COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2191 **Cir. Ct. No. 99-CV-152**

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

RICHARD HERBERT VOIGT,

PLAINTIFF-RESPONDENT,

V.

CITY OF MERRILL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Lincoln County: GLENN H. HARTLEY, Judge. *Affirmed*.

Before Cane, C.J, Hoover, P.J. and Peterson, J.

¶1 PER CURIAM. The City of Merrill appeals a judgment entered upon a jury verdict finding the City causally negligent for injuries sustained by Richard Voigt when he fell onto a concrete boulevard from a municipal sidewalk. The City argues that (1) it is immune from suit pursuant to WIS. STAT.

§ 893.80(4);[1] and (2) the trial court failed to properly instruct the jury. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 The area where Voigt fell was at one time either a driveway apron or had been used for parking. This area runs adjacent to the sidewalk; however, there is a three-and-one-half-inch height difference between the sidewalk and the area where the driveway or parking area used to be. Voigt stepped off the sidewalk at the dropoff point and sustained injuries from his fall.

¶3 Voigt subsequently served the City with a Notice of Claim of Injuries pursuant to WIS. STAT. § 893.80(1)(a). After the City's common council issued a formal disallowance of Voigt's claim, he filed suit. The City subsequently filed a motion for summary judgment arguing that it was immune from liability under § 893.80(4). The trial court denied the motion and the parties proceeded to trial. A jury ultimately rendered a verdict finding the city 100% causally negligent for Voigt's injuries. The City filed motions for judgment notwithstanding the verdict and for a new trial. The trial court denied these motions and this appeal followed.

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

ANALYSIS

A. Governmental Immunity

¶4 The City argues that it is immune from suit pursuant to WIS. STAT. § 893.80(4).[2] Whether the City is immune under § 893.80(4) is a question of law that we review de novo. *See* ***Kimps v. Hill***, 200 Wis. 2d 1, 8, 546 N.W.2d 151 (1996). Immunity exists when the act or acts complained of are discretionary acts, that is, acts involving the exercise of discretion and judgment. ***Kara B. v. Dane County***, 198 Wis. 2d 24, 54, 542 N.W.2d 777 (Ct. App. 1995). An exception to governmental immunity, however, is found in WIS. STAT. § 81.15, which provides:

> 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.

The word "highway" as used in this statute has been interpreted to include sidewalks. ***Webster v. Klug & Smith***, 81 Wis. 2d 334, 260 N.W.2d 686 (1978).

¶5 Our supreme court has held that "if a plaintiff states an actionable claim under § 81.15, the governmental immunity provisions of § 893.80(4) do not apply." ***Morris v. Juneau County***, 219 Wis. 2d 543, 549, 579 N.W.2d 690

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

> No suit may be brought against any … 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 against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

(1998). More specifically, the ***Morris*** court held that "if a plaintiff's injuries occurred by reason of insufficiency or want of repairs of any highway, a governmental entity is not afforded governmental immunity under § 893.80(4)." ***Id.*** at 552.

¶6 The City argues that because the issue here is one of design rather than repair, WIS. STAT. § 81.15 is inapplicable. We disagree. The test of a city's liability is whether the street was in a reasonably safe condition for use. *See* ***Rhyner v. City of Menasha***, 107 Wis. 201, 83 N.W. 303 (1900). In other words, the question is not whether there was a defect, want of repair or insufficiency of the sidewalk, but rather whether under ordinary common law rules of negligence the City breached its duty to maintain a reasonably safe sidewalk. ***Stippich v. City of Milwaukee***, 34 Wis. 2d 260, 149 N.W.2d 618 (1967); *see also* ***Laffey v. City of Milwaukee***, 8 Wis. 2d 467, 99 N.W.2d 743 (1959). Under the applicable legal standard, the evidence supports the jury's verdict.

