COURT OF APPEALS
DECISION
DATED AND FILED

October 13, 2010

A. John Voelker
Acting 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. 2009AP2712 **Cir. Ct. No. 2006CV861**

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

LISA MCGILLIS-LEWANDOWSKI,

PLAINTIFF-APPELLANT,

THE HARTFORD LIFE INSURANCE CO.,

INVOLUNTARY-PLAINTIFF,

V.

COLEEN KILPS AND ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

STATE OF WISCONSIN, DEPARTMENT OF HEALTH AND FAMILY SERVICES,

NOMINAL-DEFENDANT.

APPEAL from a judgment of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. Lisa McGillis-Lewandowski appeals from a judgment dismissing the negligence case she filed against her landlord, Timothy Kilps. The trial court precluded certain testimony as hearsay and then granted the defendants' motion for dismissal at the close of McGillis-Lewandowski's case on grounds that she had not met her burden of proof as to negligence or causation. Rather than addressing the hearsay ruling, McGillis-Lewandowski argues that the barred testimony was admissible under "the dead man's statute," WIS. STAT. § 885.16 (2007-08).[1] By ignoring the basis on which the trial court ruled, she effectively has conceded the point. We affirm.

¶2 McGillis-Lewandowski rented an upper flat from Kilps that was serviced by an exterior wooden staircase. McGillis-Lewandowski claimed one of the steps was defective when she moved in and that she later told Kilps about it on the telephone. Charles Jordan, McGillis-Lewandowski's live-in boyfriend, assertedly overheard the conversation. McGillis-Lewandowski slipped or tripped on the allegedly faulty step and fractured her ankle. She filed suit against Kilps and his insurer, Acuity, A Mutual Insurance Company.

¶3 Kilps died before being deposed. His widow, Coleen, was substituted as the defendant and trial preparations continued.[2] On the morning of

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless noted.

[2] "Kilps" will refer to Timothy throughout the opinion. "The respondents" will refer collectively to Coleen Kilps and Acuity.

trial, the respondents' lawyer moved pursuant to the dead man's statute to bar testimony that McGillis-Lewandowski had reported the condition of the step to Kilps before the accident. He also requested that the jury be given a preliminary instruction that a deceased person is presumed not to be negligent. *See* WIS JI—CIVIL 353. McGillis-Lewandowski's counsel argued that McGillis-Lewandowski would testify only as to what she told Kilps, not about his response, and that Jordan would testify as to what he heard McGillis-Lewandowski say on the telephone. The court barred McGillis-Lewandowski's testimony as precluded by the dead man's statute and Jordan's as "[c]lassic hearsay."

¶4 The trial commenced. McGillis-Lewandowski testified that when she first viewed the apartment before moving in, she noticed that a half inch to an inch of the left front edge of one of the wooden steps had broken off. She stated that the condition of the step "greatly" concerned her, that it never was repaired and that she generally avoided stepping on the left side of the step. Jordan testified similarly about the condition of the step.

¶5 McGillis-Lewandowski testified that on the day of the accident she and Jordan were taking their dog outside. She said that as she descended the staircase, she was conversing with Jordan, who was behind her. She stepped on the chipped part of the step and a piece broke off. She lost her balance and jumped to the ground, about six or seven steps down, breaking her right ankle. She introduced photographs of the step taken six months after she fell.

¶6 At the end of the plaintiff's case, the respondents moved to dismiss on grounds that McGillis-Lewandowski had put in no evidence of Kilps' negligence, of notice to Kilps to establish foreseeability, of how long the condition McGillis-Lewandowski described had existed, that the condition actually was a

defect, rather than a variance, and that the condition of the step caused McGillis-Lewandowski's fall. The court noted that with WIS JI—CIVIL 353 the case would have to go to the jury with a presumption of no negligence on Kilps' part. Having heard "nothing that Kilps was negligent [and] … nothing about causation," the court concluded there was "nothing to go to the jury." It granted the motion to dismiss. McGillis-Lewandowski appeals.

¶7 McGillis-Lewandowski first argues that the trial court misapplied WIS. STAT. § 885.16,[3] the dead man's statute, when it precluded Jordan's intended testimony that he overheard McGillis-Lewandowski's telephone conversation with Kilps. The respondents effectively concede that Jordan's testimony would have been admissible under § 885.16. They point out, however, that the trial court very plainly barred Jordan's testimony as "[c]lassic hearsay."

