

2007 WI APP 228

**COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION**

Case No.: 2007AP51

†Petition for Review

Complete Title of Case:

KATRINA CLAYTON,

PLAINTIFF-APPELLANT,

V.

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND MARVIN
WILLIAMS,**

DEFENDANTS-RESPONDENTS,†

**STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY
SERVICES,**

SUBROGATED-PLAINTIFF,

INDEPENDENT HEALTH CARE PLAN,

INTERVENING PLAINTIFF.

Opinion Filed:	September 25, 2007
Submitted on Briefs:	September 4, 2007
Oral Argument:	--

JUDGES:	Curley, P.J., Fine and Kessler, JJ.
Concurred:	--
Dissented:	--

Appellant	
ATTORNEYS:	On behalf of the plaintiff-appellant, the cause was submitted on the briefs of <i>Victor C. Harding of Warshafsky, Rotter, Tarnoff & Bloch, S.C.</i> , Milwaukee.

Respondent
ATTORNEYS:

On behalf of the defendants-respondents, the cause was submitted on the brief of *Emile H. Banks, Jr.* and *Brenda M.S. Rivecca* of *Emile Banks & Associates, LLC*, Milwaukee.

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2007AP51

Cir. Ct. No. 2005CV9434

STATE OF WISCONSIN

IN COURT OF APPEALS

KATRINA CLAYTON,

PLAINTIFF-APPELLANT,

v.

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND
MARVIN WILLIAMS,**

DEFENDANTS-RESPONDENTS,

STATE OF WISCONSIN DEPARTMENT OF HEALTH AND FAMILY SERVICES,

SUBROGATED-PLAINTIFF,

INDEPENDENT HEALTH CARE PLAN,

INTERVENING PLAINTIFF.

APPEAL from judgments of the circuit court for Milwaukee County:
CLARE L. FIORENZA, Judge.¹ *Reversed and cause remanded.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Katrina Clayton, who was severely injured when she was run over by a car owned by Marvin Williams, appeals the circuit court’s grant of summary judgment to Williams and his insurer, American Family Mutual Insurance Company. The circuit court ruled that Williams was protected against liability by Wisconsin’s Good Samaritan statute, WIS. STAT. § 895.48(1). We conclude that there are genuine issues of material fact that need to be tried. Accordingly, we reverse.

I.

¶2 Clayton was hurt when the car owned by Williams hit her when she was in front of her home trying to avoid a car driven on the sidewalk by Johnnie Mae Carter, who was apparently trying to run over her husband and his girlfriend.

¹ Katrina Clayton’s notice of appeal recites that it is from “the entire final judgment of dismissal” entered by the circuit court “on December 19, 2006,” and attaches the December 19 document as an exhibit. Clayton’s “additional” notice of appeal states that she is also appealing “the entire amended order of dismissal entered January 12, 2007 and judgment entered February 14, 2007,” and attaches those documents as well. The December 19 and January 12 documents are, however, stylized “Order of Dismissal” and “Amended Order of Dismissal.” (Uppercasing omitted.) Both the December 19 and January 12 documents reference the circuit court’s earlier grant of summary judgment and declare in their operative phrases that “the plaintiff’s claims are hereby dismissed on their/the merits and with prejudice.” The defendants do not contend that the notices of appeal are defective. *See* WIS. STAT. RULE 805.18(1) (“The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party.”) (made applicable to appellate procedures by WIS. STAT. RULE 809.84). For consistency, we, as do Clayton’s notices of appeal, refer to the December 19, 2006, and January 12, 2007, documents as “judgments.”

Carter struck the Williams car, which was parked in front of Clayton's house. This pushed Williams's car so it hit Clayton. The right front tire of his car rose onto the sidewalk curb, and Clayton wound up under Williams's car.

¶3 According to Clayton, she was under Williams's car but had sufficient room under the car to breathe and was not in pain. She claims that Williams then got into his car, started it, and drove it forward so the right front tire came down off of the curb, thereby pinning Clayton underneath the car. Clayton asserts that Williams's car continued to roll forward, and the right front wheel crushed her right shoulder. Additionally, she was badly burned by the car's exhaust system. At that point, Clayton contends that when her brother yelled at Williams to stop or he would "kill her," Williams got out of his car, and left the engine running. Ultimately, the car was lifted off of Clayton, and she was taken to a hospital. Williams denied in his deposition getting into the car and driving it over Clayton.

¶4 The circuit court held that irrespective of whose version of the events was true, the Good Samaritan statute protected Williams against liability for Clayton's injuries.

II.

¶5 Our review of a circuit court's grant of summary judgment is *de novo*. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). Similarly, our interpretation of the Good Samaritan statute is also *de novo*. *Mueller v. McMillian Warner Ins. Co.*, 2006 WI 54, ¶20, 290 Wis. 2d 571, 581, 714 N.W.2d 183, 188.

¶6 The Good Samaritan statute, WIS. STAT. § 895.48(1) provides, as material here: “Any person who renders emergency care at the scene of any emergency or accident in good faith shall be immune from civil liability for his or her acts or omissions in rendering such emergency care.” There are thus three requirements before the statute relieves a person from liability:

- (1) Emergency care must be rendered *at the scene of the emergency*;
- (2) The care rendered must be *emergency care*; and
- (3) Any emergency care must be rendered *in good faith*.

Mueller, 2006 WI 54, ¶23, 290 Wis. 2d at 582, 714 N.W.2d at 188 (emphasis in original). “[A]ll three elements” must be met before § 895.48(1) protects the alleged tortfeasor from liability. **Mueller**, 2006 WI 54, ¶24, 290 Wis. 2d at 582, 714 N.W.2d at 188.

¶7 As we have seen, Williams denied driving his car over Clayton. Thus, there is an issue of fact as to whether he did or did not. Further, there is also an issue of fact whether, if he *did* drive his car over Clayton, he made an “initial evaluation” of Clayton’s condition and drove the car forward as part of his rendering of “emergency care,” *see id.*, 2006 WI 54, ¶46, 290 Wis. 2d at 591, 714 N.W.2d at 192 (“[E]mergency care’ under the statute refers only to the initial evaluation and immediate assistance, treatment, and intervention at the scene of an emergency during the period before care can be transferred to professional medical personnel.”), or whether he did so in “good faith.” The summary judgment Record is wholly silent on these matters because Williams denied that he drove the car over Clayton, and this per force means that he did not submit summary judgment material in support of his contention that the Good Samaritan statute protects whatever he did, on which he had the burden of proof. *See*

Sullivan v. Bautz, 2006 WI App 238, ¶13 n.5, 297 Wis. 2d 430, 438 n.5, 724 N.W.2d 908, 912 n.5 (party asserting the affirmative of a proposition has the burden of proof); *Estate of Anderson v. Anderson*, 147 Wis. 2d 83, 88, 432 N.W.2d 923, 926 (Ct. App. 1988) (party asserting affirmative of a proposition has the burden of proof); *see also Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis. 2d 281, 290, 507 N.W.2d 136, 139 (Ct. App. 1993) (party has the burden to set forth specific facts to establish the elements on which they have the burden of proof at trial). Accordingly, we reverse and remand for trial.²

By the Court.—Judgments reversed and cause remanded.

² Our resolution of the Good-Samaritan issue moots that part of Clayton's appeal that seeks vacatur of the circuit court's amended order awarding costs to the defendants.

