

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 1, 1995

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(1), 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. 93-2587

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

VERA FLANAGAN,

Plaintiff-Respondent,

v.

CITY OF NEW LONDON, WISCONSIN,
CITIES AND VILLAGES MUTUAL INSURANCE COMPANY,

Defendants-Appellants,

MAIL HANDLERS BENEFIT PLAN,

Defendant.

APPEAL from a judgment of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. The City of New London and the Cities and Villages Mutual Insurance Company (collectively "New London") appeal from a judgment entered on a jury verdict awarding Vera Flanagan \$23,217.28 for injuries sustained in a fall on a city sidewalk.¹ The issues are whether New London is immune from suit, and, if not, whether the sidewalk's defect was insufficient as a matter of law. We conclude that the immunity of § 893.80(4), STATS., does not apply to actions under § 81.15, STATS., which creates municipal liability for sidewalk defects, and that New London waived any defense that it could have raised by summary judgment. Therefore, we affirm.

Flanagan tripped and fell on a city sidewalk depression of less than three-quarters of an inch. The jury found that the City was causally negligent for failing to maintain its sidewalks in proper repair, but assessed twenty-five percent contributory negligence against Flanagan. New London moved to change the verdict answers and for judgment notwithstanding the verdict. The trial court denied New London's motions and entered judgment on the verdict.

New London claims immunity under § 893.80(4), STATS., because maintaining a sidewalk is a discretionary, rather than a ministerial act. Section 81.15, STATS., creates municipal liability, not immunity. It references § 893.80 for notices of injury and claim, not for immunity. See § 893.80(1)(a) and (b). Section 893.80(4) imposes immunity for quasi-legislative and quasi-judicial functions; it does not grant immunity for sidewalk maintenance, particularly since § 81.15 expressly imposes limited liability for failure to maintain sidewalks.

New London also asserts that it is entitled to judgment as a matter of law under *McChain v. City of Fond du Lac*, 7 Wis.2d 286, 293-94, 96 N.W.2d 607, 611-12 (1959), which granted summary judgment to Fond du Lac because the sidewalk depression was only three-quarters of an inch. *Id.* at 291, 96 N.W.2d at 609-10. *McChain* did not successfully oppose summary judgment.² *Id.* at 290-91, 96 N.W.2d at 610. Here, the sidewalk's depression was less than

¹ The jury awarded \$29,095.74, however it assessed twenty-five percent negligence against Flanagan.

² The counteraffidavit was based on information and belief, rather than on personal knowledge. *Id.* at 290-91, 96 N.W.2d at 610.

three-quarters of an inch. New London relies on *McChain's* holding that such a minimal depression is not actionable as a matter of law.³ *Id.* at 293-94, 96 N.W.2d at 611-12. New London did not assert this defense before trial. Had New London moved for summary judgment, *McChain* would have supported its position.⁴

Section 81.15, STATS., imposes limited liability for the "insufficiency or want of repairs" of a sidewalk which the city "is bound to keep in repair." Generally, "insufficiency or want of repairs" is a jury question. The jury found New London negligent for failing to maintain its sidewalk. Although New London defended its policy only to correct defects of more than three-quarters of an inch, its policy does not protect it from liability. The jury considered its policy, but determined that this particular defect constituted "insufficiency or want of repairs." The trial court instructed the jury on sidewalk defects and insufficiencies. WIS J I—CIVIL 8035 instructs that "[e]very municipality has the duty to exercise ordinary care to construct, maintain and repair its sidewalks so that they will be reasonably safe for public travel." It expressly instructs that sidewalks must be reasonably, not absolutely, safe. New London did not object to this instruction.⁵ *See* § 805.13(3), STATS. New London's acquiescing to a jury trial under § 81.15 by not moving for summary judgment, and its failing to object to WIS J I—CIVIL 8035, constitute waiver to the proposed *McChain* defense that this defect was not actionable as a matter of law. *See McChain*, 7 Wis.2d at 293-94, 96 N.W.2d at 611-12.

By the Court.—Judgment affirmed.

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

³ The angle of the sidewalk rendered the depression between one-quarter and three-quarters of an inch, depending upon precisely where Flanagan fell. Assuming *arguendo* that Flanagan fell at the most depressed point, the distance was slightly less than three-quarters of an inch.

⁴ Because New London did not move for summary judgment, we cannot anticipate and evaluate Flanagan's opposition to the motion. *See* § 802.08, STATS.

⁵ New London successfully moved to modify the instruction's phraseology on unrelated matters.