COURT OF APPEALS
DECISION
DATED AND RELEASED

October 23, 1997

NOTICE

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.

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

No. 96-2253

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

KELLY J. MCKINSTRY,

PLAINTIFF-RESPONDENT,

V.

MARVIN J. KRAMER, JANE DOE KRAMER, FRED O. MILLER, F/D/B/A FRED MILLER CONSTRUCTION, GENERAL CASUALTY COMPANY OF WISCONSIN,

DEFENDANTS,

WALBRIDGE CONDOMINIUM UNIT OWNERS ASSOCIATION, INC., AND AETNA CASUALTY & SURETY COMPANY,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County: JACK F. AULIK, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. The Walbridge Condominium Unit Owners Association, Inc., and its insurer, Aetna Casualty & Surety Company (collectively, "Association"), appeal from a judgment against them. We affirm.

Kelly McKinstry brought suit against the Association and the condominium declarant, Fred Miller, among others, to recover damages to her property caused by changes in surface water drainage from the condominium property. Shortly before trial, McKinstry settled with Miller and her suit went to trial with the Association as the only defendant. By special verdict, the jury found that the Association maintained a nuisance and was negligent in its maintenance of the property, and that these were causes of damage to McKinstry's property. The jury further found that Miller did not maintain a nuisance or act negligently in maintaining the property. The jury awarded McKinstry a total of $72,600.

The Association argues on appeal that McKinstry's settlement release with Miller also extinguished McKinstry's nuisance claim against the Association. However, it is difficult to understand the specifics of the Association's argument. The argument may be that the liability of the two defendants cannot be separated because the concept of comparative nuisance is not recognized. The Association asserts that because nuisance focuses on the interest invaded, rather than on the conduct of the defendant, a theory of comparative nuisance is impossible. Therefore, it argues, the defendants' liability is co-extensive, rather than joint and several, and by releasing Miller the plaintiff also released the Association.

If this is the Association's argument, we reject it. The argument disregards the possibility that the fact finder could ultimately conclude the nuisance was maintained by only one defendant, rather than both. Indeed, that is

what the jury found in this case. The Association's argument, if adopted, would discourage a plaintiff from settling with only one defendant, for fear that the entire claim would be extinguished. We see no reason, in either law or policy, to reach this result.

The Association relies primarily on two cases, neither of which compels the result it seeks. The first case is ***Schroeder v. Pederson,*** 131 Wis.2d 446, 388 N.W.2d 927 (Ct. App. 1986), where the plaintiff sued his father and others who owned land on which he was injured. It was undisputed that the father was the only defendant to have been negligent. The plaintiff settled with his father, while reserving his right to seek damages from the co-owners of the land, who would be vicariously liable for the father's negligence. We held that "in a tort action based exclusively on the active negligence of a joint venturer, a valid release of the sole actively negligent joint venturer also releases the other joint venturers from liability, even though the release specifically reserves claims against all other persons." ***Id.*** at 450, 388 N.W.2d at 928.

It is not clear how the Association believes ***Schroeder*** applies to the present case. Perhaps it intends to suggest that Miller was an active joint venturer and the Association was merely vicariously liable for his conduct, and thus the release of Miller released the Association. However, its brief contains no clear argument to this effect, and we decline to construct one. Furthermore, in view of the Association's effort to distinguish nuisance from negligence, it is not clear how it can argue that this negligence case supports its position.

The Association also relies on ***St. Clare Hosp. v. Schmidt, Garden, Erickson, Inc.,*** 148 Wis.2d 750, 437 N.W.2d 228 (Ct. App. 1989). Specifically, it relies on that part of the opinion in which we distinguished a negligence claim

from a strict liability claim based on a defective product. However, the Association's argument is not developed in any coherent way, and we see nothing about the case that supports the result the Association seeks here.

McKinstry also moves for a finding that this appeal is frivolous under RULE 809.25(3)(c)2, STATS. We deny the motion because we are not satisfied that the Association or its attorney "knew or should have known" that its appeal could not be supported by "a good faith argument for the extension, modification or reversal of existing law." RULE 809.25(3)(c)2.

By the Court.—Judgment affirmed.

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