COURT OF APPEALS
DECISION
DATED AND RELEASED

May 14, 1996

No. 95-2835-FT

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

ARLINE A. SMITH,

Plaintiff-Appellant,

v.

CITY OF OCONTO AND
FARNSWORTH PUBLIC LIBRARY,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Oconto County: LARRY L. JESKE, Judge. *Affirmed.*

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

PER CURIAM. Arline Smith appeals a summary judgment dismissing her claims against the City of Oconto and the Farnsworth Public Library (collectively "the City") arising out of injuries Smith sustained as a result of a slip and fall.[1] Smith identifies three issues, whether: (1) the trial court

[1] This is an expedited appeal under RULE 809.17, STATS. We construe the order of dismissal as a final judgment.

erroneously concluded that Smith's negligence exceeds the City's as a matter of law; (2) the lawn's condition presented an obvious and apparent danger; and (3) Smith was engaged in a recreational activity at the time of her injury. Because the trial court properly concluded that the undisputed facts demonstrate that Smith's negligence exceeded the City's as a matter of law, we affirm the summary judgment of dismissal.

The record discloses the following undisputed facts derived from Smith's pretrial deposition testimony and affidavit. As Smith was leaving the library, she noticed a Christmas display on its lawn. She walked over to it to look at it. She turned to walk away and took one step and felt nothing under her foot. She fell to the sidewalk and was injured. There was no snow on the ground. She had not noticed that the lawn was higher than the sidewalk. The lawn was approximately one foot higher than the adjacent sidewalk, retained by a concrete-type wall. A photograph, marked as an exhibit, shows that the library's lawn is approximately two steps higher than the abutting sidewalk.

Smith brought this action alleging injuries as a result of the City's failure to provide a railing or a warning of the dangerous condition. She further alleged that her fall resulted from an attractive nuisance. There were no allegations that the sidewalk condition violated any safety statutes or building codes. On motion for summary judgment, the trial court concluded that Smith's negligence exceeded the City's as a matter of law. It dismissed the action, but refused to order costs to the prevailing party.

When reviewing summary judgment, we apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Sec. Corp.,*** 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). 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). Because numerous cases discuss the methodology, we do not repeat it here. *See* ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 314-15, 401 N.W.2d 816, 820 (1987).

Contributory negligence is a defense to an action grounded on negligence, or nuisance having its origins in negligence. ***Schiro v. Oriental Realty Co.,*** 272 Wis. 537, 546-47, 76 N.W.2d 355, 360 (1956). If plaintiff's

negligence is greater than defendant's, § 895.045, STATS., bars recovery.[2] "Generally, the apportionment of negligence is a question for the jury." ***Kloes v. Eau Claire Cavalier Baseball Ass'n***, 170 Wis.2d 77, 88, 487 N.W.2d 77, 81 (Ct. App. 1992). "Where the facts are undisputed, whether a plaintiff's negligence exceeds a defendant's negligence as a matter of law is a question of law that we review de novo." ***Id.*** at 86, 487 N.W.2d at 81. Further, "where the plaintiff's negligence clearly exceeds the defendant's, we may so hold as a matter of law." ***Id.*** at 88, 487 N.W.2d at 81.

A pedestrian has the obligation to exercise ordinary care for her own safety. *See* ***Kobelinski v. Milwaukee & Suburban Transp. Corp.,*** 56 Wis.2d 504, 511, 202 N.W.2d 415, 420 (1972). The failure to exercise ordinary care to employ one's own sense of sight so as to become aware of the existence of a danger is negligence. *See* WIS JI—CIVIL 1007. Here, Smith testified that she did not notice the grade change between the lawn and the sidewalk, although it was plainly visible. There is no allegation that her vision was obscured by darkness, or that weather conditions, ice or snow were factors. There is no contention that the City violated any safety code.

This set of undisputed facts demonstrates that Smith, in failing to observe where she was walking, failed to exercise ordinary care for her own safety. In comparing the alleged negligence of the City with that of Smith, we conclude that the trial court did not err when it determined that the proofs disclosed a high degree of negligence on Smith's part and low degree of negligence on the City's part, if indeed the City was negligent at all. Because the undisputed facts disclose that Smith's negligence clearly exceeds that of the City's, we affirm the summary judgment dismissing her claim.[3]

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[2] Section 895.045, STATS., provides:

> Contributory negligence shall not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

[3] Because we affirm the trial court's contributory negligence determination, we do not reach

Next, the City argues that the trial court erroneously failed to award it costs as the prevailing party. The City, however, has not cross-appealed the judgment that it challenges. A respondent may raise a claim of error in his brief without filing a notice of cross-appeal when all that is sought is the correction of an error which would sustain the judgment. ***Auric v. Continental Cas. Co.,*** 111 Wis.2d 507, 516, 331 N.W.2d 325, 330 (1983). That is not the case here, where the City seeks to modify the summary judgment. The City's failure to file a notice of cross-appeal prevents appellate review of its claim of error. *See* § 809.10(2)(b), STATS.

By the Court.—Judgment affirmed. No costs on appeal.

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

(..continued)
Smith's alternative claims of error.