COURT OF APPEALS
DECISION
DATED AND FILED

OCTOBER 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0883-FT

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

TIMM ARMOUR,

PLAINTIFF-APPELLANT,

STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, A STATE ENTITY,

PLAINTIFF,

V.

MILWAUKEE TRANSPORT SERVICES, INC., A DOMESTIC CORPORATION AND COUNTY OF MILWAUKEE, A MUNICIPAL CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Timm Armour appeals from the trial court's grant of summary judgment in favor of Milwaukee Transport Services, Inc., (Milwaukee Transport). The trial court's order dismissed Armour's personal injury suit. Armour asserts that the trial court erred in deciding that Armour was more negligent than Milwaukee Transport for his injuries as a matter of law. Because we conclude that the evidence submitted to the trial court demonstrated as a matter of law that Armour was at least fifty-one percent negligent for his injuries, we affirm the trial court's judgment.[1]

We review the trial court's grant of summary judgment *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Section 802.08(2), STATS., sets forth the standard by which summary judgment motions are to be judged: "The judgment sought shall be rendered 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 judgment as a matter of law." Summary judgment should be granted only where the moving party shows the right to judgment with such clarity as to leave no room for controversy. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980).

The elements of a claim for negligence are: "'(1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.'" ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 293, 507 N.W.2d 136, 140 (Ct. App. 1993) (quoted source omitted). It is the duty

[1] Pursuant to this court's order dated April 22, 1997, this case was submitted to the court on the expedited appeals calendar. S*ee* RULE 809.17, STATS.

of the court to bar a negligence suit where the evidence of the plaintiff's contributory negligence is so clear and so significant that the court concludes that the negligence of the plaintiff is as a matter of law equal to or greater than that of the defendant. *See* ***Johnson v. Grzadzielewski***, 159 Wis.2d 601, 608, 465 N.W.2d 503, 506 (Ct. App. 1990).

The key facts before the trial court regarding Armour's contributory negligence were undisputed. Armour testified at his deposition that during the afternoon of September 7, 1994, he went to a tavern where he drank two beers and visited with the tavern's owner, Clarence Germershausen, a friend of his. Armour stated that he decided to go home around 5:30 p.m., so he left the tavern and went outside to wait for his bus. Armour indicated that he was thirty-two years old at this time, and he was diagnosed with cerebral palsy at birth, a condition that affects his hand-eye coordination. Armour stated that he noticed the bus he intended to take approaching the bus stop. Armour indicated that a car was illegally parked in the bus loading zone so he was aware that he would have to step into the street in order to board the bus. Armour testified that he saw the bus slow down to approximately five miles an hour and begin to pull into the bus stop. Armour stated that he waved at the bus driver to indicate his intention to board the bus and that the driver acknowledged his gesture.

Armour stated that he stepped approximately two or three feet into the street as the bus pulled into the bus stop area and slowed to a very low speed. Armour stated that the bus did not stop and then began to accelerate past him. Armour stated that he realized that the bus was passing him by, so he intentionally rapped on the bus door with the bottom of his fist to show his anger and frustration and to get the attention of the bus's driver. Armour indicated that as he hit the bus with his fist, a side of the bus door or a part of the bus caught his hand, spinning

him around and causing him to fall down onto his left side. Armour testified that he suffered a fractured left femur and fractured left elbow as a result of the fall.

Germershausen, who witnessed the accident, confirmed the key facts of Armour's statement of events. Oliver Newsom, the driver of the bus, denied any knowledge of the incident. Newsom did acknowledge that a bus operator has no right to refuse ridership to anyone seeking to board a Milwaukee Transport bus.

Armour had a duty to exercise ordinary care for his own safety. *See* ***Johnson***, 159 Wis.2d at 608, 465 N.W.2d at 506. Hitting the side of a moving bus in a city street is not an exercise of ordinary care. It is instead a dangerous and intentional act which can foreseeably lead to grave injury. *Cf*. ***id***. at 608-09, 465 N.W.2d at 506 (plaintiff failed to use ordinary care in "expressing" elevator by overriding safety devices and causing elevator to descend many floors without stopping, a dangerous and intentional misuse of elevator which could foreseeably lead to grave injury). Because Armour failed to use ordinary care for his own safety by striking a large moving vehicle, we conclude that he was at least fifty-one percent causally negligent for his injuries and is therefore barred from recovery as a matter of law. *See* § 895.045(1), STATS.;[2] and s*ee* ***Johnson***, 159 Wis.2d at 609, 465 N.W.2d at 506 (plaintiff who "expressed" elevator and climbed out of it was at least fifty-one percent causally negligent and was barred from recovery as a matter of law). Because our decision on this point disposes of the

[2] Section 895.045(1), STATS., provides in pertinent part as follows:

> COMPARATIVE NEGLIGENCE. Contributory negligence does 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 that negligence was not greater than the negligence of the person against whom recovery is sought....

appeal, we will not decide whether Armour's case was subject to dismissal on public policy grounds. *See* ***Sweet v. Berge***, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

By the Court.—Judgment affirmed.

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