Polling Vote Record

Committee on Transportation and Information Infrastructure

Date: Wednesday, November 5, 2003

Ballot Deadline: **Thursday, November 6, 2003 by 12:00 PM***

**** The 12:00 PM ballot deadline is due to an effort to have the bill available for a Rules Committee meeting later this afternoon.***

Bill Number: Assembly Bill 255

Motion: ***Concurrence of Assembly Bill 255.***

Moved by: Senate Committee on Transportation and Information Infrastructure

---

Committee Member	Aye	No	Not Voting
Senator Roger Breske	☒	☐	☐

Signature: Roger Breske

Ballot Rec'd:

Date: 5-NOV-03 **Time**: 1142 **Signature**: D. L. Liststadt

Polling Vote Record

Committee on Transportation and Information Infrastructure

Date: Wednesday, November 5, 2003

Ballot Deadline: **Thursday, November 6, 2003 by 12:00 PM***

** The 12:00 PM ballot deadline is due to an effort to have the bill available for a Rules Committee meeting later this afternoon.*

Bill Number: Assembly Bill 255

Motion: ***Concurrence of Assembly Bill 255.***

Moved by: Senate Committee on Transportation and Information Infrastructure

---

Committee Member	Aye	No	Not Voting
Senator Ted Kanavas	☒	☐	☐

Signature: Ted

Ballot Rec'd:

Date: 5-Nov-03 **Time**: 1140 **Signature**: M. A. Wilstaff

Polling Vote Record

Committee on Transportation and Information Infrastructure

Date: Wednesday, November 5, 2003

Ballot Deadline: **Thursday, November 6, 2003 by 12:00 PM***

**** The 12:00 PM ballot deadline is due to an effort to have the bill available for a Rules Committee meeting later this afternoon.***

Bill Number: Assembly Bill 255

Motion: ***Concurrence of Assembly Bill 255.***

Moved by: Senate Committee on Transportation and Information Infrastructure

---

Committee Member	Aye	No	Not Voting
Senator Joseph Leibham	☑	☐	☐

Signature: Joe Leibham

Ballot Rec'd:

Date: 5-NOV-03 **Time**: 1223 **Signature**: M. A. Wilstatt

Polling Vote Record

Committee on Transportation and Information Infrastructure

Date: Wednesday, November 5, 2003

Ballot Deadline: **Thursday, November 6, 2003 by 12:00 PM***

**** The 12:00 PM ballot deadline is due to an effort to have the bill available for a Rules Committee meeting later this afternoon.***

Bill Number: Assembly Bill 255

Motion: ***Concurrence of Assembly Bill 255.***

Moved by: Senate Committee on Transportation and Information Infrastructure

---

Committee Member	Aye	No	Not Voting
Senator Neal Kedzie	☒	☐	☐

Signature: Neal J. Kedzie

Ballot Rec'd:

Date: 6-NOV-03 **Time**: 1124 **Signature**: R. L. Uphoff

Polling Vote Record

Committee on Transportation and Information Infrastructure

Date: Wednesday, November 5, 2003

Ballot Deadline: **Thursday, November 6, 2003 by 12:00 PM***

** The 12:00 PM ballot deadline is due to an effort to have the bill available for a Rules Committee meeting later this afternoon.*

Bill Number: Assembly Bill 255

Motion: ***Concurrence of Assembly Bill 255.***

Moved by: Senate Committee on Transportation and Information Infrastructure

---

Committee Member	Aye	No	Not Voting
Senator Mark Meyer	☑	☐	☐

Signature: Mark Meyer

Ballot Rec'd:

Date: 5-oct-03 **Time**: 1445 **Signature**: M.C. Wilstead

- Home
- Lobbying in Wisconsin
- Organizations employing lobbyists
- Lobbyists

PRESENTED BY THE WISCONSIN ETHICS BOARD

as of Tuesday, October 28, 2003

2003-2004 legislative session

Legislative bills and resolutions

(search for another legislative bill or resolution at the bottom of this page)

Text, Sponsors and Analysis
Status and Fiscal Estimate
Lobbying Effort on this item

Assembly Bill 255

liability of cities, villages, towns, and counties for damages caused by an insufficiency or want of repair of a highway. (FE)

Organization		These organizations have reported lobbying on this proposal:	Place pointer on icon to display comments, click icon to display prior comments		
Profile	Interests		Date Notified	Position	Comments
		AFSCME Council 11	4/9/2003		
		City of Madison	7/15/2003		
		City of Milwaukee	7/11/2003		
		Dane County	7/2/2003		
		Kenosha County	4/17/2003		
		League of Wisconsin Municipalities	5/18/2003		
		Outagamie County Board of Supervisors	5/1/2003		
		State Bar of Wisconsin	5/12/2003		
		Waukesha County	5/14/2003		
		Waukesha County Municipal Executives	4/14/2003		
		Wisconsin Academy of Trial Lawyers	4/9/2003		
		Wisconsin Alliance of Cities Inc	4/14/2003		
		Wisconsin Builders Association	5/13/2003		

●	●	Wisconsin Counties Association	5/23/2003		
●	●	Wisconsin Insurance Alliance	7/18/2003		
●	●	Wisconsin Professional Police Association	5/14/2003		
●	●	Wisconsin Towns Association	5/14/2003		

Select a legislative proposal and click "go"

House Assembly / Senate

Proposal Type Bill / Joint Resolution / Resolution

Proposal Number 255 (enter proposal number)

Legislative Session 2003 Regular Session

Go

Summary of Assembly Bill 471

Sponsored by Representatives LeMahieu, Ladwig, Towns, Kestell, Townsend, M. Lehman, Gard, F. Lasee, Seratti, Grothman, Gunderson, Ainsworth, Coggs, Hundertmark, McCormick, Freese, Ott and Bies; cosponsored by Senators Reynolds, Brown, Darling, Breske, Lazich, Roessler, Leibham and A. Lasee.

BACKGROUND

Under current law, if a town incurs a cost for a fire call on a county trunk highway, the county maintaining the highway is required to reimburse the town up to $200 for the costs if the town submits written proof that the town has made a reasonable effort to collect the costs from the person to whom the fire call was provided. If the town collects the costs from such a person after the county has reimbursed the town, the town is required to return the amount collected to the county.

Also under current law, if a town incurs costs for a fire call on a state trunk highway or any highway that is a part of the national system of interstate highways and maintained by the Department of Transportation (DOT), DOT is required to reimburse the town up to $500 for the costs, even if the fire equipment is not actually used, if the town submits written proof that the town has made a reasonable effort to collect the costs from the person to whom the fire call was provided. If the town collects the costs from such a person after DOT has reimbursed the town, the town is required to return the amount collected to DOT.

Current law also requires DOT to reimburse any village with a volunteer fire department, or city with a combination paid-volunteer fire department, up to $500 for any call on a state trunk highway or any highway that is part of the national system of interstate highways maintained by DOT.

SUMMARY OF AB 471

Under Assembly Bill 471, a town is required to first attempt to collect the costs for responding to a vehicle fire on a county trunk highway from the insurer of the person to whom the fire call was provided. In addition, a city or village with a volunteer fire department, or a town, is required to first attempt to collect such costs for responding to a vehicle fire on a state trunk highway or any highway that is a part of the national system of interstate highways and maintained by DOT, from the insurer of the person to whom the fire call was provided. The bill specifies that the city, village, or town may attempt to collect the cost from the person only if the city, village, or town is unsuccessful in its efforts to collect from the person's insurer or if the person has no insurer.

FISCAL EFFECT

A fiscal estimate prepared by the Department of Transportation indicates there is no state or local fiscal effect for Assembly Bill 471.

PROS

1. Assembly Bill 471 allows local governments to first attempt to bill an insurance company, instead of traffic accident victims or the families of traffic fatalities.

SUPPORTERS

Rep. Dan LeMahieu, author; Sen. Tom Reynolds, lead co-sponsor; David Bloom, Wisconsin State Fire Chiefs Association; Paul Guilbert, Jr., Village of Pleasant Prairie Fire Chief; Tanace Matthiesen, Wisconsin Department of Transportation; and Tom Fonfara, Wisconsin State Firefighters Association. **In addition, John Hill of the Sheboygan Press who wrote editorials asking for a change in the law similar to AB 471 as to protect local VOLUNTEER fire & rescue from the scrutiny of sending bills to recover costs to local families that may have lost a loved one in an auto accident.**

Assembly Bill 471 was passed unanimously out of both Assembly and Senate Committees who heard the bill. Floor votes were both voice votes.

