COURT OF APPEALS
DECISION
DATED AND FILED

July 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-2745

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

TINA HARMON,

PLAINTIFF-RESPONDENT,

GREGORY D. HARMON, SR.,
GREGORY D. HARMON, JR., A MINOR BY
GARY S. GREENBERG, HIS GUARDIAN AD
LITEM AND BRANDON A. HARMON, A MINOR BY
GARY S. GREENBERG, HIS GUARDIAN AD LITEM,

PLAINTIFFS,

V.

CITY OF MILWAUKEE,

DEFENDANT-APPELLANT,

METROPOLITAN LIFE INSURANCE COMPANY,
MERIDIAN RESOURCE CORPORATION ON BEHALF OF
ASSOCIATION MUTUAL INSURANCE COMPANY AND
MILWAUKEE COUNTY DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

WEDEMEYER, P.J. The City of Milwaukee appeals from a judgment entered in favor of Tina Harmon following the second trial of Harmon's negligence claim against the City. The second trial involved determining the comparative negligence of the parties. The City claims: (1) the trial court erred when it ruled on a motion after verdict that was filed in violation of the time limit of § 805.16(1), STATS.; (2) the trial court erred when it ruled on the motion after verdict beyond the time limit specified in § 805.16(3), STATS.; and (3) the trial court erred when it changed special verdict answers from the first trial and when it ordered a new trial for comparative negligence. Because there was credible evidence to support the verdict of the original jury, the trial court erred when it changed the special verdict answers. Accordingly, we reverse the judgment and remand with directions to reinstate the original jury verdict and enter judgment on that verdict. Based on our disposition, it is not necessary for us to address the alleged time limit violations of § 805.16, STATS. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

I. BACKGROUND

On May 14, 1993, Tina and her husband, Gregory, were walking in a northwesterly direction on West Appleton Avenue in the City of Milwaukee. Near the 8200 block, the two decided to cross mid-block from the sidewalk on the west side of the street to the east side of the street. When they reached the median strip, westbound traffic prevented them from crossing the other half of the street. As a

result, they began walking on the grassy median strip in a northwesterly direction. Gregory was walking directly in front of Tina. Gregory crossed over an electrical handhole cover on the median without incident. As Tina was crossing the handhole cover, her left leg entered the hole. She had not seen the hole before she stepped in it. The cover is approximately eighteen inches in diameter and the handhole is eighteen inches deep. The cover, and the cylinder upon which it sits, allows access to low voltage electrical cables used to operate the sodium vapor street lights.

Tina and Gregory filed a lawsuit against the City for injuries sustained as a result of this incident. In January 1996, Tina's motion for summary judgment on the issue of liability was denied. The case was tried to a jury on October 14 through October 17, 1996. Before the case was submitted to the jury, an instruction conference was held. The trial court amended WIS J I—CIVIL 8035 by deleting the notice of defect portions of paragraph three and replacing them with the inspection provisions of WIS J I—CIVIL 1395.[1] The jury found that

[1] The instruction, as given, provided:

> Every municipality has the duty to exercise ordinary care to construct, maintain, and repair it's [sic] highways so that they will be reasonably safe for public travel. By "highway," I mean the entire width of any public road, including the median strip. This duty does not require the municipality to guarantee the safety of its highways or render them absolutely safe for all person's [sic] that travel on them.
>
> It suffices if they are constructed and maintained so as to be reasonably safe. It is the duty of the City to exercise ordinary care to maintain the facilities in a reasonably safe state of repair in order to avoid obstructing or repairing [sic] the public use of the highway. The City has a further duty to exercise ordinary care to make inspections from time to time, to learn of any defects that may cause an obstruction or impairment to the public use of the highway.
>
> The frequency of such inspections is determined by what a person of ordinary intelligence and prudence would do in view of the type and life span of the materials used in the

(continued)

neither the City nor Tina was negligent. Postverdict motions were filed and various hearings were held. As pertinent to this decision, the trial court held a hearing on January 9, 1997, where it changed the answers to special verdict questions 1 and 2 to "yes." Question 1 asked: "At and immediately before the accident in question, was the City of Milwaukee negligent in the maintenance of its handhole and handhole cover in the 8300 block of West Appleton Avenue?" Question 2 asked: "If you answered Question No. 1 'Yes,' then answer this question; otherwise do not answer it; Was such negligence a cause of Tina Harmon's injury?" The trial court determined that the City must be found causally negligent as a matter of law for failing to inspect and maintain the handhole and its cover. The trial court ordered a new trial for comparative negligence purposes.

