**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

October 24, 1995

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.

**NOTICE**

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

No. 95-1553-FT

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

**MARK WILLIAM JAGLA, PERSONAL REPRESENTATIVE OF THE ESTATE OF KINSEY K. SPILLER, DECEASED,**

**Plaintiff-Appellant,**

**LORI SKORIE,**

**Plaintiff-Co-Appellant,**

**v.**

**DOUGLAS J. GUENTHNER, GLOBE AMERICAN CASUALTY CO., INTEGRITY MUTUAL INSURANCE CO., DEVIN K. WIRTZ, SHIRLEY WIRTZ, REGENT INSURANCE COMPANY and WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES,**

**Defendants-Respondents.**

APPEAL from judgments of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Mark William Jagla, the personal representative of the estate of Kinsey K. Spiller, and Lorie Skorie[1] appeal summary judgments dismissing the complaint against each of three defendants and their insurers.[2] Jagla contends that the trial court erred by concluding that as a matter of law none of the three named defendants were guilty of causal negligence in Kinsey's death. Because we conclude that the trial court correctly determined that none of the three named defendants were guilty of causal negligence, we affirm the judgments.

Lori Skorie and her four-year-old daughter, Kinsey Spiller, were visiting the Shirley Wirtz residence in White Lake, Wisconsin. Sometime after dark, Shirley Wirtz's ten-year-old son, Devin, asked for permission from his mother to go sledding in the front yard. After Shirley gave Devin permission to go sledding, Skorie gave Kinsey permission to go sledding with Devin.

Devin and Kinsey occupied the same sled. As they came down the hill in the front yard, the sled hit the icy driveway causing them to slide across the road and onto the shoulder of the opposite side of the road. At the end of the ride, Kinsey got off the sled and ran into the roadway where she was struck by a vehicle driven by Douglas Guenthner.

The roads were ice covered and slippery at the time of the accident. In addition, there was a hill a short distance from the Wirtz home that was large enough to obscure the vision of an approaching vehicle. As a result, Guenthner was driving his motor vehicle at a greatly reduced speed, estimated to be between fifteen and twenty-five miles per hour.[3] As Guenthner came over the crest of the hill, he saw the children on the edge of the road and attempted to slow down even more. However, he could not stop in time to avoid the

[1] Skorie is named as a co-appellant in this appeal but did not file a brief.

[2] This is an expedited appeal under RULE 809.17, STATS.

[3] The posted speed limit on the road was 55 miles per hour.

collision when Kinsey darted in front of his vehicle. Kinsey died as a result of her injuries.

Jagla, as personal representative of Kinsey's estate, and Skorie brought suit against Guenthner, Shirley Wirtz, Devin Wirtz and their insurers. The trial granted the defendants' motions for summary judgment concluding they were not causally negligent as a matter of law.

We review a grant of summary judgment de novo, applying the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). That methodology has been set forth many times and need not be repeated here. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476 (1980). If based upon the facts presented, no properly instructed reasonable jury could find a defendant guilty of negligence the trial court may properly grant summary judgment as to that defendant. *See* ***Ceplina v. South Milwaukee School Bd.*** 73 Wis.2d 338, 342, 243 N.W.2d 183, 185 (1976).

Four elements must be present to sustain a cause of action for negligence: "(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" .... ***Coffey v. Milwaukee***, 74 Wis.2d 526, 531, 247 N.W.2d 132, 135 (1976). Causation is a question of whether the breach of duty was a substantial factor in causing the harm. ***Fondell v. Lucky Stores***, 85 Wis.2d 220, 227, 270 N.W.2d 205, 209 (1978).

In this case, Jagla contends that Guenthner was negligent in operating his vehicle and his negligence caused Kinsey's death. However, on summary judgment Guenthner produced undisputed evidence that he drove his vehicle at a greatly reduced speed in difficult driving conditions, that he saw the children as he came over the hill and slowed down even more, and that he attempted to avoid striking Kinsey when she darted out into the road, but could not do so because of the driving conditions. Jagla did not present any evidence in rebuttal to suggest that Guenthner did not exercise reasonable care in his operation and control of the vehicle or that he did not maintain a proper lookout. Further, there is no evidence to suggest that proper operation and

control of the vehicle could have avoided the collision. We therefore conclude that the trial court properly granted summary judgment to Guenthner.

Jagla next contends that Shirley Wirtz was casually negligent in Kinsey's death. Jagla's theory of negligence against Wirtz is difficult to discern. Shirley was not the person charged with the responsibility of supervising Kinsey, did not grant permission for Kinsey to accompany Devin sledding, and assumed no responsibility for observing the children once they went outside. Under these circumstances we can see no basis upon which any reasonable jury could find Shirley Wirtz guilty of causal negligence. We therefore conclude that the trial court properly dismissed Jagla's complaint against her and her insurer.

Finally, Jagla contends that ten-year-old Devin was negligent in his operation of the sled and that negligence caused Kinsey's death. While this is a close question, we conclude that there is no evidence indicative of causal negligence on the part of Devin. Devin was ten at the time of the incident and is to be judged not by a standard of care to be used by an adult but a reduced standard of care commensurate with his age. *See* ***Frayer v. Lovell***, 190 Wis.2d 795, 806-07, 529 N.W.2d 236, 241 (Ct App. 1995).

We conclude that no reasonable jury could find any negligence on the part of Devin that was a substantial factor in causing Kinsey's death. Had Kinsey been struck by a vehicle while on the sled, Devin's conduct in allowing the sled to go across the roadway may have constituted causal negligence. But these are not the facts in this case. The sled with Kinsey and Devin upon it safely traversed the roadway and reached the opposing shoulder. Before Devin could get off the sled Kinsey had darted into the roadway. Devin attempted to stop Kinsey by calling a warning but was unsuccessful in stopping her.

There is no evidence that Devin had an opportunity to restrain Kinsey or that Kinsey's decision to suddenly run into the roadway was reasonably foreseeable by Devin at the time in question. Based upon the totality of the evidence and considering Devin's age and the lack of any evidence that would indicate it was foreseeable that Kinsey would dart into the roadway in front of an oncoming car, we conclude that the trial court did not err in dismissing the claims of causal negligence against Devin. We therefore affirm

the trial court's judgments dismissing the complaint against all of the defendants.

*By the Court.*—Judgments affirmed.

Not recommended for publication in the official reports.