¶7 John Wenning, an engineer and former head of the State Division of Building Safety, testified at trial that the sidewalk was not reasonably safe for public travel. Wenning testified that Voigt fell because the sidewalk was placed over a sloping apron resulting in an unexpected dropoff. Wenning emphasized that the hazard was increased because the sidewalk and apron were the same color. The jury ultimately found that at the time and place of Voigt's fall, the city was 100% negligent with respect to the construction, maintenance and/or repair of the sidewalk and boulevard pursuant to WIS. STAT. § 81.15.

¶8 On review, we will not upset a jury verdict if there is any credible evidence to support it, "even though it be contradicted and the contradictory evidence be stronger and more convincing." ***Weiss v. United Fire & Cas. Co.***,

197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995). Our deference to the verdict is even greater where, as here, the verdict has the trial court's approval. *See* ***York v. Nat'l Continental Ins. Co.***, 158 Wis. 2d 486, 493, 463 N.W.2d 364 (Ct. App. 1990). Further, it is this court's obligation "to search for credible evidence that will sustain the verdict, not for evidence to sustain a verdict the jury could have but did not reach." ***Id.*** Because Voigt's injuries occurred because of insufficiency or want of repairs of the sidewalk as contemplated under WIS. STAT. § 81.15, the City is not afforded governmental immunity under WIS. STAT. § 893.80(4).

B. Jury Instruction

¶9 The City argues that the trial court failed to properly instruct the jury. A trial court's decision whether to give an instruction and, if so, the wording of the instruction, is a discretionary one. ***D'Huyvetter v. A.O. Smith Harvestore Prods.***, 164 Wis. 2d 306, 334, 475 N.W.2d 587 (Ct. App. 1991). A trial court has "broad discretion when instructing a jury so long as it fully and fairly informs the jury of the rules and principles of law applicable to the particular case." ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 531 N.W.2d 597 (1995). When a trial court has given an erroneous instruction or has erroneously refused to give an instruction, "a new trial is not warranted unless the error is prejudicial." ***Lutz v. Shelby Mut. Ins. Co.***, 70 Wis. 2d 743, 751, 235 N.W.2d 426 (1975).

¶10 Voigt, citing ***Callan v. Peters Constr. Co.***, 94 Wis. 2d 225, 288 N.W.2d 146 (Ct. App. 1979), requested the camouflage jury instruction. The trial court granted Voigt's request and instructed the jury as follows:

> The color and texture of an object may blend with the color and texture of the sidewalk so that a pedestrian using ordinary care as to lookout may not see the object until it is too late. You must determine whether the abrupt drop off so blended with the sidewalk that a proper lookout would not disclose its presence.

WIS JI—CIVIL 1056. The City argues that the camouflage instruction is inapplicable because it deals with objects, not designs. The City also contends that the camouflage instruction allowed the jury to excuse Voigt from any responsibility for maintaining a proper lookout. We are not persuaded.

¶11 In ***Callan***, the plaintiff was injured when she stepped on an object that appeared to be a four- to five-inch-long piece of concrete, irregularly shaped and not unlike the color of the sidewalk. ***Id.*** at 230. Although ***Callan*** involved a piece of concrete, Wisconsin's model jury instruction for "Lookout: Camouflage" cites a "hole in the road" as an example of an object description for purposes of tailoring the instruction to a specific case.[3] The "object" in the present case was the "dropoff" between the sidewalk and the adjacent concrete boulevard. Ultimately, the City's proposed distinction is immaterial. The trial court properly tailored the model jury instruction to the facts of this case.

¶12 Finally, contrary to the City's assertions, the camouflage instruction does not relieve Voigt of responsibility for maintaining a proper lookout. Rather,

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[3] WISCONSIN JI—CIVIL 1056 provides:

> The color of an object may blend with the color of the road so that a driver using ordinary care as to lookout may not see the object until it is too late to avoid a collision with it. You must determine whether (describe the object, e.g., the hole in the road) so blended with the road that a proper lookout would not disclose its presence.

it excuses the negligence of one who, as here, was exercising proper lookout but was nevertheless unable to see the dropoff because it blended with the sidewalk.

By the Court.—Judgment affirmed.

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