January 15, 1999

Jim Thiel/OGC/DOT

LAW NOTE

DOES MORRIS V. JUNEAU COUNTY CHANGE COUNTY EXPOSURE TO LIABILITY FOR MAINTENANCE OF STATE TRUNK HIGHWAYS?

Answer: **NO.** It is a procedural case; it does not have any significant effect on county exposure to liability or existing legal relationships between WISDOT and the counties under contracts for maintenance of state trunk highways under sec. 84.07(1), Stats.

Leading Case: **Morris v. Juneau County**, 219 Wis.2d 544 (1998); Motion for Reconsideration denied August 25, 1998, affirming **Morris v. Juneau County**, 211 Wis.2d 890 (Unpublished) (Ct. App. 1997)

Subsequent Case: **Mariades v. Marquette County**, No.97-3549 (Unpublished Ct. App. October 15, 1998); Same result as **Morris, supra**, but CTH.

Abstract:

A motorist (Morris) was westbound on STH 82 when an eastbound vehicle went out of control, crossed the center line striking the Morris vehicle. Morris was severely injured and filed a claim against the other motorist and Juneau County. The other motorist settled out-of-court. The claim against Juneau County and Juneau County's insurance company alleged that the vehicle that struck Morris lost control due to a drop-off or rut between the blacktop and the aggregate gravel shoulder of the road. This claim was based on this highway defect and the want of maintenance or repair by the County.

The County answered that it was immune from liability because the maintenance involved discretionary decisions for which governmental units are immune from liability. The trial court agreed and dismissed the case on this legal, procedural basis, not on the merits. Morris appealed to the Court of Appeals. The Court of Appeals said NO. The case must go to trial because there is another statute, sec. 81.15, Stats., that applies that has nothing to do with discretionary functions and makes the county liable for insufficiency or want of repairs of a highway, regardless of whether the acts were discretionary. The statute reads in part:

> "81.15 **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 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. If the damages happen by reason of the insufficiency or want of repairs of a highway which any county by law or by agreement with any town, city or village is bound to keep in repair, or which occupies any land owned and controlled by the county, the county is liable for the damages and the claim for damages shall be against the county. ... The amount recoverable by any person for any damages so sustained shall not exceed $50,000."

The County appealed, but the Wisconsin Supreme Court also agreed that sec. 81.15, Stats., meant the case had to go to trial on the merits. **This statute has been on the books since 1849. Attachment A.** [Note: The original statute applied damages to a person, his team, carriage or other property due to insufficiency or want of repairs of any road.] The Supreme Court pointed out that when the Court and Legislature made changes affecting governmental immunity in the 1960s and 1970s, the Legislature **never changed this statute**. Hence, there is not now and never has been governmental discretionary immunity under sec. 81.15, Stats., and the rights and remedies under sec. 81.15, Stats., have existed for 150 years. A computer search shows that 175 Wisconsin appellate court cases applied sec. 81.15, Stats., over the years from 1884 to the present. A subsequent also confirms this decision. The Court also rejected a somewhat specious County argument that the shoulder is not part of the highway. The County did not challenge whether a contract with WISDOT under sec. 84.07(1), Stats., for STH maintenance thereby extended sec. 81.15, Stats. **Attachment B.**

- What the case decides? **The County is not now and never has been immune from liability due to alleged highway maintenance defects.** Must go to trial; should never have been dismissed in first place. Section 81.15, Stats., has been on the books for 150 years.

- What the case does not decide? It does **not** decide that the County is liable; just that County is not immune as a matter of law from any and all liability for damage due to highway maintenance defects. Understand case scheduled on merits around March 1999.

WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: SENATOR JOSEPH LEIBHAM AND MEMBERS OF THE SENATE COMMITTEE ON TRANSPORTATION AND INFORMATION INFRASTRUCTURE

FROM: Don Salm, Senior Staff Attorney

RE: Analysis of 2003 Assembly Bill 255, Relating to Liability of Cities, Villages, Towns, and Counties for Damages Caused by an Insufficiency or Want of Repair of a Highway

DATE: October 28, 2003

This memorandum analyzes 2003 Assembly Bill 255, relating to liability of cities, villages, towns, and counties for damages caused by an insufficiency or want of repair of a highway. On September 25, 2003, the bill was passed by the Assembly on a vote of Ayes, 55; Noes, 40. The Senate Committee on Transportation and Information Infrastructure will hold a public hearing on the bill **on Wednesday, October 29, 2003, at 12:00 p.m., in Room 201 Southeast, State Capitol, Madison.**

CURRENT LAW

Under current law:

1. Cities, villages, towns, and counties are **immune** from claims arising out of the performance of a **discretionary duty**, or duty that requires a governmental entity to use judgment or discretion in carrying out the duty. Cities, villages, towns, and counties are liable for damages of up to $50,000 arising out of the performance of a nondiscretionary duty.

2. Cities, villages, towns, and counties are liable for damages of up to $50,000 to a person or property resulting from an **insufficiency or want of repair** of a highway, which includes shoulders, sidewalks, and bridges. Cities, villages, towns, and counties are also liable for damages resulting from the accumulation of snow or ice that has existed on a highway for at least three weeks [s. 81.15, Stats.].

In *Morris v. Juneau County*, 219 Wis. 2d 544 (1998) (a copy of which is attached), the Wisconsin Supreme Court held that the statutory provision imposing liability on cities, villages, towns, and counties for highway defects is an **exception** to the more general provision granting immunity to cities, villages, towns, and counties from liability arising out of the performance of discretionary duties.

3. If the negligence or deliberate wrongdoing of a person or private corporation contributes to the creation of a highway defect that results in damages to a person or property, the negligent or wrongdoing person or corporation is **primarily liable** and the city, village, town, or county is **secondarily liable** only if the negligent person or the person who committed the wrong does not satisfy the judgment, and the city, village, town, or county is otherwise liable for the damages [s. 81.17, Stats.].

2003 ASSEMBLY BILL 255

2003 Assembly Bill 255 eliminates the specific immunity exception under which cities, villages, towns, and counties may be held liable for an insufficiency or want of repairs of a highway. This bill does not affect the immunity exception under which cities, villages, towns, and counties may be held liable for damages of up to $50,000 for the accumulation of snow or ice that has existed on a highway for at least three weeks.

The bill also **eliminates** secondary liability for cities, villages, towns, and counties (by replacing s. 81.17, Stats.).

This bill, if enacted into law, **first applies** to actions arising on the effective date of the new law.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

DLS:ksm;wu
Attachment

Attachment

Morris v. Juneau County

John T. Morris and Jeanne Morris, Plaintiffs-Appellants, v. Juneau County, a municipal corporation and Wisconsin County Mutual Insurance Corporation, Defendants-Respondents-Petitioners.

No. 96-2507

SUPREME COURT OF WISCONSIN

219 Wis. 2d 543; 579 N.W.2d 690; 1998 Wisc. LEXIS 88

April 28, 1998, Oral Argument
June 30, 1998, Opinion Filed

PRIOR HISTORY: **[***1]** REVIEW of a decision of the Court of Appeals. COURT: Circuit. COUNTY: Juneau. JUDGE: Patrick Taggart.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellee county sought review of the judgment from the Court of Appeals (Wisconsin), which held that the governmental immunity of Wis. Stat. § 893.80(4) did not apply to a suit brought by appellants under Wis. Stat. § 81.15 to recover personal injury damages from an accident that was due in part to the negligent repair of the shoulder of a highway.

OVERVIEW: One appellant was injured when another vehicle traveling toward him hit a rut on the shoulder of the road, lost control, and came back over the center line striking his vehicle. Reversing the summary judgment that the circuit court granted in favor of the county, the appellate court determined that the county was not immune from the suit. On appeal, the court held that because the general immunity given to counties under Wis. Stat. § 893.80(4) was not applicable when the conditions of Wis. Stat. § 81.15 were met, as they were in this case, and because the shoulder was part of the highway, the appellate court decision was affirmed. The court found that the plain language of the statutes appeared to be in conflict. In order to give effect to both statutes, the court concluded that § 81.15, the more specific statute, provided an exception to the general grant of immunity under Wis. Stat. § 893.80(4). Additionally,

the state had long defined highway as including the shoulder portion of the road; therefore, the rut on the shoulder was part of the highway as that term was used in Wis. Stat. § 81.15.

