

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 12, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP189

Cir. Ct. No. 2003CV347

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

DONNA MARTINEZ AND JESS MARTINEZ, JR.,

PLAINTIFFS-APPELLANTS,

HUMANA WISCONSIN HEALTH ORGANIZATION,

PLAINTIFF,

v.

WAUKESHA COUNTY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
JACQUELINE R. ERWIN, Judge. *Affirmed.*

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Donna and Jess Martinez appeal the circuit court’s summary judgment in favor of Waukesha County. They argue that the area where Donna Martinez was injured is a “highway” under WIS. STAT. § 81.15 (2001-02).¹ In the alternative, they argue that whether the area is a highway under the statute is a question of fact for the jury to decide. We affirm.

¶2 Donna Martinez drove to a park, parked her car, got out, and headed toward a walking path with her dog. There were posts planted to prevent cars from driving onto the walking path, but one of the posts was missing, leaving a hole in the ground. Martinez stepped in the hole and injured her leg. Donna and Jess Martinez brought an action against Waukesha County, alleging that it had negligently maintained the area. The circuit court granted summary judgment in favor of the county on the grounds of governmental immunity.

¶3 We review a decision granting summary judgment *de novo*, benefiting from the circuit court’s analysis. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶21, 241 Wis. 2d 804, 623 N.W.2d 751. Summary judgment is appropriate where there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*, ¶24.

¶4 Donna and Jess Martinez contend that they are entitled to recover for the county’s negligence under the exception to immunity set forth in WIS. STAT. § 81.15, which provided:

Damages caused by highway defects; liability of town and county. If damages happen to any person or his or her property by reason of the insufficiency or want of repairs of

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

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.

They argue that the area where Donna was injured is part of a “highway,” as defined by the statute.

¶5 We have previously explained that the definition of “highway” under WIS. STAT. § 81.15 includes “the entire width between the boundary lines of every way open to the use of the public as a matter or right for the purposes of vehicular travel.” See *Ellerman v. City of Manitowoc*, 2003 WI App 216, ¶8, 267 Wis. 2d 480, 671 N.W.2d 366. In *Ellerman*, we ruled that a public parking lot came within the definition of a highway because it was “available to the entire community for vehicular travel.” *Id.*, ¶10. However, we see no reason to extend the boundaries of the paved area of the parking lot to include a grassy area outside the paved area. The area where Donna Martinez was walking her dog was not “available to the entire community for *vehicular* travel.” It was a walking path on which vehicles were not permitted.

¶6 Donna and Jess Martinez point to the fact that the supreme court has included the shoulder area of a highway as falling within the definition of a highway under WIS. STAT. § 81.15, and contend the area where Donna was injured is analogous to a shoulder of a highway. See *Morris v. Juneau County*, 219 Wis. 2d 543, ¶29, 579 N.W.2d 690 (1988). We disagree. The shoulder falls within “the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel,” *Ellerman*, 267 Wis. 2d 480, ¶8, and is designed to allow vehicles to pull over in cases of emergency. In contrast, the very purpose of the parking lot is to park the car and

get out and go somewhere. The area outside of the parking lot is not designed for vehicle use.

¶7 In sum, we conclude that the circuit court properly granted summary judgment because the term “highway” in WIS. STAT. § 81.15 does not encompass the grassy area where Martinez was injured. This determination was a question of law, not a question of fact, and was properly decided by summary judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

