, that the County failed to place the stop sign on Elvehjem Road in the proper location, and that it failed to trim or remove vegetation that obscured the view along CTH AB from Elvehjem Road. The Browns alleged that this negligence was a cause of the accident.

¶4 The County denied the substantive allegations of the complaint. It also alleged a number of affirmative defenses, including immunity from suit for discretionary acts or omissions. The County moved for summary judgment on the grounds that it was immune from suit for the actions or omissions cited by the Browns, which the County maintained were discretionary acts. The trial court

[1] We will refer to the plaintiffs-appellants as "the Browns" and the defendants-respondents as "the County."

agreed and entered judgment dismissing the Browns' claims. The Browns appeal the judgment dismissing their claims.

ANALYSIS

¶5 Before addressing the Browns' substantive arguments, we briefly address their claim of procedural error. The Browns assert that the County's motion cannot properly be granted because the County submitted virtually no proofs with its motion. The County responds that it relied in part on the proofs submitted by a former defendant, the Town of Dunn, in its motion for summary judgment. The Browns do not reply to the County's response, and we see no reason why the County may not properly rely on materials submitted by another defendant. Therefore, in the analysis which follows, we will consider all of the materials before the court constituting the record on summary judgment.

¶6 This case was decided on summary judgment, the methodology for which is well established. *See* WIS. STAT. § 802.08 (1999-2000);[2] ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). The County asserted in its motion for summary judgment that it was immune from suit under WIS. STAT. § 893.80(4) because it was performing discretionary, rather than ministerial, duties when it placed the stop sign and when it decided whether to trim vegetation.[3] The

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[3] WISCONSIN STAT. § 893.80(4) provides:

(continued)

general principles governing the law of public official discretionary immunity is also well established. *See, e.g.,* ***C.L. v. Olson***, 143 Wis. 2d 701, 717-18, 422 N.W.2d 614 (1988).

¶7 We first address the claim that the stop sign was not properly placed. The County argues that the decision on whether to install a stop sign is discretionary, and that this includes the decision on where, exactly, to place the sign if one is installed. In support of this proposition the County relies on ***Harmann v. Schulke***, 146 Wis. 2d 848, 855, 432 N.W.2d 671 (Ct. App. 1988). We concluded in ***Harmann*** that the decision to install a stop sign is discretionary and not controlled by the Manual for Uniform Traffic Control Devices. The Browns concede as much in this appeal but argue that, if a sign is installed, it must be installed consistently with the manual, as required by WIS. STAT. § 349.065. The County essentially concedes this point, and we see nothing in ***Harmann*** that gives the County discretion to ignore or disobey § 349.065 in choosing the site for a sign.[4]

> 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.

The phrase, "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions," has been defined as being synonymous with "discretionary" acts. ***Linville v. City of Janesville***, 174 Wis. 2d 571, 584, 497 N.W.2d 465 (Ct. App. 1993), *affirmed*, 184 Wis. 2d 705, 516 N.W.2d 427 (1994).

[4] WISCONSIN STAT. § 349.065 provides as follows:

(continued)

¶8 Accordingly, we next consider whether the County's affidavits have established either (1) that the uniform manual leaves the location of the sign to the County's discretion, or (2) that the County complied with whatever the manual may require. We conclude that the record establishes that the sign was placed within the manual's distance parameters, and that the precise location of the sign within those parameters is a matter committed to the discretion of the cognizant highway officials.

¶9 The County submitted an affidavit of its counsel, presenting two pages from Highway Commissioner Norwell's answers to plaintiffs' interrogatories. Norwell averred that the uniform manual states that the stop sign "should be placed within a range of distance of 12 feet minimum to 50 feet maximum."[5] In another affidavit, James Manson, the Town of Dunn's public works foreman, averred that at the time of the accident the stop sign on Elvehjem Road was located thirty-four feet back from the nearest lane of CTH AB. He further averred that if a motorist stopped at that sign and looked south along CTH AB, vision is limited by vegetation on adjacent property. However, Manson further averred that if the motorist moves past the stop sign and stops again before

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> Local authorities shall place and maintain traffic control devices upon highways under their jurisdiction to regulate, warn, guide or inform traffic. The design, installation and operation or use of new traffic control devices placed and maintained by local authorities … shall conform to the manual. After January 1, 1977, all traffic control devices placed and maintained by local authorities shall conform to the manual.