OUTCOME: The court affirmed the appellate court judgment in favor of appellants.

COUNSEL: For the defendants-respondents-petitioners there were briefs by Bradley D. Armstrong, Paul Voelker, Christopher P. Koback and Axley Brynelson, Madison and oral argument by Christopher R. Koback.

For the plaintiffs-appellants there was a brief and oral argument by William H. Rudolph, Hillsboro.

Amicus curiae was filed by John J. Prentice, Andrew T. Phillips and Prentice & Phillips, Milwaukee for the Wisconsin Counties Association.

Amcus curiae was filed by Michael Riley and Atterbury, Riley & Luebke, S.C., Madison for the Wisconsin Academy of Trial Lawyers.

JUDGES: WILLIAM A. BABLITCH, J.

OPINIONBY: WILLIAM A. BABLITCH

OPINION: **[*546]** **[**691]**

P1 WILLIAM A. BABLITCH, J. Juneau County (County) seeks review of a decision of the court of appeals which held that the County was not immune from suit for alleged negligence in repairing the shoulder of a highway. John T. Morris (Morris) was injured when another vehicle traveling towards him hit a rut on the shoulder of the road, lost control, and came back over the center line striking his vehicle. Because we conclude that the general **[***2]** immunity given counties under Wis. Stat. § 893.80(4) is not applicable when the conditions of Wis. Stat. § 81.15 are met, as they are here, and because we conclude that the shoulder is part of the highway, we affirm the decision of the court of appeals. In addition, because we conclude that the Morrises sufficiently stated a claim in their pleadings, we need not determine whether Ms. Morris' affidavit, filed after the County's motion for summary judgment and alleging that there was also a pothole in the highway, was inconsistent with her prior deposition testimony and filed only to create a genuine issue of material fact.

P2 The following facts are relevant to this appeal. On February 23, 1994, the plaintiff, Morris, was driving his vehicle westbound on State Highway 82 when a vehicle driven eastbound by Jean Williams (Williams) went out of control, crossed the center line, and hit the Morris vehicle. Mr. Morris suffered severe injuries as a result of the accident.

P3 Mr. Morris and his wife, Jeanne Morris, filed a Notice of Claim with Juneau County, a municipal corporation, pursuant to Wis. Stat. § 893.80(1)(b) (1991-92), n1 alleging that Williams lost control of her car due **[***3]** to a drop-off (also referred to as a rut) between **[*547]** the blacktop and the aggregate gravel shoulder of the road. The claim was based on this highway defect and the County's want of maintenance or repair. The County denied the

claim and served a notice of disallowance on the plaintiffs.

- - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n1 All references to Wisconsin Statutes are to the 1991-92 version unless otherwise noted.

- - - - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - - -

P4 The Morrises then filed a Summons and Complaint against the County and its insurance company, alleging that the collision between Morris and Williams occurred in part due to a highway defect resulting from a want of maintenance or repair by Juneau County. Because the dispute with Williams was settled out-of-court, the subject of the action against the County was the apportionment of the County's negligence contributing to Morris' injury. Mr. Morris requested damages for his medical expenses, pain and suffering, loss of enjoyment of life, permanent disability, loss of wages, and loss of future earning capacity. Ms. Morris requested damages **[***4]** for her medical expenses, loss of society and companionship, and loss of consortium.

P5 Among other affirmative defenses, the County answered that it was immune from the plaintiffs' claims because they were based on acts that the County performed in the exercise of its discretionary powers. The County also answered, as an affirmative defense, that no damages sustained by the Morrises happened because of the insufficiency or want of repairs of the highway. The County demanded judgment dismissing the plaintiffs' complaint on its merits, with prejudice. The County later filed a motion for summary judgment.

P6 In response to the County's motion for summary judgment, plaintiffs' counsel deposed several persons including William Anderson (Anderson), the Department of Transportation Area Highway Maintenance **[*548]** Supervisor. During his deposition, Anderson **[**692]** presented photographs of the accident site that he had taken in July 1994, five months after Morris' accident. The photographs showed that in the approximate area where Williams lost control of her vehicle, there was a pothole on the edge of the pavement. Although Anderson did not know whether the pothole was present on the date of the accident, **[***5]** he testified that such a pothole could take a year to develop. Following Anderson's deposition, Ms. Morris filed an affidavit in which she stated for the first time that two days after the accident, she noticed a "big chunk of pavement broken off at the beginning of the rut."

P7 The Juneau County Circuit Court, Patrick J. Taggart, Judge, granted the County's motion for summary judgment. The court determined that the County was immune from suit under Wis. Stat. § 893.80(4) because repairing the rut was a discretionary act. The court further determined that the Morrises did not have a cause of action under Wis. Stat. § 81.15 because that statute only imposes an obligation on the County to keep the traveled surface of the road in a reasonably safe condition. The circuit court stated that the shoulder of the road is not part of the traveled surface of the highway and the road was in a reasonably safe condition given the winter weather conditions. The court did not address Ms. Morris' affidavit regarding the pothole.

P8 The Morrises appealed and in an unpublished decision, n2 the court of appeals reversed the circuit court's judgment granting the County's motion for summary judgment. **[***6]** The court of appeals determined that if Wis. Stat. § 81.15 is otherwise applicable the County is liable under § 81.15 for insufficiency or **[*549]** want of repairs of a highway, regardless of whether the acts were discretionary under Wis. Stat. § 893.80(4). The court of appeals

further concluded that the shoulder of the highway is within the meaning of the term "highway" used in § 81.15. Finally, the court of appeals determined that there was no basis for the County's assertion that Ms. Morris submitted her affidavit, which stated that there was a pothole in the highway, in bad faith. The court of appeals reversed the circuit court's judgment because it concluded that the case presented disputed issues of material fact, thus making a grant of summary judgment inappropriate.

- - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n2 Morris v. Juneau County, 211 Wis. 2d 887, 568 N.W.2d 652, unpublished limited precedent opinion (1997).

- - - - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - - -

P9 This court granted the County's petition for review, and we address the two primary issues presented by this case: 1) whether governmental immunity **[***7]** under Wis. Stat. § 893.80(4) applies to an actionable claim under Wis. Stat. § 81.15; and 2) whether the term "highway" includes the shoulder adjacent to the paved portion of the highway as the term "highway" is used in § 81.15. We hold that if a plaintiff states an actionable claim under § 81.15, the governmental immunity provisions of § 893.80(4) do not apply. Therefore, because the Morrises stated an actionable claim under § 81.15, we need not determine whether the County's duties were discretionary or ministerial under § 893.80(4). We also hold that the definition of "highway" includes the shoulder of the highway. Because we conclude that the plaintiffs sufficiently stated a claim in their pleadings, we need not determine whether Ms. Morris' affidavit, alleging that there was also a pothole in the highway, was inconsistent with her prior deposition testimony and filed only to create a genuine issue of material fact. Accordingly, we affirm the court of appeals' decision.

[*550] P10 On appeal, this court applies the same summary judgment methodology as applied by the circuit court. See Green Spring Farms v. Kersten, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). HN1 A circuit court **[***8]** properly grants summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). The party moving for summary judgment has the burden of proving that there is no genuine issue of material fact. See Grams v. Boss, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). Inferences **[**693]** should be drawn in the light most favorable to the non-moving party. See id. at 339. Whether the moving party in this case, the County, is entitled to judgment as a matter of law depends on our interpretation of Wis. Stat. §§ 81.15 and 893.80(4).

P11 The first issue presented by this case, whether governmental immunity under Wis. Stat. § 893.80(4) applies to an actionable claim under Wis. Stat. § 81.15, requires that we interpret both statutes and their relationship. HN2 A question of statutory interpretation is a question of law that we review de novo. See Colby v. Columbia County 202 Wis. 2d 342, 349, 550 N.W.2d 124 (1996) (citing Pufahl v. Williams, 179 Wis. 2d 104, 107, 506 **[***9]** N.W.2d 747 (1993)). The main goal of statutory interpretation is to discern the intent of the legislature. See State v. Rosenburg, 208 Wis. 2d 191, 194, 560 N.W.2d 266 (1997) (citing Scott v. First State Ins. Co., 155 Wis. 2d 608, 612, 456 N.W.2d 152 (1990)). HN3 "We ascertain legislative intent by examining the language of the statute, as well as its scope, history, **[*551]** context, subject matter, and purpose." Rosenburg, 208 Wis. 2d at 194 (citing Scott, 155 Wis. 2d at 612). When there is an inconsistency between statutes, we must

reconcile them without nullifying either statute and in a way which gives effect to legislative intent. See Colby, 202 Wis. 2d at 349 (citing Phillips v. Wisconsin Personnel Comm'n, 167 Wis. 2d 205, 217, 482 N.W.2d 121 (Ct. App. 1992)).

P12 The language of Wis. Stat. § 81.15 (reprinted in full below) n3 provides in pertinent part that the "claim for damages shall be against the county" for "damages [that] happen by reason of the insufficiency or want of repairs of a highway which any county . . . is bound to keep in repair . . . ." Wisconsin Stat. § 893.80(4) (reprinted in full below) n4 provides in pertinent **[*552]** part that "no suit may be **[***10]** brought against any . . . political corporation . . . for the intentional torts of its officers, officials, agents or employes nor may any suit be brought against such corporation . . . for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."

- - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n3 HN4 Wisconsin Stat. § 81.15 provides:

> **81.15 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 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. If the damages happen by reason of the insufficiency or want of repairs of a highway which any county by law or by agreement with any town, city or village is bound to keep in repair, or which occupies any land owned and controlled by the county, the county is liable for the damages and the claim for damages shall be against the county. . . . The amount recoverable by any person for any damages so sustained shall not exceed $ 50,000. The procedures under s. 893.80 shall apply to the commencement of actions brought under this section. 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.

[*11]**

n4 HN5 Wisconsin Stat. § 893.80(4) provides:

> **(4)** No suit may be brought against 553 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.

- - - - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - - -

P13 The County argues that the plain language of Wis. Stat. § 893.80(4) confers governmental immunity for discretionary acts in all suits and that nothing precludes application of immunity for alleged violations of Wis. Stat. § 81.15. We disagree. The plain language of these statutes is seemingly in conflict. On one hand, if a plaintiff alleges insufficiency or want of repairs of a highway, § 81.15 provides that a claim for damages shall be against the County. See Wis. Stat. § 81.15. On the other hand, § 893.80(4) provides that the governmental **[***12]** entity is immune from suit if the acts of the governmental entity are within the entity's discretionary functions. See Lifer v. Raymond 80 Wis. 2d 503, 511-12, 259 N.W.2d 537 (1977).

P14 Our task is to harmonize these statutes, giving effect to both, if possible. **[**694]** We do so by concluding that Wis. Stat. § 81.15 provides an exception to the general grant of immunity under Wis. Stat. § 893.80(4). Accordingly, if a plaintiff's injuries occurred by reason of insufficiency or want of repairs of any highway, a governmental entity is not afforded governmental immunity under § 893.80(4). We reach this conclusion by examining legislative history and case law interpreting these statutes.

[*553] P15 Wisconsin Stat. § 81.15 was included in the first publication of Wisconsin statutes as R.S. 1849, ch. 16, § 103. At the time, common law governmental immunity was the rule, and § 81.15 was the legislative exception, imposing liability for damages caused by insufficiency or want of repairs of any highway. See Holytz v. Milwaukee, 17 Wis. 2d 26, 36, 40, 115 N.W.2d 618 (1962).

P 16 In 1962 with the Holytz decision, this court completely abrogated common law governmental immunity, applying **[***13]** the abrogation broadly to torts, whether by commission or omission. See id. at 39. "The rule is liability--the exception is immunity." Id. However, "this decision is not to be interpreted as imposing liability on a governmental body in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions." Id. at 40 (citing Hargrove v. Cocoa Beach, 96 So. 2d 130, 133 (Fla. 1957)).

P17 The legislature was quick to respond to the abrogation of governmental immunity in Holytz by creating Wis. Stat. § 331.43 (1963) (now Wis. Stat. § 893.80). n5 See ch. 198, Laws of 1963. The statute included a subsection regarding governmental immunity: "No suit shall be brought against any political corporation . . . for the intentional torts of its officers, officials, agents or employes nor shall any suit be brought against such . . . corporation . . . for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." § 331.43(3) (1963). Acts done in the exercise of legislative, quasi-legislative, judicial **[*554]** or quasi-judicial functions refer to discretionary acts. See Lifer, 80 Wis. 2d at 512.

- - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n5 Wisconsin Stat. § 331.43 (1963) was renumbered as Wis. Stat. § 895.43, see § 2, ch. 66, Laws of 1965, and was again renumbered to its present location at Wis. Stat. § 893.80, see § 29, ch. 323, Laws of 1979.

- - - - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - - - **[***14]**

P18 In the same year that the legislature created Wis. Stat. § 331.43 (1963), the legislature also amended Wis. Stat. § 81.15. The amendments to § 81.15 provided that a plaintiff had to

provide notice to a governmental entity within 120 days of the event causing injury and increased the damage limit to $ 25,000. See ch. 435, Laws of 1963. The time frame for notice and damage limit amount mirrored the provisions in the newly created § 331.43 (1963). Significantly, the legislature did not abolish the exception to governmental immunity provided by § 81.15.

P19 In discussing the relationship between Wis. Stat. §§ 81.15 and 895.43 (previously Wis. Stat. § 331.43 and now Wis. Stat. § 893.80), this court called for the legislature to repeal § 81.15.

> Neither sec. 81.15 nor sec. 895.43 create liability but rather provide the procedure to prosecute a claim for negligence. If the city is negligent, one or the other of the sections must be followed depending upon the type of negligence involved. . . . Apparently a material difference in these sections is the fact that sec. 895.43 makes provision for actual notice while sec. 81.15 does not. . . . . A lot of confusion in the practice **[***15]** would be avoided if the legislature would repeal sec. 81.15, which is no longer needed since our decision in Holytz v. Milwaukee, (1962), 17 Wis. 2d 26, 115 N.W.2d 618, and the amendment to sec. 895.43.

Schwartz v. Milwaukee, 43 Wis. 2d 119, 123, 168 N.W.2d 107 (1969) (Schwartz I). See also Schwartz v. Milwaukee, 54 Wis. 2d 286, 288-89, 195 N.W.2d 480 (1972) (Schwartz II) ("Sec. 895.43 covers some of the same ground covered by sec. 81.15, and we pointed out **[*555]** in Schwartz v. Milwaukee, supra, sec. 81.15 might as well be repealed by the legislature since its purported language creating a cause of action has been supplanted by Holytz v. Milwaukee, (1962), 17 Wis. 2d 26, 115 N.W.2d 618.").

P20 Despite this court's repeated clear suggestion to the legislature to repeal Wis. Stat. § 81.15, the legislature declined to do so. **[**695]** Rather, in 1977, the legislature made sweeping changes to the notice provisions for various governmental entities by combining the notice requirements into Wis. Stat. § 895.43 (1978) (now Wis. Stat. § 893.80). See ch. 285, Laws of 1977. The act, published on May 8, 1978 and effective on November 8, 1978, deleted all notice **[***16]** requirements from Wis. Stat. § 81.15 but added the following sentence to that statute: "The procedures under s. 895.43 shall apply to the commencement of actions brought under this section." § 5, ch. 285, Laws of 1977. The act also repealed and recreated § 895.43 (now § 893.80). See § 11, ch. 285, Laws of 1977. The Prefatory Note to the statute recognized that several statutes at the time contained "a variety of procedural steps to follow when bringing a claim against a county, town, city, school district or other municipality. This bill consolidates these procedures . . . and makes them uniform . . . ." Prefatory Note, ch. 285, Laws of 1977. In the recreation of Wis. Stat. § 895.43 (1978), the legislature continued the governmental immunity provision for discretionary acts first enacted as part of Wis. Stat. § 331.43 (1963). However, and again significantly, the legislature did not abolish the exception to governmental immunity provided by § 81.15.

