COURT OF APPEALS
DECISION
DATED AND FILED

November 30, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-2393

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

CONRAD L. AICHELE AND AMANDA L. AICHELE, MINORS, BY THEIR GUARDIAN AD LITEM BARBARA K. MILLER, BONNY A. AICHELE, NICHOLAS L. AICHELE, LAURAINE AICHELE AND LAURAINE AICHELE AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF CONRAD AICHELE,

PLAINTIFFS-APPELLANTS,

V.

CLARK COUNTY AND XYZ INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Clark County: MICHAEL W. BRENNAN, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. The surviving family members of Conrad Aichele appeal from a summary judgment decision dismissing their wrongful death action against Clark County. The dispositive issue is whether plowed snow which melts, is sprayed across a highway by motor vehicle traffic, and then refreezes constitutes an artificial accumulation of ice, so as to preclude the County from claiming a three-week grace period from liability under WIS. STAT. § 81.15 (1997-98).[1] We conclude that the formation of ice in such a manner constitutes a natural accumulation and therefore affirm the trial court's determination that the County was immune from suit.

BACKGROUND

¶2 This suit arose from a fatal traffic accident which occurred on Easter Sunday in 1997 on Highway 29 in Clark County. Conrad Aichele was a passenger in a car being driven by his seventeen-year-old son Nicholas. The car hit a patch of ice at the intersection of Highway 29 and Bachelor's Avenue and rolled several times. Conrad was ejected from the vehicle and died of his injuries.

¶3 Earlier in the evening on the night of the accident, county officials had been informed by a Stanley police officer that there was water running across the highway from melting snowbanks. A Clark County deputy had also seen the running water but concluded that there was no immediate danger and took no action to ameliorate the situation. After the accident, a county employee pushed the snowbanks further back and cut a ditch to divert the running water away from the highway.

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶4 Conrad's family members filed suit against the County, alleging that it was negligent in maintaining the highway because it should have been aware of the danger presented by melting snowbanks at that intersection and should have taken measures similar to those it took after the accident, but in advance. The County responded that it was immune from suit under WIS. STAT. § 81.15. The trial court agreed with the County and dismissed the suit on summary judgment.

STANDARD OF REVIEW

¶5 This court applies the same summary judgment methodology as that employed by the circuit court. WISCONSIN STAT. § 802.08; ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim and then review the answer to determine whether it joins issue. ***Id.*** If we conclude that the pleadings are sufficient to join an issue of law or fact, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. ***Id.*** If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. ***Id***.

ANALYSIS

¶6 We are satisfied that the complaint stated a proper negligence claim and that the answer joined issues of fact and law. We look to the facts set forth in the affidavits to determine whether summary judgment is warranted on the issue of immunity under WIS. STAT. § 81.15.

¶7 WISCONSIN STAT. § 81.15 sets forth the conditions under which a county may be liable for the negligent maintenance of a highway. The section provides in relevant part:

> No action may be maintained to recover damages for injuries sustained by reason of an accumulation of snow or ice upon any bridge or highway, unless the accumulation existed for 3 weeks.

Caselaw precludes a county from invoking the statutory grace period if the accumulation was artificially, rather than naturally, created. ***Laffey v. City of Milwaukee***, 4 Wis. 2d 111, 113-15, 89 N.W.2d 801 (1958) (where accumulation of ice on sidewalk came from water discharged by a city fire department). Naturally occurring snow or ice is not rendered artificial when it is merely moved from streets or sidewalks into snowbanks. ***Damaschke v. City of Racine***, 150 Wis. 2d 279, 284-85, 441 N.W.2d 332 (Ct. App. 1989); ***Kobelinski v. Milwaukee & Suburban Transp. Corp.***, 56 Wis. 2d 504, 514, 202 N.W.2d 415 (1972). As we explained in ***Damaschke***:

> Accumulation of ice and snow is a natural incident of the climate in Wisconsin during the winter months. Municipalities should be encouraged to clear their highways and sidewalks of snow and ice. A natural consequence of plowing streets is that the snow must be placed somewhere. To hold the limitations of sec. 81.15, Stats., inapplicable to snow that has been pushed to a new location in the course of snow-removal operations would have the undesirable effect of encouraging municipalities to leave snow and ice where it falls on the highways and sidewalks so as to enjoy the three-week period of immunity.

See ***Damaschke***, 150 Wis. 2d at 285 (citations omitted). However, ice which forms on a sidewalk or roadway as the result of a flawed drainage system constitutes an artificial accumulation. ***Sambs v. City of Brookfield***, 66 Wis. 2d 296, 306, 224 N.W.2d 582 (1975) (where inadequate culverts or drainage ditches along the side of the road allowed melting snow to spread over the roadway).

¶8 The appellants first claim that the immunity set forth in WIS. STAT. § 81.15 is unavailable to the County in this case because the there was no evidence

here that the snow which was pushed into snowbanks and subsequently melted had fallen fewer than three weeks prior to the accident. They point out that the reviewing courts in ***Damaschke*** and ***Kobelinski*** listed the dates on which snowfalls had occurred in the weeks immediately preceding the accidents. We note that the ***Damaschke*** and ***Kobelinski*** courts also listed the dates on which the snow had been shoveled or plowed. However, because the snowfalls, plowing, and shoveling had all occurred within three weeks before the accidents at issue in those cases, the reviewing courts were never called upon to, and did not, address whether the three-week immunity periods were being calculated from the dates of the snowfalls or from the dates of the shoveling or plowing.

¶9 We are persuaded that the relevant accumulation date here was the day that the melting snow ran onto the highway and refroze, because that was the date on which the ice which caused the accident accumulated on the roadway. Our conclusion is consistent with the reference in ***Sambs*** to the "accumulation of water on the highway" due to inadequately drained runoff. ***Sambs***, 66 Wis. 2d at 305. Therefore, the accumulation of ice at issue in this case occurred within the three-week immunity period.

¶10 The appellants next argue that the accumulation of ice in this case was artificial because it resulted from the County's failure to provide an adequate drainage system for melting snow. They claim that, as in ***Sambs***, the jury should be allowed to determine whether the County had sufficient notice to trigger a duty to remedy the hazard caused by melting snow freezing on the highway. ***Id.*** at 306 (noting "there is a duty to provide proper drainage where it is known to the public authority that a dangerous condition exists"). We conclude, however, that the facts of this case are distinguishable from those in ***Sambs***.

¶11 In ***Sambs***, the City of Brookfield had created a set of ditches and culverts which were designed to divert runoff from melting snow away from the road. It turned out that the culverts were inadequate to handle the flow of water from a normal thaw. ***Id.*** at 301-02. As a result, the culverts became blocked by ice, preventing water from going under the road instead of onto it. This blockage had occurred on numerous occasions. Thus, in ***Sambs***, the defective drainage system, which the municipality had created and maintained, contributed to the creation of the hazard.

¶12 Here, however, Clark County had no drainage system in place. The only action it took which could be deemed to have contributed to the creation of the runoff hazard was clearing snow off of the road. Yet, as discussed above, moving snow from one location to another does not create an "artificial" accumulation. ***Damaschke***, 150 Wis. 2d at 284-85. We therefore conclude that the ordinary melting process of snow which has been plowed into a snowbank produces a "natural" accumulation of water or ice if it refreezes. Our decision does not eliminate the duty of municipalities to provide an adequate drainage system for melting snow; it merely affords municipalities the three-week grace period set forth in WIS. STAT. § 81.15 before they can be held liable.

By the Court.—Judgment affirmed.

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