COURT OF APPEALS
DECISION
DATED AND RELEASED

December 12, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1951-FT

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

LEROY GILBERT and
JANIS GILBERT,

Plaintiffs-Respondents,

v.

AMERICAN FAMILY INSURANCE,
a Wisconsin Insurance Co.,

Defendant-Third Party Plaintiff-Appellant,

v.

CITY OF ANTIGO,

Third Party Defendant.

APPEAL from an order of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. American Family Insurance Co. appeals an order denying its motion for summary judgment.[1] Because the material facts are undisputed and American Family is entitled to a judgment of dismissal as a matter of law, we reverse the order and remand with directions to enter summary judgment in favor of American Family.[2]

Janis Gilbert filed a complaint against Ronald Smith seeking damages for personal injuries arising out of a trip and fall on a City of Antigo sidewalk. The sidewalk borders property owned by Smith, American Family's insured. Gilbert was out for a walk when her toe hit a raised portion of the sidewalk and she tripped and fell on the city sidewalk in front of Smith's property. She injured her wrist, lip and elbow. When Gilbert looked to see what she tripped over, she saw that the sidewalk was "all full of this grass and stuff," brown in color, like someone had sprayed a weed killer on it. Photographs of the sidewalk show brown grass in the seams of the sidewalk.

The Gilberts' complaint states:

> That the insured, Ronald Smith, was then and there negligent in failing to correct a defective condition of the sidewalk, failing to warn the public including the Plaintiff, Janice Gilbert, of the dangerous condition of the sidewalk, and in maintaining said sidewalk in a faulty and unsafe condition, although, Ronald Smith knew or should have known of its condition.

American Family joined Antigo as a third-party defendant because the sidewalk in question was owned by the city. The trial court denied American Family's motion for summary judgment, stating: "If the plaintiff can show at trial that a condition was created by the landowner grass that was unreasonably dangerous at the time, the doctrine of common law negligence would apply to that owner." American Family appeals the order.

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[1] This is an expedited appeal under RULE 809.17, STATS.

[2] On August 8, 1995, we granted leave to appeal the nonfinal order.

When reviewing summary judgment, we apply the standard set forth in § 802.08(2), STATS., de novo. ***Cook v. Continental Cas. Co.,*** 180 Wis.2d 237, 244-45, 509 N.W.2d 100, 103 (Ct. App. 1993). To survive a prima facie case for summary judgment, a party may not rely on pleadings but must support his or her allegations with evidentiary facts. ***Hopper v. Madison,*** 79 Wis.2d 120, 130, 256 N.W.2d 139, 143 (1977); § 802.08(3), STATS. Summary judgment is appropriate when material facts are undisputed and when inferences that may be reasonably drawn from the facts are not doubtful and lead only to one conclusion. ***Radlein v. Industrial Fire & Cas. Ins. Co.,*** 117 Wis.2d 605, 609, 345 N.W.2d 874, 877 (1984).

Gilbert contends that an examination of the proofs on file demonstrate that (1) grass was allowed to grow in the seams of the sidewalk in front of Smith's property, (2) some kind of vegetation killer had been sprayed on it causing it to turn brown, (3) the only area on the entire block where it turned brown was in front of Smith's property, and (4) the brown grass concealed the raised portion of the sidewalk. Gilbert contends that a jury could reasonably conclude that Smith sprayed grass killer, causing the grass to turn brown, thus camouflaging the raised portion of the sidewalk. Gilbert contends that Smith would have been liable for omitting due care in connection with activities on his premises.

There are several flaws with the Gilberts' liability theories against Smith. First, it is undisputed that the allegedly defective sidewalk was on the city's premises, not Smith's. Smith owes no legal obligation to maintain city sidewalks. An abutting landowner is "liable for only such defects or dangerous conditions in public streets or sidewalks that are created by the active negligence of such landowners or their agents." ***Jasenczak v. Schill,*** 55 Wis.2d 378, 382, 198 N.W.2d 369, 371 (1972). There is no showing that Smith created or contributed to the raised part of the sidewalk. Second, there is no proof from which a reasonable inference could be made that brown dead grass concealed the sidewalk defect more effectively than green growing grass. Gilbert testified at her deposition that she did not know whether she noticed that the grass was brown before she fell. Third, there is no proof from which to infer that Smith used weed killer on the grass or that even if he had done so, it was a factor causing Gilbert's injuries.

The parties discuss the concepts of active and passive negligence. Their discussion is not material here because the undisputed facts fail to

demonstrate that Smith breached any legal duty. Absent a showing of legal duty and its breach, there is no negligence. *See* ***Milwaukee Partners v. Collins Engineers,*** 169 Wis.2d 355, 361-62, 485 N.W.2d 274, 276-77 (Ct. App. 1992) (Negligence claim consists of a duty of care; a breach of the duty; causal connection between the breach and the injury; and actual loss or damage as a result of the injury.).

Consequently, the order is reversed and remanded with directions to grant American Family's motion for summary judgment.

By the Court.—Order reversed and cause remanded with directions.

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