P21 When discerning legislative intent, we assume that the legislature knew the law in effect at the time it enacted the statute in question. See Rosenburg, **[*556]** 208 Wis. 2d at 194-95 (citing Milwaukee v. Kilgore, 193 Wis. 2d 168, 183, **[***17]** 532 N.W.2d 690 (1995)). We need not depend on an assumption in this instance, however, because here we know that when the legislature enacted Wis. Stat. § 331.43 (1963), the predecessor to Wis. Stat. §

893.80, it was aware of Wis. Stat. § 81.15. The legislature amended the two statutes in the same year, see ch. 198 and ch. 435, Laws of 1963, and in the same act. See §§ 5 and 11, ch. 285, Laws of 1977; and ch. 63, Laws of 1981. Despite a seeming inconsistency between §§ 81.15 and 893.80, the legislature continued to keep them both on the books.

P22 We also presume that when the legislature repealed and recreated Wis. Stat. § 895.43 (now Wis. Stat. § 893.80) in ch. 285, Laws of 1977 to consolidate the notice provisions of several statutes, including Wis. Stat. § 81.15, the legislature was aware of our prior decisions regarding these two statutes and our suggestion that § 81.15 be repealed. See Schwartz I, 43 Wis. 2d at 123; Schwartz II, 54 Wis. 2d at 288-89. Because the legislature clearly had several opportunities to respond to this court's suggestions but nonetheless acquiesced in our decisions or refused to amend or repeal § 81.15, we conclude **[***18]** that the legislature intended to keep in force the exception to governmental immunity provided by § 81.15. We can derive no other conclusion for the legislature's failure to abolish § 81.15. Were we to reach the opposite conclusion we would make a nullity of § 81.15. By the legislative action outlined above, the legislature did not intend that § 81.15 be a nullity.

P23 Because the legislature continued to breathe life into a statute which this court stated was "no longer needed," we must now give the statute **[*557]** effect. We do so by turning to the rule of statutory interpretation that HNG a specific statute takes precedence over a general statute. See Kilgore, 193 Wis. 2d at 185. "[Section] 81.15, Stats., only applies to a small area of negligent conduct by a municipality and in this area does not necessarily cover all the negligence which might relate to highways." Schwartz I, 43 Wis. 2d at 122-23. Wisconsin Stat. § 81.15 specifically applies to damages caused by the insufficiency or want of repairs of any highway. Wisconsin Stat. § 893.80(4) generally grants immunity for the intentional acts of its officers, officials, agents or employees or for the exercise of its discretionary **[***19]** functions. Therefore, since § 81.15 is specific and § 893.80(4) is general, § 81.15 takes precedence over § 893.80(4). To reconcile these statutes and give them both effect, we conclude that § 81.15 provides an exception to the general grant of immunity found in § 893.80(4).

P24 To support its argument that it is immune from suit, the County argues that Wis. Stat. § 893.80(4), providing governmental immunity, must be read in conjunction with Wis. Stat. § 893.80(5) (reprinted below) **[**696]** n6 which provides that § 893.80 is exclusive and applies to all claims unless rights or remedies are provided by another statute. The County asserts that case law provides that no rights or remedies **[*558]** are provided under Wis. Stat. § 81.15. See, e.g., Schwartz II, 54 Wis. 2d at 289.

- - - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - - -

n6 Wisconsin Stat. § 893.80(5) provides in pertinent part:

> **(5)** Except as provided in this subsection, the provisions and limitations of this section shall be exclusive and shall apply to all claims against . . . political corporation, governmental subdivision . . . . When rights or remedies are provided by any other statute against any political corporation, governmental subdivision or agency . . . for injury, damage or death, such statute shall apply and the limitations in sub. (3) shall be inapplicable.

- - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - - **[***20]**

P25 We are not persuaded by the County's interpretation of Wis. Stat. § 893.80. First, the language of Wis. Stat. § 81.15 does provide rights or remedies for parties injured "by reason of the insufficiency or want of repairs of any highway . . . ." § 81.15. The statute provides that "the claim for damages shall be against the county." § 81.15. We recognize that in both Schwartz I and Schwartz II, this court stated that § 81.15 does not create liability but only provides "the procedure to prosecute a claim for negligence . . . ." Schwartz II, 54 Wis. 2d at 289. At the time of these cases, however, liability for highway defects existed in the absence of § 81.15 because of the abrogation of common law immunity in Holytz. See Dunwiddie v. Rock County, 28 Wis. 2d 568, 573, 137 N.W.2d 388 (1965). As we noted in Schwartz II, the language of § 81.15 "purported[ly] . . . creating a cause of action has been supplanted by Holytz . . . ." Schwartz II, 54 Wis. 2d at 288-89.

P26 However, when the legislature stripped Wis. Stat. § 81.15 of all procedures, it left the rights and remedies for injuries caused by the insufficiency or want of repairs of any **[***21]** highway. See ch. 285, Laws of 1977. The legislature specified that parties must follow the procedures in Wis. Stat. § 893.80 to commence an action under § 81.15 but did not abolish the rights and remedies of § 81.15. Accordingly, we must conclude from the above that § 81.15 does create rights or remedies--the right to recover damages from a county negligent in its insufficiency or want of repairs of any highway.

[*559] P27 In sum, we conclude that if a plaintiff's injuries occurred by reason of insufficiency or want of repairs of any highway, that is, the plaintiff states an actionable claim under Wis. Stat. § 81.15, a governmental entity is not afforded immunity under Wis. Stat. § 893.80(4).

P28 We now turn to the second issue presented by this case: whether the term "highway" includes the shoulder adjacent to the paved portion of the highway as the term "highway" is used in Wis. Stat. § 81.15. The County argues that the shoulder is not part of the highway by relying on this court's statement in Weiss v. Milwaukee, 79 Wis. 2d 213, 255 N.W.2d 496 (1977) that § 81.15 "has been interpreted to refer to physical defects existing on the traveled surface of the highway . . . ." **[***22]** Weiss, 79 Wis. 2d at 225 (emphasis added). However, later in the Weiss decision this court, like the court of appeals in this case, correctly relied on the statutory definition of "highway" found in Wisconsin's Vehicle Code at Wis. Stat. § 340.01(22) to conclude that "highway" as used in § 81.15 includes the shoulder.

P29 This court has previously relied on Wis. Stat. § 340.01(22) for the statutory definition of "highway." See Weiss, 79 Wis. 2d at 232. The court distinguished "highway" from "roadway:" "West Mill Road and the two closely proximated frontage roads comprised a highway (footnote quoting the definition of highway in § 340.01(22)) consisting of three separate and parallel roadways (footnote quoting the definition of roadway in Wis. Stat. § 340.01(54)." Id. HN2 The term "highway" "includes 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." § 340.01(22). In contrast, "roadway" is defined **[*560]** as "that portion of a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel, excluding **[***23]** the berm or shoulder." § 340.01(54). The distinction **[**697]** between the definition of "highway" and "roadway" emphasizes that "highway" includes the shoulder of the highway.

P30 Neither the court in Weiss nor the court of appeals in this case was embarking on new territory by using the definition of "highway" in Wis. Stat. § 340.01(22) to interpret a statute in another chapter of the statutes. For example, in Weiss v. Holman, 58 Wis. 2d 608, 619, 207 N.W.2d 660 (1973), the court used the definition of "highway" in § 340.01(22) to interpret Wis. Stat. §

182.017(2) (1973) regarding the duties of public utilities in placing power poles. See Holman, 58 Wis. 2d at 618-19. Relying on the doctrine of in pari materia, the court reasoned that it could rely on § 340.01(22) because both the Vehicle Code and § 182.017(2) are concerned with public safety. See also In Interest of E.J.H., 112 Wis. 2d 439, 442, 334 N.W.2d 77 (1983) (relying on § 340.01(22) to determine that the grassy portion next to the shoulder of the pavement is part of the highway, thereby concluding that a juvenile was properly adjudged delinquent for driving without a license when she drove on this grassy **[***24]** area.); Panzer v. Hesse, 249 Wis. 340, 346, 24 N.W.2d 613 (1946) (concluding that the term "highway" as used in Wis. Stat. § 85.44(6) (1946) which required pedestrians to walk on the left side of the highway when there is no sidewalk, refers to the portions of the highway open to use by vehicular traffic including the gravel shoulder.); and Poyer v. State, 240 Wis. 337, 340, 3 N.W.2d 369 (1942) (relying on § 340.01(22) in a dispute regarding the public or private nature of an alley and concluding that the **[*561]** area adjacent to the paved roadway is part of the highway because "vehicles may use this for the purpose of making turns and other maneuvers incident to the use of the roadway . . . .").