In response to a request for admissions, the County admitted that "the provisions of the 'Manual for Uniform Traffic Control Devices' (Uniform Manual) set the minimum standards for placement of stop signs on public roads within Dane County."

[5] This quotation is from Norwell's interrogatory answer. He did not claim to be quoting directly from the manual itself, and did not provide a copy of any portion of the manual.

entering the nearest lane of CTH AB, vision to the south on CTH AB is "unobstructed."

¶10 Taken together, Norwell's affidavit establishes where the stop sign should be placed in order to comply with the manual's specified distance parameters, and Manson's affidavit shows that the sign was placed within the range stated in the manual. The County has thus presented a *prima facie* defense to a claim that the sign was not properly placed. Put another way, the County's submissions indicate that its highway officials had complied with any ministerial duty to place the sign as required by the manual.

¶11 We turn next to the Browns' opposing affidavits. To overcome the County's *prima facie* defense, the Browns must show that the County had a ministerial duty to place the stop sign in a particular place other than where it did. The Browns submitted the affidavit of their expert, William Berg, an engineer specializing in accident reconstruction. His affidavit includes a copy of section 2B-9 of the manual, entitled "Location of Stop Sign and Yield Sign." The section begins with this sentence: "A STOP sign should be erected at the point where the vehicle is to stop or as near thereto as possible, and may be supplemented with a Stop line and/or the word STOP on the pavement."

¶12 The Browns argue that the County had a ministerial duty, required under the provisions of the manual, to place the stop sign at the location where a driver on Elvehjem Road should stop in order to obtain proper vision distance along CTH AB. In response, the County argues that any duty it may have to place the sign at a specific point within the manual's specified range is discretionary, because the manual states only that the sign "should" be placed "where the vehicle is to stop," not that it "shall" be. The County points out that other sentences in the

same section of the manual use "shall" in ways that seem intended to be mandatory, while other provisions use "should" or "may," such as the sentence cited by the Browns.[6] In this context, the County argues, "should" is reasonably read as a recommendation, not a requirement.

¶13 We accept the County's reading of these provisions. The Browns have cited no provision in the manual which requires that a stop sign be placed at the point of optimum or maximum sight distance for the intersection. Rather, the manual leaves the precise placement of a stop sign within the specified maximum and minimum distances to the discretion of municipal highway officials, and with good reason. Competing considerations may impact on the proper placement of the sign, with sight distance along the intersecting highway being one, but not necessarily the exclusive determinant.[7] We agree with the County that the appropriate sign placement should be determined after taking various facts and factors into account, which is the hallmark of an act requiring the exercise of discretion as opposed to one that is "absolute, certain and imperative." ***Olson***, 143 Wis. 2d at 711.

¶14 Furthermore, sight distances along intersecting highways may vary with vehicle heights, and they may change over time due to changes in vegetation

[6] For example, the manual specifies that where only one stop sign is placed at an intersection, "it *shall* be on the right-hand side of the traffic lane to which it applies," and where the visibility of a stop sign is restricted, "a Stop Ahead sign … *shall* be erected …." (Emphasis added.)

[7] Highway Commissioner Norwell testified at a deposition that "[t]he duty is to place a stop sign within a certain distance of the intersection to see that people adequately stop, their initial stop." When asked to agree "that that's a function of the line-of-sight distance," he responded, "Not necessarily. There's other functions involved with it, too." In a further response, he said that "[t]he line of sight is one of the functions that is used and does not necessarily govern in that situation."

or improvements in the vicinity of the intersection. We conclude that it would be unrealistic to impose on highway officials a "ministerial duty" to ensure that stop signs are always placed at the point of maximum or optimum sight distances. In this regard, placement of the stop sign within the range required by the manual is similar to decisions regarding when, where and how much to trim roadside vegetation. The supreme court has declined to declare the existence of an "affirmative duty" on municipalities "to cut roadside vegetation in order to assure motorist visibility," thereby committing such decisions to the realm of discretionary action by highway officials. ***Walker v. Bignell***, 100 Wis. 2d 256, 266, 301 N.W.2d 447 (1981). In so doing, the court explained its rationale as follows:

