OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

February 26, 2014

To:

Hon. L. Edward Stengel
Circuit Court Judge
Sheboygan County Courthouse
615 N. 6th Street
Sheboygan, WI 53081

Nan Todd
Clerk of Circuit Court
Sheboygan County Courthouse
615 N. 6th Street
Sheboygan, WI 53081

Corrado Cirillo
Olsen, Kloet, Gunderson & Conway
602 N. 6th St.
Sheboygan, WI 53081

William W. Moir III
Hopp Neumann Humke LLP
2124 Kohler Memorial Dr., Ste. 110
Sheboygan, WI 53081

Douglas J. Ondrasek
Ondrasek Law Office
P.O. Box 1193
Fond du Lac, WI 54936-1193

You are hereby notified that the Court has entered the following opinion and order:

2013AP979 Alice M. Feldman v. Turner Hall LLC (L.C. #2011CV1169)

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

Alice M. and Daniel H. Feldman appeal from a judgment dismissing their negligence claims arising from Alice's fall down a set of basement stairs in a tavern operated by Turner Hall, LLC. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm because as a matter of law, no reasonable juror could conclude that Turner Hall's negligence, if any, was equal to or greater than Feldman's contributory negligence.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

In June 2009, Alice Feldman, a frequent patron of Turner Hall, walked into the back barroom intending to use the women's restroom for the second time that night. Though there were no lights on in the back room, the entrance door was propped open and artificial lighting from the front bar extended into the back room. The back room's right wall was parallel to and flush with the entrance from the front room. The women's bathroom was the first door on the right. A blue and white restroom sign was posted on the door. There was no knob or handle and the bathroom door pushed inward, activating an interior light. The door to the basement was on the other side of and adjacent to the bathroom door. On the basement door, there was an "employees only" sign, a door knob, and a lock that tended to malfunction. The basement door opened outward and there was no automatic light. Feldman had never been in the basement but had seen employees walking up and down the basement stairs. On the night in question, Feldman walked past the restroom door and pulled open the basement door. Believing it was the restroom, Feldman stepped into Turner Hall's unlit basement and fell down the stairs, sustaining injuries.

Feldman filed a complaint under the safe-place statute alleging that she was a frequenter at the business and that Turner Hall was negligent in several respects, including that it failed to: (1) turn on the lights near the women's restroom, (2) ensure that the basement door was locked at all times, and (3) properly light the basement stairs when the door to the stairway was unlocked. Turner Hall alleged several affirmative defenses, including that because Feldman's fall occurred in a location not open to the public, she was a trespasser under the safe-place statute and that her recovery was precluded by Wisconsin's comparative negligence statute. Feldman amended her

complaint to allege that regardless of whether she was a frequenter or trespasser, she was entitled to relief because Turner Hall engaged in willful, wanton and malicious conduct.[2]

After a hearing on Turner Hall's motion for summary judgment, the trial court considered the undisputed facts and concluded that "at the time of the accident, Ms. Feldman had lost her status as a frequenter and had become a trespasser." The trial court further determined as a matter of law that Turner Hall's actions did not constitute willful, wanton or reckless conduct.

We review a grant of summary judgment independently, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. The summary judgment methodology is well established and need not be repeated here. *See*, *e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial, and we view the materials in the light most favorable to the party opposing the motion. ***Id.***, ¶¶23-24.

We conclude that summary judgment in favor of Turner Hall was appropriate because as a matter of law the undisputed facts establish that Feldman's negligence was greater than that of Turner Hall.[3] *See* WIS. STAT. § 895.045(1) ("Contributory negligence does not bar recovery in an action by any person … to recover damages for negligence resulting in … injury to person or property, if that negligence was not greater than the negligence of the person against whom

[2] The duty owed to a trespasser by a business owner is to refrain from willful, wanton, or reckless conduct. *See* ***Monsivais v. Winzenried***, 179 Wis. 2d 758, 766, 508 N.W.2d 620 (Ct. App. 1993).

[3] We may affirm the trial court's decision even if the trial court reached its result for different reasons. ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992). Moreover, we independently review the propriety of summary judgment.

recovery is sought."). Feldman had used the bathroom on many prior occasions, including that same day. There was light filtering into the back from the front bar. The "employees only" posting on the basement door was prominently displayed. Feldman was aware that the bathroom door pushed inward and that this action triggered the automatic light inside. In the face of her prior experience, Feldman walked right past the bathroom, grabbed ahold of an outside handle, and pulled the door outward. No lights were activated. Despite these peculiarities, Feldman chose to take a step forward into a dark room. On these facts, no reasonable juror could find that Feldman was not more negligent than Turner Hall.

Because we conclude that Feldman's negligence was comparatively greater than that of Turner Hall and its employees, we need not decide whether she was frequenter or a trespasser under the safe-place statute. *See* ***Skybrock v. Concrete Constr. Co.***, 42 Wis. 2d 480, 490-91, 167 N.W.2d 209 (1969) ("Since we have determined that the negligence of the plaintiff was … greater than that of the defendant as a matter of law, we do not reach the issue of the status of the plaintiff [under the safe-place statute]."). In reaching our conclusion, we considered all of Turner Hall's conduct, including that which Feldman characterized as willful, wanton or malicious. Therefore, our decision disposes of each of Feldman's claims.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals