COURT OF APPEALS
DECISION
DATED AND FILED

April 21, 1998

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. 96-3283

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

RICKLY WESLEY, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF RONDA WESLEY,

PLAINTIFF-APPELLANT,

V.

THE CITY OF MILWAUKEE, A MUNICIPAL CORPORATION,

DEFENDANT-RESPONDENT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, A WISCONSIN CORPORATION, AND THEODIS DUKES,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN J. DiMOTTO, Judge. *Affirmed.*

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

PER CURIAM. Rickly Wesley, individually, and as Special Administrator of the Estate of Ronda Wesley, appeals from a grant of summary judgment in favor of the City of Milwaukee on the basis that the City is entitled to immunity from suit pursuant to § 893.80(4), STATS. Wesley claims the trial court erred in granting summary judgment because the open and obvious danger exception to the governmental immunity rule applies in this case and because, after the City made the discretionary decision to place the light pole involved in this case, Wesley contends the actual placement of the pole and its maintenance are ministerial duties. Because the City is entitled to immunity pursuant to § 893.80(4), we affirm.

I. BACKGROUND

On July 11, 1993, Ronda Wesley was driving northbound on Martin Luther King, Jr. Drive. She was killed when the car driving next to her collided with her car, forcing it off the roadway and into a concrete light pole. Rickly Wesley filed suit against the offending driver and the City. Wesley alleged that the City was negligent for failing to move the light pole further away from the roadway and/or failing to replace the concrete pole with a breakaway pole. This appeal involves only the claim against the City.

The City filed a motion for summary judgment on the bases that it was entitled to immunity under § 893.80(4), STATS., as it did not violate any duty owed to the plaintiff, and the light pole placement was not the proximate cause of Ronda's death. The trial court granted the motion ruling that the City was immune from suit. Wesley now appeals.

II. DISCUSSION

This appeal arises following a grant of summary judgment. Our standard for reviewing such cases has been set forth in numerous cases and need not be repeated here. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 314-15, 401 N.W.2d 816, 820 (1987). Our review is *de novo*. *See* ***id.***

The issue in this case is whether the City is entitled to immunity from suit for its placement of a concrete light pole within one foot of the street. The statute which sets out the governmental entities immunity is § 893.80(4), STATS., which provides:

> 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 employes nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

The general rule is that if the conduct at issue involves a discretionary duty, the City is entitled to immunity, but if the conduct involves a ministerial duty, the City is not immune from suit. *See* ***Estate of Cavanaugh v. Andrade***, 202 Wis.2d 290, 299, 550 N.W.2d 103, 107 (1996). An action is ministerial when "it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." ***C.L. v. Olson***, 143 Wis.2d 701, 711-12, 422 N.W.2d 614, 617 (1988). There are exceptions to the general rule, including a known compelling danger, which may

transform what might otherwise be considered a discretionary duty into a ministerial one. *See* ***id.*** at 713-15, 422 N.W.2d at 618-19.

Therefore, the resolution of this case turns on whether the placement and/or maintenance of the light pole involves a discretionary action or a ministerial action and whether the light pole constituted an "open and obvious danger" so as to compel action by the City.

In answering these questions, there are several additional pertinent facts that should be noted. The concrete light pole was put in place sometime before 1950 in order to provide street lighting and power to the cable car system. The City does not have any rules, ordinances or regulations governing placement of street lights.

We conclude that the decision to place the light pole was a discretionary one. There are no rules or regulations dictating how, when or why to place street lights. There is no law prescribing where a light pole should be placed when a decision is made to install it.[1] There is simply nothing in the record to demonstrate that the decision to install the light pole in this case, or where to install it, was dictated with such "certainty that nothing remains for judgment or discretion." ***Id.*** at 711-12, 422 N.W.2d at 617. Thus, the City's decision to install the light pole involved discretionary action.

[1] Wesley argues that the American Association of State Highway and Transportation Officials (ASHTO) policy guidelines, which recommend placing light poles 10 feet from the street, somehow create a ministerial duty. We do not agree. The ASHTO recommendations are advisory and they are not the law in this state, nor are they mandated by the City.

Next, we must determine whether the "open and obvious danger" exception applies. We conclude that it does not and adopt the trial court's reasoning:

> [A]n open and obvious danger really is one -- it's a condition that any reasonable person would or should recognize presents a serious risk. That light post has been there for over 50 years. There is no evidence that it was an open and obvious danger, that it is so compelling that the City had to have known that they had an imperative obligation to do something.

Thus, we agree that the City is entitled to immunity from this suit pursuant to § 893.80(4), STATS., because the placement and/or maintenance of the light pole involved a discretionary duty and did not constitute an open and obvious danger. Because we have concluded that immunity bars this action, there are no genuine issues of material fact in dispute and summary judgment was appropriately granted.[2]

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[2] Wesley also argues that once a municipality decides to place a sign or light pole, the actual placement of the object and its maintenance are ministerial duties. He cites ***Firkus v. Rombalski***, 25 Wis.2d 352, 130 N.W.2d 835 (1964) in support of this argument. In ***Firkus***, our supreme court held that, although a town had no initial duty to erect a stop sign, having done so, it had a duty to properly maintain it. *See* ***id.*** at 358, 130 N.W.2d at 838. Therefore, when the town had actual knowledge that a stop sign was missing for 19 days, it had a duty to replace the sign or take other measures to warn the public of the danger. *See* ***id.*** at 359, 130 N.W.2d at 838. The instant case, however, is very different from the facts of ***Firkus***. ***Firkus*** involved a stop sign, which is a traffic control device that has significant impact on the actual flow or movement of vehicles through an intersection. The instant case involves a light pole that does not control the movement of traffic. Further, Firkus was decided in part on the basis that ***Holytz v. City of Milwaukee***, 17 Wis.2d 26, 115 N.W.2d 618 (1962) abolished governmental immunity. With the enactment of § 893.80(4), STATS., that is no longer the case.

Wesley also directs us to ***Chart v. Dvorak***, 57 Wis.2d 92, 203 N.W.2d 673 (1973), but we likewise find ***Chart*** distinguishable from the instant case. Although the court in ***Chart*** held highway officials amenable to suit for sign placement, the reasoning was based on the fact that the placement of the sign was inconsistent with the directive of the State Highway Commission's Uniform Traffic Manual. *See* ***id***. at 99-102, 203 N.W.2d at 677-78. Thus, we conclude that the case law Wesley proffers does not control our decision in this case.

By the Court.—Judgment affirmed.

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