A new trial was conducted on May 6 through May 9, 1997. The verdict submitted to this jury already indicated that the City was causally negligent. The jury was to determine the percentage of negligence attributable to the City. The jury was also to determine whether Tina was negligent and, if so, what percentage of negligence was attributable to her. The jury determined that the City was 95% negligent and Tina was 5% negligent. The City filed motions

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> constructions and the likelihood or unlikelihood of damage by outside persons or forces. A highway is defective when it is not maintained so as to be reasonably safe for anticipated public use.
>
> However, before you may find a municipality negligent because of the existence of any such defective condition, you must first find that the municipality through its officers or employes had either actual notice of the defect, or constructed [sic] notice thereof, because it had existed for such a length of time before the accident that the municipality through its officers and employes and the exercise of ordinary care should have discovered it in time to remedy the defect.
>
> You may take into consideration the topography and development of the locality, as well as the amount and character of traffic on said highway and the intended use thereof by the public.

challenging the verdict, which were denied. Judgment was entered on this second verdict. The City now appeals.

II. DISCUSSION

The issue presented here is whether the trial court erred when it set aside the first jury's finding that the City was not negligent and ruled, as a matter of law, that the City must be found negligent. The City argues that by doing so, the trial court created a new rule of law and placed the burden of proof on the City to show that it was not negligent with respect to inspection and maintenance. We conclude that the trial court erred, that the judgment appealed from must be reversed, and that the original jury verdict rendered October 17, 1996, must be reinstated.

In reviewing the trial court's decision, we apply the following standards. "A motion for a directed verdict should be granted only where the evidence is so clear and convincing that a reasonable and impartial jury properly instructed could reach but one conclusion." ***Liebe v. City Finance Co.***, 98 Wis.2d 10, 18-19, 295 N.W.2d 16, 20 (Ct. App. 1980). In making this determination, the evidence must be "viewed most favorably to the party against whom the verdict is sought to be directed." ***Village of Menomonee Falls v. Michelson***, 104 Wis.2d 137, 154, 311 N.W.2d 658, 666 (Ct. App. 1981). And, "[w]hen there is *any* credible evidence to support a jury's verdict, 'even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand.'" ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 389-90, 541 N.W.2d 753, 761-62 (1995) (quoted source omitted) (ellipsis in ***Weiss***).

Here, the first jury found, based on the evidence, that the City was not negligent. Our review of the record reveals that there is credible evidence to support that determination. There was evidence that the City maintained the grassy median with regular grass cutting, and this activity would necessarily include walking or riding over the handhole on a regular basis. Thomas Schwartzenbacher, a supervisor in the City of Milwaukee Bureau of Electrical Services, testified that it was possible that this particular electrical access point or handhole and handhole cover may have been accessed to repair a street light that was not functioning in the area approximately one year before the accident. Electrical Services Supervisor Gerald Hollweck testified that when a street light was reported as out in this area, the lightman would go out and check the circuits through the handholes. The foregoing provides a jury with sufficient evidence from which it could make reasonable inferences to conclude that the City was not negligent.

Moreover, the trial court erred in taking the negligence issue away from the jury which, in effect, placed the burden of proof on the City. The trial court, by its own admission, disregarded case law and created a new rule of law to comport with "common sense." That is, the trial court determined that the burden of proving that the City inspected and maintained the handhole would be placed upon the City and, if that burden was satisfied, then and only then would the burden shift to Tina to demonstrate that the City had actual or constructive notice. Based on the trial court's recollections of the evidence at the October trial, it ruled, as a matter of law, that the City failed to satisfy this newly announced burden and, as a result, was causally negligent for Tina's injuries.

In creating this new rule of law, the trial court did not cite any legal authority, relying solely on "common sense." It erred in doing so. Case law requires some type of notice before liability is imposed. Under § 81.15, STATS.:

> 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.

This statute has been interpreted to impose liability in the case of a defect in repair or maintenance only when the city had actual or constructive notice of the defect. *See, e.g.*, ***Ward v. Town of Jefferson***, 24 Wis. 342 (1869). A city has constructive notice of a defect if the defect existed long enough before the accident so that the city, in the exercise of reasonable diligence, should have discovered it in time to take reasonable precautions to remedy the situation. *See* ***Smith v. City of Jefferson***, 8 Wis.2d 378, 385, 99 N.W.2d 119, 124 (1959). Similarly, unless it had actual or constructive notice of the defect or dangerous condition where the plaintiff fell, a property owner cannot be held liable for common law negligence. *See generally* ***Kaufman v. State St. Ltd. Partnership***, 187 Wis.2d 54, 522 N.W.2d 249 (Ct. App. 1994). Tina argued that the City had notice of the defective condition of the handhole—that the cover was rusty and loose and had a screw missing. The jury was not persuaded.

Tina also argued that the general notice requirement is inapplicable here because the handhole was a structural defect. We disagree. Both cases she cites, ***Hommel v. Badger State Inv. Co.***, 166 Wis. 235, 165 N.W. 20 (1917) and ***Hannebaum v. DiRenzo & Bomier***, 162 Wis.2d 488, 469 N.W.2d 900 (Ct. App. 1991), address structural defects as part of a building pursuant to the safe place statute. Those cases do not apply here.

By the Court.—Judgment reversed and cause remanded with directions.

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