

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 19, 1996

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. 96-0247

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**CALVIN MARX and
CYNTHIA MARX,**

Plaintiffs-Appellants,

v.

**AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,**

Defendant-Respondent,

**EMPLOYERS HEALTH INSURANCE
COMPANY,**

Defendant-Subrogee,

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. Calvin Marx and Cynthia Marx appeal from a judgment dismissing their complaint. We affirm.

The plaintiffs' complaint named American Family Mutual Insurance Company as defendant. The complaint alleged that the company's insured, Gary Servais, was negligent while Calvin Marx was helping him perform work on his house. As a result of the alleged negligence, Marx fell while on a stepladder and was injured. The circuit court granted American Family's motion for summary judgment on the grounds that the plaintiffs failed to present evidence of negligence by Servais, or how that negligence might have caused Calvin's fall.

Summary judgment methodology is well-established and need not be repeated. See *Grams v. Boss*, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980). We review the circuit court decision without deference, using the same methodology. *In re Cherokee Park Plat*, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582 (Ct. App. 1983).

In the present case, the complaint states a claim and the answer raises issues of fact or law. We turn to the affidavit of the moving party, defendant American Family. That affidavit included excerpts from the deposition of Calvin Marx in which he stated that he did not know what caused the ladder to give way while he was on it. American Family argued that these excerpts showed that the plaintiffs would be unable to prove that the accident was caused by any negligence of Servais. The affidavit shows a *prima facie* defense on the issue of causation.

The plaintiffs responded with several affidavits which included excerpts from depositions of Calvin Marx and Servais, photos of the accident location and the stepladder taken after the accident, and weather records indicating frequent rain around the date of the accident. The photos of the stepladder show that one of the spreader arms is not connected on one end, and the support side of the stepladder (that is, the side without steps) is twisted. The deposition excerpts do not include an opinion as to what caused the ladder to fall.

A number of possible explanations for the accident can be proposed: poor construction of the ladder, poor maintenance of the ladder, excessive weight on the ladder, legs of the ladder planted on uneven ground, wet ground giving way, and probably others. However, there is no evidence

pointing specifically to any one, or a combination, of these explanations. In the absence of such evidence, if the jury were to find that Servais was negligent in some respect, the jury would only be speculating as to whether that negligence was actually a cause of the ladder's fall. Therefore, we affirm the dismissal of the complaint.

By the Court. – Judgment affirmed.

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