¶8 We agree. Inexplicably, McGillis-Lewandowski's counsel utterly fails to address that point although raised in the respondents' brief.[4] This court

[3] WISCONSIN STAT. § 885.16 provides in relevant part:

> No party or person in the party's or person's own behalf or interest, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person personally with a deceased … person in any civil action or proceeding, in which the opposite party derives his or her title or sustains his or her liability to the cause of action from, through or under such deceased … person … unless such opposite party shall first, in his or her own behalf, introduce testimony of himself or herself or some other person concerning such transaction or communication, and then only in respect to such transaction or communication of which testimony is so given or in respect to matters to which such testimony relates….

[4] We regret the need but feel compelled to point out that in a civil case the remedy for ineffective assistance of counsel is a suit for malpractice. *See* ***Village of Big Bend v. Anderson***, 103 Wis. 2d 403, 406, 308 N.W.2d 887 (Ct. App. 1981).

often has said that a respondent cannot complain when an appellant's proposition is taken as confessed if the respondent does not undertake to refute it. *See, e.g.*, ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). We also have said:

> [T]he same holds true when an appellant ignores the ground upon which the trial court ruled and raises issues on appeal that do not undertake to refute the trial court's ruling. This is especially so where the respondent raises the grounds relied upon by the trial court, and the appellant fails to dispute these grounds in a reply brief.

Schlieper v. DNR, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). As noted, McGillis-Lewandowski does not challenge the grounds upon which Jordan's testimony was barred. We thus are left with a situation where, even if we agreed with her as to her appellate issue, we would not reverse the trial court's ruling since the court precluded the evidence on grounds not challenged on appeal.

¶9 That said, we do think the trial court's hearsay ruling was mistaken. Where a declarant's statement is offered for the fact that it was said, rather than for the truth of its content, it is not hearsay. ***State v. Wilson***, 160 Wis. 2d 774, 779, 467 N.W.2d 130 (Ct. App. 1991). Rather than being offered to prove the truth of the matter asserted—that the step *was* defective—Jordan's testimony was being offered as substantive evidence of notice to Kilps to prove his knowledge of a *claimed* defect. "A statement that D made a statement to X is not subject to attack as hearsay when its purpose is to establish the state of mind thereby induced in X, such as receiving notice or having knowledge …." K. Broun, MCCORMICK ON EVIDENCE § 249 (6th ed. 2006). As McGillis-Lewandowski does not argue this point, it does not change our disposition of the case.

¶10 McGillis-Lewandowski next argues that the trial court erroneously exercised its discretion in dismissing her case for insufficiency of the evidence when it ruled that her failure to introduce evidence of Kilps' negligence left no issue of fact for the jury to try.

¶11 A motion to dismiss at the end of the plaintiff's case should be granted only if the evidence, viewed in the light most favorable to the plaintiff, is clearly insufficient to sustain a verdict in the plaintiff's favor. ***Kinship Inspection Serv., Inc. v. Newcomer***, 231 Wis. 2d 559, 575-76, 605 N.W.2d 579 (Ct. App. 1999). In reviewing the trial court's decision to grant a motion to dismiss, this court views the evidence in the light most favorable to the appellant, but we will not reverse the trial court's decision unless it was clearly wrong. ***Olfe v. Gordon***, 93 Wis. 2d 173, 185-86, 286 N.W.2d 573 (1980).

¶12 A cause of action in negligence requires proof that the defendant failed to exercise ordinary care and that the act or omission complained of was the cause of the plaintiff's injury. ***Fischer v. Cleveland Punch & Shear Works Co.***, 91 Wis. 2d 85, 92, 280 N.W.2d 280 (1979). Causation is a fact and the existence of causation is frequently an inference to be drawn from the circumstances by the trier of fact. *See* ***Merco Distrib. Corp. v. Commercial Police Alarm Co., Inc.***, 84 Wis. 2d 455, 459, 267 N.W.2d 652 (1978). The mere possibility of causation is not enough, however. ***Id.*** at 460. When the matter remains one of pure speculation or conjecture or if the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. ***Id.***

¶13 The court heard arguments from both sides. It also examined the evidence and parsed out the negligence jury instruction, WIS JI—CIVIL 1005, line

by line, satisfying its duty to "state with particularity" the grounds upon which it was granting dismissal. *See* WIS. STAT. § 805.14(3).

¶14 Looking at the evidence in the light most favorable to McGillis-Lewandowski, we conclude the trial court's decision was not "clearly wrong." *See* ***Olfe***, 93 Wis. 2d at 186. There is no evidence that Kilps did or did not do something that created an unreasonable risk of injury or that Kilps had any knowledge of the condition of the step. The motion to dismiss was properly granted.

By the Court.—Judgment affirmed.

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