> Instead we prefer to declare directly that, as a matter of public policy, municipalities should not be exposed to common law liability under the circumstances present in this case. Exposure to such liability would, we feel, place an unreasonable and unmanageable burden upon municipalities such as the defendants herein, not only in terms of keeping areas adjacent to every highway intersection clear of visual obstructions at whatever intervals are necessitated by the vicissitudes of Wisconsin's climate, but also in terms of the potential for significant financial liability owing to the unfortunate propensity of motorists to have intersection accidents. In addition, because the height and density of vegetation would become a factor in nearly every intersection accident case, municipalities would inevitably be drawn into considerably more litigation, with its attendant costs and demands.

Id.[8]

¶15 Finally, we note that, notwithstanding the manual's recommendation that a stop sign should be placed as near as possible to the point at which a vehicle is to stop, the legislature has placed on motorists the burden of ensuring that a vehicle stops at an appropriate point to allow safe entry into an intersection:

> If there is neither a clearly marked stop line nor a marked or unmarked crosswalk at the intersection or if the operator cannot efficiently observe traffic on the intersecting roadway from the stop made at the stop line or crosswalk, the operator shall, before entering the intersection, stop the vehicle at such point as will enable the operator to efficiently observe the traffic on the intersecting roadway.

WIS. STAT. § 346.46(2)(c). The existence of this traffic statute also persuades us that a municipality's duty to place a stop sign at any given location within the range required in the manual is not "ministerial," given that the ultimate duty of stopping a vehicle at the point of optimum visibility of crossing traffic lies with its driver.

¶16 Before addressing the vegetation issue, we note that the Browns' submissions in opposition to the summary judgment motions also included a copy of the County's responses to certain requests for admission. The County admitted that "[p]ursuant to sec. 2B-9 of the Uniform Manual, the stop sign should have

[8] As the passage indicates, the supreme court's holding in ***Walker v. Bignell***, 100 Wis. 2d 256, 266, 301 N.W.2d 447 (1981), is premised on public policy considerations. The court did not discuss the concepts of discretionary versus ministerial duties for purposes of determining immunity under WIS. STAT. § 893.80(4). We conclude, however, that the court's rationale supports our conclusion that municipalities have no ministerial duty either to trim roadside vegetation for general visibility reasons, or to place stop signs based solely on line of sight considerations.

been placed at the point where eastbound vehicles on Elvehjem Road were to stop before entering the intersection with Highway A/B, or as near thereto as possible." As we have discussed, that is indeed what the manual says, which the County acknowledges in this admission.

¶17 The County also admitted the following: "At all times relevant herein, Dane County had a ministerial duty to place the stop sign at the point where eastbound vehicles on Elvehjem Road were to stop before entering the intersection with Highway A/B, or as near thereto as possible." The Browns view this admission as the smoking gun in their claim that the County may be held liable for not placing the stop sign some fifteen feet closer to the intersection, where they allege a better sight distance along CTH AB existed. We are not persuaded, however, that by this admission the County conceded it was under a ministerial duty to place the sign where the Browns claim it should have been.

¶18 As we have noted, the County has conceded its obligation to follow the manual standards in the design and installation of traffic signs. (See footnote 4.) It has also consistently maintained that it did so, having placed the sign within the specified minimum and maximum distances from the intersection, and at the point where, in its discretion, it determined vehicles "were to stop" before entering the intersection, "or as near thereto as possible." We reject the Browns' assertion that the County's cited response constitutes an admission on its part that it was under a ministerial duty to do anything beyond what the manual specifies. As we

have explained, placement of a stop sign at the precise point of optimum sight distance is not a requirement under the manual.[9]

¶19 The Browns' second claim is that the County was negligent by failing to trim or remove vegetation that obscured the view along CTH AB from Elvehjem Road. The County again argues that it is immune because it did not have a ministerial duty to trim the vegetation, citing ***Walker***, 100 Wis. 2d at 266. The County concedes that under ***Walker***, a statutory duty to cut roadside vegetation may exist when there has been affirmative conduct by the highway authorities to plant vegetation for beautification or erosion control purposes, or where the authorities have evinced a clear manifestation of intent to preserve and protect existing vegetation for those same purposes. *See* ***id.*** at 272-73.