P31 The County argues that by relying on the definition of "highway" in Wis. Stat. § 340.01(22) the court of appeals ignored decades of decisions by this court which defined "highway" as the traveled surface of the road. We disagree. As early as 1872, this court determined that Wis. Stat. § 81.15 applied not only to the traveled part of the highway but also to the area "so connected with [the highway] as to affect the safety or convenience of those using the traveled path . . . ." **[***25]** Wheeler v. Town of Westport, 30 Wis. 392, 403 (1872) (citations omitted). In Wheeler, boulders next to the traveled path "were connected with it, and so closely as to make it almost true that they formed a part of it." Id. See also McChesney v. Dane County, 171 Wis. 234, 237, 177 N.W. 12 (1920); Meidenbauer v. Pewaukee, 162 Wis. 326, 331-332, 156 N.W. 144 (1916). Reliance on the definition of highway in § 340.01(22) is consistent with the construction of the term "highway" as used in § 81.15 for over 120 years.

P32 We conclude that the area adjacent to the paved portion of the highway, commonly known as the shoulder, is part of the highway as that term is used in Wis. Stat. § 81.15. Because the County does not dispute that the rut is an insufficiency or want of repair and because the rut is in part of the highway, we conclude that the plaintiffs have stated an actionable claim under § 81.15. Accordingly, governmental immunity is not available to the County.

[*562] P33 In sum, we conclude that HN8 if a plaintiff states an actionable claim under Wis. Stat. § 81.15, the governmental immunity provisions of Wis. Stat. § 893.80(4) do not apply. Therefore, because the Morrises **[***26]** stated an actionable claim under § 81.15, we need not determine whether the County's duties were discretionary or ministerial. We also hold that the definition of "highway" in Wis. Stat. § 340.01(22) appropriately applies to § 81.15 and includes the shoulder of the highway. Accordingly, we conclude that the Morrises did state an actionable claim under § 81.15 and therefore, summary judgment was inappropriate.

P34 Regarding Ms. Morris's affidavit, filed several months after the County moved for summary judgment, we need not determine whether such affidavit should be permitted to preclude summary judgment. Because we conclude that the Morrises stated an actionable claim under Wis. Stat. § 81.15 without consideration of Ms. Morris' affidavit, we need not determine this issue.

P35 Several months after the County filed its motion for summary judgment, Ms. Morris **[**698]** filed an affidavit in which she stated for the first time that she saw a chunk of broken-off pavement at the scene of the accident two days after the accident. The County argues that by filing this late affidavit Ms. Morris was only attempting to create a genuine issue of material fact and thereby survive the County's summary **[***27]** judgment motion. The County asserts that her affidavit was inconsistent with her prior deposition testimony in which the only highway defect she mentioned was the rut in the shoulder. The County urges this court to adopt the position of the

Seventh Circuit Court of Appeals that "parties cannot thwart the purpose of **[*563]** [Federal] Rule [of Civil Procedure] 56 [similar to Wis. Stat. § 802.08(2)] by creating issues of fact through affidavits that contradict their own depositions." Miller v. A.H. Robins Co., Inc., 766 F.2d 1102, 1104 (7th Cir. 1985) (citing Perma Research and Development v. Singer Co., 410 F.2d 572, 577-78 (2nd Cir. 1969)).

P36 This court is, of course, the proper forum for determining the issue of whether a party can submit an affidavit that is inconsistent with prior deposition testimony in response to a motion for summary judgment. Cf. Wolski v. Wilson, 174 Wis. 2d 533, 540-41, 497 N.W.2d 794 (Ct. App. 1993). However, this case does not require that we decide this issue. The plaintiff's pleadings, depositions, and answers to interrogatories create a genuine issue of material fact even without considering Ms. Morris' affidavit submitted after the County's **[***28]** motion for summary judgment. Therefore, we need not decide whether her affidavit and deposition testimony are contradictory. The Morrises' claims survive the County's motion for summary judgment without consideration of Ms. Morris's later affidavit.

By the Court.--The decision of the court of appeals is affirmed.

Keeping Wisconsin Families Safe

www.watl.org

EXECUTIVE DIRECTOR
Jane E. Garrott
44 E. Mifflin Street, Suite 103
Madison, Wisconsin 53703-2897
Telephone: 608/257-5741
Fax: 608/255-9285
exec@watl.org

Testimony of Keith R. Clifford
on behalf of the
Wisconsin Academy of Trial Lawyers
before the
Senate Committee on Transportation and Information Infastructure
Sen. Joseph Liebham, Chair
on
2003 Assembly Bill 255
October 29, 2003

CHAIRMAN LIEBHAM AND MEMBERS OF THE COMMITTEE, my name is Keith R. Clifford. I am a partner in the Madison law firm of Clifford & Raihala. I am the Past President of the Wisconsin Academy of Trial Lawyers and appear on its behalf to speak against Assembly Bill 255. Thank you for this opportunity.

The Wisconsin Academy of Trial Lawyers renews its opposition to this proposal which was considered in the last session of the Legislature as Assembly Bill 6. Passing this legislation is unnecessary. It is a statute and a concept that has been part of Wisconsin's laws going all the way back to 1849. Wisconsin has survived for over 150 years with this concept embedded in its statutes. I suspect we can survive a few more.

This bill is a reaction to the Supreme Court decision in *Morris v. Juneau County*, 219 Wis. 2d 544 (1998). This decision did not change the law in any radical way. You do not need to take our word for it that the *Morris* case did not change the law. I have attached a "Law Note" dated January 15,

1999 by Jim Thiel of the Wisconsin Department of Transportation. The note begins by asking the question, "Does *Morris v. Juneau County* change county exposure to liability for maintenance of state trunk highways?" Thiel's answer: "No." (This is a portion of Mr. Thiel's presentation entitled "Liability Issues Concerning Highway Operations: WisDOT Perspectives" prepared for the 1999 Winter Highway Conference in Stevens Point.) Mr. Thiel's reminded his audience of municipal highway officials that: "The County is not now and never has been immune from liability due to alleged highway maintenance defects."

The rest of Chapter 81 of the statutes still imposes a duty on towns to take care of the roads. Local governments will continue to maintain and repair their roads. It is one of the most common and logical local services offered. Your constituents will continue to expect their local governments to take care of the roads. Passing this bill will not change that.

It is unlikely that local governments will save any money as a result of this bill. Most will continue to carry liability insurance to protect themselves. You can almost guarantee there will be no savings on local governments' insurance premiums since local governments are not sued often under this provision and their liability for any highway defects is limited to $50,000. Passing this bill will not change that.

Assembly Bill 255 would repeal those portions of § 81.15 Stats. that are designed to protect the interests of your constituents and retain the portion of § 81.15 Stats. that is designed to protect the local government. It is a cruel hoax on your constituents to suggest that this legislation will somehow help them and improve their lives. This statute is used when a citizen who has suffered injury in a motor vehicle crash can prove that a cause of the crash was a failure on the part of a municipality to repair a known defect on a highway. At the time this proposal was adopted in the mid-1800's, it was one of the few areas where liability was imposed on government. Your constituents will still expect their local governments to repair known defects in highways that lead to unsafe conditions. Passing this bill will not change that expectation of your constituents.

The authors of this legislation and other supporters have predicted a flood of litigation because of the *Morris* case, and that is one of the primary

reasons given for the statute's repeal. If the argument is made again that there will be increased litigation, you should demand to know from the bill's sponsors what the experience has been in the last five years. There has never been much litigation under this statute throughout our history, and we certainly have not seen it in the years since the Supreme Court issued the *Morris* decision. There will be no flood of litigation because these lawsuits are difficult to prove, expensive to bring because they require expert engineering testimony, and limited in recovery because the maximum recovery is $50,000. Passing this bill will not change that.

