COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 10, 1996

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(1), 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. 96-0725

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

SHARON K. SONNENTAG,

Plaintiff-Appellant,

v.

JOHN SCHINDLER, d/b/a JOHN SCHINDLER CONSTRUCTION, INTEGRITY MUTUAL INSURANCE COMPANY, GERALDINE ROBINSON and TONY PANOSIAN, d/b/a JJ&R ENTERPRISES and SECURA INSURANCE, a mutual company,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Reversed and cause remanded with directions.*

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

PER CURIAM. Sharon Sonnentag appeals a judgment of dismissal based on the jury's verdict finding her 50% liable for her injuries resulting when a defectively built stairway, held only by three small nails, collapsed. She argues that because there was no evidence that a reasonable inspection would have disclosed the danger, the jury's allocation of negligence is unreasonably disproportionate as a matter of law. We agree. Because those who built the stairs are more negligent as a matter of law, we reverse the judgment and remand with directions to grant a new trial on the apportionment of negligence.

This case involves a single family residential stairway constructed in 1989 leading from Sonnentag's kitchen to her basement. The stairway consisted of two stringers, the tops of which were attached to a piece of plywood which was then nailed to a floor joist at the entrance to the kitchen. It is disputed whether John Schindler or Tony Panosian actually nailed the plywood to the floor joist. However, it is unrefuted that only three four-pennyweight nails were used to affix the stairway to the floor joist. The stairs were not anchored at the floor. It is also unrefuted that the inadequate size and number of nails were the cause of the collapse.[1]

Schindler, a carpenter, disputed that he built the steps leading from the kitchen.[2] He testified that he was working on other projects at the house at the time they were built and may have been asked for advice. Panosian, a landlord, testified that he helped Schindler build the steps by nailing the treads to the stringers.[3] There is no dispute that Sonnentag had no knowledge or experience in the construction of stairs and played no role in the building of the stairway in question.

On the day of the accident, Sonnentag and the Culligan man, who weighed 200 pounds, went down the steps. He was in front of Sonnentag.

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[1] The four-pennyweight nails were each approximately 1¼ inch in length and .20 of an ounce in weight. *See* WEIGHT TABLE, WEBSTER'S NEW COLLEGIATE DICTIONARY 1319 (1973). *See* Appendix A, which consists of a photocopy of Exhibit 13, the actual nails.

[2] Because Schindler was deceased at the time of trial, his deposition testimony was used.

[3] Panosian was a property manager for the landlord who later conveyed the property in question to Panosian.

When he hit the first step, he felt it wiggle and jumped back. He testified that Sonnentag told him not to worry about the steps, "[t]hey have been doing that since they have been installed." He went down the steps without difficulty and Sonnentag was right behind him. He asked her to get him a pail. Sonnentag went back up the steps. On returning down the steps with a small pail, the stairway let loose and Sonnentag fell.

The defendants argue that the following evidence supports the jury's determination that Sonnentag was 50% negligent.[4] At trial, Sonnentag testified that she used the steps three to four times a day. She noticed something was different a couple of days before the accident: that the steps were "just a little loose." Also, they were not in line and the first step was a longer step than previously. She testified that the first step had moved lower from the kitchen floor approximately one-fourth inch.

Sonnentag had asked her husband to take a look at the steps. She knew he looked at them, but made no repairs. She never contacted her landlord or carpenter to fix the steps. She continued to use the steps although there were steps in the garage she could have used to access the basement that would have only taken ten or fifteen seconds longer.

When the stairs collapsed and Sonnentag fell, she said that "my husband was going to get to them but never did." After surgery, Sonnentag was angry with her husband. She stated that if he would have done what she had asked, this would have never happened. The jury found Panosian and Schindler each 25% negligent and Sonnentag 50% negligent.

The apportionment of negligence is generally a question for the jury and is to be sustained if there is any credible evidence to support it. ***Stewart v. Wulf,*** 85 Wis.2d 461, 471, 271 N.W.2d 79, 84 (1978). It will not be upset except where it is manifest as a matter of law that the allocation is unreasonably disproportionate. ***Leckwee v. Gibson,*** 90 Wis.2d 275, 289, 280 N.W.2d 186, 192 (1979). We review the evidence in the light most favorable to

[4] Panosian's response brief cites Sonnentag's pretrial deposition to support his version of facts. This court must review testimony that was before the court. If Panosian wishes to direct this court's attention to deposition testimony that was later used at trial, the correct method is to cite to the portions of the trial transcript that admit the deposition testimony.

sustain the verdict. ***Sumnicht v. Toyota Motor Sales, U.S.A., Inc.,*** 121 Wis.2d 338, 360, 360 N.W.2d 2, 12 (1984). Nonetheless, when it appears that one party's negligence exceeds the other's as a matter of law, "it is not only within the power of the court but it is the duty of the court to so hold." ***Leckwee***, 90 Wis.2d at 289, 280 N.W.2d at 192.

If the danger is discoverable in the exercise of ordinary care, the injured plaintiff is negligent. ***Schulz v. St. Mary's Hosp.,*** 81 Wis.2d 638, 647, 260 N.W.2d 783, 785 (1978). Sonnentag had no role in the construction of the steps and no experience in stairway construction. Consequently, her negligence would be failing to recognize and appreciate the danger that should have been recognized by a reasonably prudent person under the circumstances. *See* WIS J I—CIVIL 1007. Reviewing the evidence in the light most favorable to the verdict demonstrates that Sonnentag knew that the steps were a little loose and moved a quarter of an inch. She asked her husband to fix them and he did not. Nonetheless, she proceeded to use the steps.

Under the facts presented, the jury's allocation of negligence is unreasonably disproportionate. We conclude as a matter of law that Sonnentag cannot be held to be as negligent as those who defectively built the stairway. Even if Sonnentag knew there were problems with the stairs, there is no showing that they were in danger of collapse. A stairway collapse of this nature is outside common experience. The structural defect, consisting of using only three wholly inadequate nails to fasten the entire stairway, created the hazard. There is no showing that a reasonable inspection by an ordinary person would have disclosed the nature of this structural defect. The Culligan man's testimony, that he felt a wiggle but proceeded down the steps without difficulty moments before the collapse, is unrefuted. There is no evidence that it would have been apparent to any person, other than a stair builder, that the stairs were in danger of collapse.

Sonnentag's reporting of the problem she perceived and request for inspection does not render her as negligent as those who built the steps. The defendants created the hazard and Sonnentag fell into it. As a matter of law, we conclude that under these facts, she cannot be held as negligent as those who prepared the hazard. We therefore reverse the judgment and remand with directions to grant Sonnentag a new trial on the issue of apportionment of

negligence. Because the jury's findings with respect to damages were not challenged, no new trial on the issue of damages is required.[5]

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

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

[5] Sonnentag also challenged the jury instructions and argued that the defendants' negligence should have been aggregated. We need not reach Sonnentag's other arguments for reversal because we resolved the appeal on the grounds stated. *See* ***Meyer v. Ludwig,*** 65 Wis.2d 280, 291-92, 222 N.W.2d 679, 685 (1974).

AN EXHIBIT HAS BEEN ATTACHED TO THIS OPINION. THE EXHIBIT CAN BE OBTAINED UNDER SEPARATE COVER BY CONTACTING THE WISCONSIN COURT OF APPEALS.

COURT OF APPEALS
OF WISCONSIN
110 EAST MAIN STREET, SUITE 715
POST OFFICE BOX 1688
MADISON, WISCONSIN 53703-1688
TELEPHONE: (608) 266-1880
FAX: (608) 267-0640

Marilyn L. Graves, Clerk
Court of Appeals