¶20 With this concession in mind, we turn to the County's affidavits to see whether it has made a *prima facie* showing that the vegetation in this case was not within this statutory duty. The County provided a copy of answers it made to certain of the Browns' interrogatories. Those interrogatories asked whether the State of Wisconsin, the County, the Town, or any other municipal, county or state authority has authorized or suggested the planting of vegetation for beautification

[9] In their arguments on this point, the Browns appear to commit an error in reasoning that is common when public officer immunity is at issue. They confuse the County's alleged negligence with the question of whether a ministerial duty was breached. The County may have been negligent in placing the stop sign where it did, as opposed to fifteen feet closer to the intersection, where the Browns claim it should have been. The question in the present analysis, however, is not whether the County acted negligently, but whether the act complained of was one requiring the exercise of discretion, or one whose method of performance was "absolute, certain and imperative." As the supreme court has explained: "Just because a jury can find that certain conduct was negligent does not transform that conduct into a breach of a ministerial duty.… Indeed, we begin our review of this case on the assumption that negligence exists here; if it were otherwise, [the defendants] would not need to seek the protection of immunity." ***Kimps v. Hill***, 200 Wis. 2d 1, 11-12, 546 N.W.2d 151 (1996) (footnote omitted).

or erosion control purposes within a 500 foot radius of the stop sign on Elvehjem Road. Another interrogatory inquired whether any authority had authorized or suggested to anyone to avoid cutting or stop cutting any existing vegetation. To both questions, the County answered: "Dane County has not authorized or suggested" those activities. Even though the County's answer is not fully responsive to the question, because it answered only as to Dane County and not other possible actors, we will accept the County's response as sufficient to state a *prima facie* defense.

¶21 In opposition, the Browns submitted copies of three "Statements of Policy" adopted by the Dane County Transportation Committee on the subjects of planting along county trunk highways, roadside mowing, and trimming and brushing. None of these policy statements say anything specific about vegetation near the intersection of Elvehjem Road and CTH AB. The Browns appear to argue that these general policies are sufficient to establish the County's ministerial duty, but the ***Walker*** holding is to the contrary. The supreme court stated in ***Walker*** that "the authorities are under a duty to trim *what they have planted or protected* to provide safety to users of the highway." ***Walker***, 100 Wis. 2d at 273 (emphasis added). In the absence of any evidence specifically showing that the County's policies had some impact on the vegetation at this particular intersection, the Browns have failed to rebut the County's defense.

¶22 The County also argues that the Browns' claims must fail on public policy grounds and because their submissions failed to establish that the placement of the stop sign or vegetation in the area were causative of their injuries. We have concluded that the County is entitled to judgment because it is immune from liability for the acts complained of, and therefore, we will not address these alternative arguments for sustaining the judgment under review.

¶23 Finally, we note in closing that we recently declined to apply the ***Walker*** public policy holding in a case in which vegetation obscured a stop sign. ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.***, 2001 WI App 148, ¶¶28-35, 246 Wis. 2d 933, 632 N.W.2d 59, *review granted*, 2001 WI 117, 635 N.W.2d 781 (Wis. Sep. 19, 2001) (No. 00-1836). We concluded in ***Physicians Plus*** that "the public policy considerations which led the supreme court in ***Walker*** to relieve municipalities of civil liability for failure to cut vegetation to maintain visibility at intersections should not be extended to circumstances where a traffic control sign, and not just general visibility at the intersection, is obscured." ***Id.*** at ¶31. In the present case, as in ***Walker***, the vegetation at issue was alleged to have obscured the general visibility of crossing traffic at the intersection, not the visibility of the County's stop sign, as was the case in ***Physicians Plus***.

CONCLUSION

¶24 In summary, we conclude that the circuit court did not err in granting the County's motion for summary judgment. We therefore affirm the appealed judgment.

By the Court.—Judgment affirmed.

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