In the *Morris* decision the Supreme Court explained the history of governmental liability in Wisconsin this way:

> In 1962 with the *Holytz* decision, this court completely abrogated common law governmental immunity, applying the abrogation broadly to torts, whether by commission or omission. [citation omitted] "[T]he rule is liability – the exception is immunity." [citation omitted] However, "[t]his decision is not to be interpreted as imposing liability on a governmental body in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions." [citation omitted]

The Supreme Court's decision in *Holytz* was written into the statutes and is now § 893.80, Stats. The courts have never changed the basic rule of *Holytz* that the rule is liability and the exception is immunity. There have been many court decisions, however, interpreting just what are legislative or judicial or quasi-legislative or quasi-judicial functions. Through the years the courts have significantly expanded these terms and granted immunity in more and more situations, so much so that the exception of immunity threatens to swallow the rule of liability.

The Wisconsin Academy of Trial Lawyers filed an amicus curiae brief in the *Morris* case at both the Court of Appeals and Supreme Court levels. The brief discussed the development of the law in the 36 years after the *Holytz* decision. I would be happy to supply the committee with copies of the amicus curiae brief, if you would like them.

One of the ironies of passing AB 255 is that it will likely lead to a different type of litigation. An issue that was discussed in *Morris* but not decided was the proper interpretation of § 893.80, Stats. in the context of

highway maintenance and repair. If you remove most of § 81.15 and all of § 81.17 from the statutes, there will most likely be lawsuits in the future to determine whether local governments are liable for negligence in highway maintenance or repair under § 893.80. The current state of the law is settled after the *Morris* case; passing this bill will make the law unsettled and require further litigation to settle it.

We hope you will strongly consider the needs of your constituents for greater safety on their roads and for redress in the unfortunate circumstances when they have been injured. We urge you to oppose AB 255.

Thank you.

WISCONSIN
COUNTIES
ASSOCIATION

22 EAST MIFFLIN STREET, SUITE 900
MADISON, WI 53703
TOLL FREE: 1.866.404.2700
PHONE: 608.663.7188
FAX: 608.663.7189

MEMORANDUM

TO: Honorable Members of the Assembly

FROM: Craig Thompson, Legislative Director CT

DATE: October 29, 2003

RE: Support for Assembly Bill 255

The Wisconsin Counties Association (WCA) strongly supports Assembly Bill 255 (AB 255). AB 255 repeals language in two sections of the Wisconsin statutes that relate to the liability of municipalities and counties for insufficient or inadequately maintained highways.

Section 893.80 (4) Wis. Stats. confers immunity for cities, towns and counties from the performance of a discretionary duty, or duty which requires a governmental entity to use judgment or discretion in carrying out this duty.

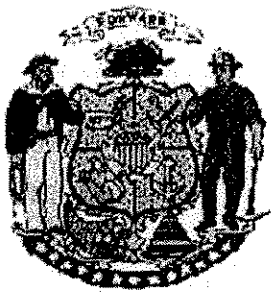
The Wisconsin Supreme Court in *Morris v. Juneau County*, held that the statutory provision (Wis. Stats. 81.15 and 81.17) imposing liability on cities, villages, towns and counties for highway defects is an exception from liability arising out of the performance of discretionary duties. However, in the Supreme Court decision in *Morris v. Juneau County*, the Court clearly states that it has repeatedly suggested that the Legislature repeal Wis. Stats. 81.15 and 81.17. The Court states "Because the Legislature continued to breathe life into a statute which the Court stated was no longer needed, we must now give the statute effect".

Potholes and similar road wear can develop with little warning, as weather conditions in Wisconsin are unpredictable. The Wisconsin Supreme Court sets a very dangerous precedence in *Morris v. Juneau County*. Property tax dollars are now being allocated to pay for lawsuit settlements rather than the repair of highways.

To further exacerbate the problem, in the last biennial budget there was a significant cut in funding for state highway maintenance. If the Legislature does not restore the funding for highway maintenance, county liability will greatly increase and a number of counties have indicated that they will no longer be able to afford to maintain the state's roads.

County highway departments have the very difficult task of maintaining safe roads for a minimal amount of taxpayer dollars. AB 255 ensures that taxpayer dollars go toward repairing roads rather than costly lawsuits. The bill will also afford local governments the same liability immunity that the state currently receives under Wisconsin Statute. For these reasons, WCA respectfully requests your positive action on Assembly Bill 255.

Thank you for considering our comments. If you have any questions, please do not hesitate to contact the WCA office at 608.663.7188.



To: **Interested Parties**
From: **Representative Sheryl Albers**
Senator Dale Schultz

Date: **October 29, 2003**
Subject: **Questions and Answers – 2003 Assembly Bill 255**

---

1. *Why do we need this legislation?*

In February 1994, a vehicle traveling in Juneau County lost control, crossed the centerline, and struck an oncoming car driven by Mr. John Morris, seriously injuring him. In a subsequent lawsuit against Juneau County, Mr. Morris and his wife alleged that the oncoming car lost control due to a rut between the edge of the road and the shoulder. They contended the county was negligent in maintaining the roadway, and, under §81.15 of the Wisconsin Statutes, therefore liable for damages. §81.15 allows individuals who sustain injuries due to a need of highway repairs to recover up to $50,000 in damages from the governmental unit responsible for that highway if they can prove negligence on the part of the municipality.

Juneau County claimed immunity from liability under §893.80(4), Wis. Stats., which provides immunity to municipalities for discretionary actions. The county maintained that fixing (or not fixing) the rut on the edge of the road was a discretionary act, and therefore it was immune from liability, notwithstanding §81.15. Note that under §893.80(4), if a duty is "ministerial" (i.e. required of the municipality), the municipality does not receive immunity, and a plaintiff can argue negligence on the part of the municipality in order to recover up to $50,000 in damages.

The case made its way to the Wisconsin Supreme Court, and in 1998 the court held in favor of the Morris' [*see Morris v. Juneau County*, 219 Wis. 2d 544, 579 N.W.2d 690 (1998)]. In its opinion, the court held that Juneau County could not raise the defense of discretionary immunity from liability under §893.80(4) of the Wisconsin Statutes because §81.15 operates as an *exception* to this statute. Therefore, the court did *not* address whether highway maintenance is discretionary or ministerial under §893.80(4).

In its decision, the court also "scolded" the legislature for failing to repeal §81.15, as it had recommended in previous decisions:

> **"Because the legislature clearly had several opportunities to respond to this court's suggestions but nonetheless acquiesced in our decisions or refused to amend or**

repeal §81.15, we conclude that the legislature intended to keep in force the exception to governmental immunity provided by §81.15."

. . .

"Because the legislature continued to breathe life into a statute which this court stated was "no longer needed," we must now give [section 81.15] effect."

. . .

"In sum, we conclude that if a plaintiff's injuries occurred by reason of insufficiency or want of repairs of any highway, that is, the plaintiff states an actionable claim under Wis. Stat. §81.15, a governmental entity is not afforded immunity under Wis. Stat. §893.80(4)."

Due to this case, municipalities may fear the need to request additional state dollars in order to maintain their highways. The legislature must now take the initiative to heed the advice of our Wisconsin Supreme Court, and repeal the portions of §81.15 that act as an exception to the ability of a municipality to raise the defense of immunity from liability for discretionary decisions under the provisions of §893.80(4).

2. *Why does the legislation remove §81.17, too?*

§81.15's sister statute, §81.17, deals with primary and secondary liability for highway defects. Repeal of this section is prudent for the following reasons:

(1) Per *Armour v. Wis. Gas Co.*, 54 Wis. 2d 302, 195 N.W.2d 620 (1971), §81.17 applies *only* to highway defects, and must be read in conjunction with §81.15 (which solely deals with highways). Eliminating §81.15 and keeping §81.17 could create confusion.

(2) §81.17 creates a "primary" and "secondary" liability system. In other words, a court determines who is primarily liable, and (if necessary) who is secondarily liable. The entity with primary liability pays 100%; if they cannot pay all or part of their liability, then the entity with secondary liability pays the entire / remaining amount. This is an antiquated system, since "comparative negligence" (where two or more parties can share liability in a lawsuit) is the modern standard under tort law, codified in §895.045 of the statutes.

3. *Is this the only way to allow municipalities to raise the defense of immunity for discretionary highway maintenance?*

Yes. Municipalities will not have the opportunity to raise the immunity defense unless the legislature repeals §81.15 – even if the highway maintenance involved is actually discretionary. This puts all municipalities in Wisconsin at risk of costly litigation in years to come.

4. ***Why does the bill keep and amend the provisions on snow and ice accumulation in §81.15? Why not just eliminate the entire section of the statues altogether?***

The current provisions of §81.15 deal with *all* highway maintenance, including snow removal. While the statute provides an exception to the §893.80(4) immunity *at any time* for negligence in making road repairs, it provides a "mini-immunity" provision for snow removal. The ability to sue a municipality for negligence in removing snow and ice doesn't trigger until after three weeks of snow or ice accumulation sitting on a highway without normal removal practices. In other words, the statutes provide a three week "grace period" for snow and ice removal.

If the legislature eliminated §81.15 altogether, municipalities would have the ability to raise the defense of immunity from liability for discretionary actions under §893.80(4). However, the 3-week "grace period" (immunity) for snow and ice removal would be lost. In addition, all of the case law established over the years that meticulously deals with snow removal issues would have less force, since the statute it interprets would no longer exist. Therefore, it is in the best interests of the state to leave these provisions of §81.15 in place.

The bill amends §81.15 because, in its current form, the statute allows negligence actions after the three week grace period, *regardless of whether or not the late snow and ice removal in a particular circumstance constitutes a discretionary act.* If a severe snow storm(s) hit Wisconsin, it could take a number of weeks to effectively remove snow and ice from every highway in the state. Municipalities could argue – if sued – that their actions in response to such a storm do not constitute negligence. However, we should provide our municipalities with the opportunity to first argue that snow removal after the three-week grace period is a discretionary action, and therefore falls under the immunity provisions of §893.80(4), just as the bill does for all other highway maintenance issues.

5. ***Does this legislation provide municipalities with complete immunity?***

No. If this legislation becomes law, to be immune from liability under §893.80 of the statutes, municipalities would first have to prove that the highway maintenance in question (repairs or snow and ice removal after three weeks) constitutes a "discretionary" duty. "Discretionary" duties involve the ability of the municipality to weigh facts and circumstances, then make a decision on what action to take regarding the maintenance.

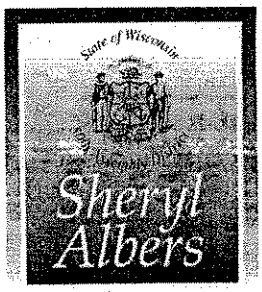
This is contrasted with a "ministerial" duty, which does not allow the municipality any discretion – it must perform the action. If the court were to find that the maintenance issue in question constitutes a ministerial duty, immunity would not apply, and the plaintiff would then need to prove that the municipality is negligent in carrying out its particular ministerial duty. If the court then found the municipality negligent, the plaintiff could receive damages up to $50,000 (the same as currently provided by §81.15).

As stated previously, in *Morris v. Juneau County*, the Wisconsin Supreme Court did not address the question of whether or not maintaining a highway is or is not a discretionary or

ministerial duty of a governmental unit. The court only decided that §81.15 acted as an exception to the immunity provided for discretionary acts under §893.80(4). There is little case law development defining what types of highway maintenance constitute discretionary or ministerial acts. Thus, while we know that governmental units will utilize §893.80(4) as a preliminary defense to a suit for failure to maintain a highway, we do not know whether the statute will actually give them that immunity.

Courts may find most highway maintenance discretionary, some maintenance completely discretionary or completely ministerial, or certain specific maintenance discretionary *or* ministerial, depending upon the factual circumstances involved (weather, machinery available, etc.). The Wisconsin Supreme Court could eventually set out some general guidelines for lower courts, too. Given the complexity of such determinations, however, the best course of action involves allowing lower courts to resolve "discretionary versus ministerial" arguments on a case-by-case basis, subject to appellate review, based on the specific facts and circumstances surrounding those cases.

(END)



2003 Assembly Bill 255 – Highway Maintenance Liability

Testimony of State Representative Sheryl K. Albers before the Senate Committee on Transportation and Information Infrastructure

October 29, 2003

Thank you, Chairman Leibham, for the opportunity to discuss AB 255, a bill that provides relief and much-needed peace of mind to our municipalities for mishaps that may occur from potholes, cracks, or other defects that occur naturally in roads.

Those of you who served in the Assembly last session will be familiar with this bill – it is a reintroduction of 2001 Assembly Bill 6, which passed the Assembly last session. For those who are new to this bill, the issue came to my attention as a result of an incident that occurred in Juneau County in February of 1994.

That month, a vehicle traveling in Juneau County lost control, crossed the centerline, and struck an oncoming vehicle, driven by John Morris. John, unfortunately, was seriously injured.

In the aftermath of the incident, the Morrises sued Juneau County under §81.15 of the Wisconsin Statutes. They claimed that the accident resulted from a rut between the edge of the road and the shoulder. They also claimed that Juneau County was negligent in maintaining the roadway, and as such, they were entitled to financial compensation.

State Capitol Office: P.O. Box 8952 • Madison, Wisconsin 53708-8952
(608) 266-8531 • (877) 947-0050 • FAX: (608) 282-3650 • Rep.Albers@legis.state.wi.us
District: 339 Golf Course Road • Reedsburg, Wisconsin 53959 • (608) 524-0022

The case made its way to the Wisconsin Supreme Court, where the Court ruled in favor of Mr. Morris. Specifically, the court said that Juneau County could not raise a defense of discretionary immunity under §893.80(4) because §81.15 acts as an exception to that law.

At that time, the Court suggested strongly – as it had in the past – that §81.15 be repealed. It had no choice but to enforce §81.15 as an exception because the Legislature, given fair warning, failed to take corrective action. This bill provides the corrective language that our local governments have been seeking.

While the remedy isn't necessarily simple, I think the question is. It comes down to this – if there's a pothole in the road, and your car hits it, and you get a flat tire, should you be able to sue a local government for the costs of getting a new tire? Or do we assume that when we get behind the wheel, not all roads are perfect and that occasional flat tires and other mishaps are just part of owning and operating a vehicle?

When one considers that most everyone in Wisconsin has automobile insurance to assist with the expenses of road-related accidents, it is clear that we, as a society, have chosen the latter. We accept responsibility for accidents. We pay for insurance to limit our financial liability for these accidents.

Leaving municipalities on the hook for liability is an unsettling proposition. Local governments can't catch every road defect the second it emerges. They're often reliant on phone calls from local residents to identify these problems – someone complains about a pothole, someone gets sent to check it out, and the problem is fixed. I firmly believe that local governments operate in good faith and resolve these problems in as timely a fashion as possible.

Liability lawsuits are also a big question mark. It is difficult – if not impossible – to budget for them because you have no idea how many will be brought up or when they will occur. Municipalities are stretched thin already – just like the state. Even if they "win" their case, taxpayers ultimately "lose" because their resources are expended in order to defend the actions of local government. In a time when aids to local governments are being scaled back, local governments are asking us in return for relief from certain mandates and other onerous laws. This is one of them.

We must also remember that counties enter into contracts to perform maintenance work on behalf of the state, repairing state roads. They are not necessarily responsible for the quality of construction, and cannot force the state to invest more money in maintaining those roads we already have. Yet with current law, we've created a situation in which counties are forced to assume liability on behalf of the state.

If we do not get this change made this session, don't be surprised if many counties reconsider this relationship and withdraw from their maintenance agreements. If the state is not willing to amend their liability – whether by modifying it or assuming it on their behalf – the only way counties can protect themselves legally is by allowing existing contracts to lapse. It is unlikely that the state will find a company in the private sector to do the job less expensively. Counties have done an excellent job of maintaining our state highway system. This bill gives them the credit they deserve and the protection they demand.

The bill does not provide municipalities with complete immunity. Rather, it allows the courts the latitude to determine whether certain repairs are "ministerial" duties or "discretionary" duties – in other words, whether local governments have to perform them, or may perform them at their discretion.

I believe that allowing courts to make these determinations on a case-by-case basis is the best approach. It also gives local governments a proverbial leg to stand on. Right now, local governments cannot use discretion as an argument. They are specifically liable for damages that result from defects in their roads. The only question for a court to determine is whether or not the defect contributed to or directly caused the damages. Local governments deserve more flexibility in defending their actions.

I have distributed a comprehensive "Question and Answer" document that addresses many of the frequent questions I have been asked in regard to this bill. Please take a moment and look it over.

Thank you for your time. I would be happy to answer any questions that committee members might have.