

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 5, 2015

Diane M. Fremgen
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. 2013AP2247

Cir. Ct. No. 2012CV75

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CONSTANCE KROPP,

PLAINTIFF-APPELLANT,

V.

**ADAMS-FRIENDSHIP AREA SCHOOL DISTRICT, ADAMS-FRIENDSHIP
AREA HIGH SCHOOL AND EMPLOYERS MUTUAL CASUALTY COMPANY,**

DEFENDANTS,

**MID-STATE YOUTH FOOTBALL & CHEERLEADING CONFERENCE, RLI
INSURANCE COMPANY, ADAMS-FRIENDSHIP YOUTH FOOTBALL,
AND BERLIN YOUTH FOOTBALL AND CHEERLEADING, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Adams County:
CHARLES A. POLLEX, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Constance Kropp appeals a summary judgment decision that dismissed her tort claims against Mid-State Youth Football & Cheerleading Conference, RLI Insurance Company, Adams-Friendship Youth Football, and Berlin Youth Football and Cheerleading, Inc. (collectively, the football organizations) for serious injuries that Kropp suffered, while she was attending a youth football game as a spectator, when she stepped into a “pole vault hole” that had not been covered. The circuit court determined that the football organizations could not be held liable for Kropp’s alleged injuries under Wisconsin’s recreational immunity statute. The circuit court did not address or rely on alternative grounds for summary judgment advanced by the football organizations, namely, the contentions that they owed no duty of care to Kropp and that Kropp’s own contributory negligence exceeded any negligence on their part as a matter of law.

¶2 On this appeal, Kropp has addressed only the recreational immunity issue. In response, the football organizations dispute recreational immunity and also advance arguments on their duty of care and contributory negligence theories. Kropp declined to reply to the football organizations’ alternative arguments. She states that she has not replied to the alternative arguments because they were not the basis for the circuit court’s decision, were not the focus of her own appeal, and the football organizations did not file a cross-appeal. None of these reasons justify Kropp’s failure.

¶3 This was not a situation in which the football organizations needed to file a cross-appeal in order to argue that the circuit court’s decision should be affirmed based on alternative grounds. The reason the football organizations may raise these alternative arguments is because they are offered in support of affirming the circuit court’s decision. It is well established that a respondent on

appeal may raise any argument that would support the action taken by the circuit court because judicial economy is not served by reversing on one ground a decision that would be supported under another theory. *State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985).

¶4 Indeed, apart from Kropp’s failure to address the football organizations’ alternative arguments in her reply brief, it is problematic that she failed to address the alternative grounds *in her brief-in-chief*, where, as here, she knew that the football organizations have alternative arguments supporting summary judgment. Our review of summary judgment decisions is *de novo*, meaning that we independently review the complaint, answer, and summary judgment materials themselves rather than the circuit court’s decision. *See Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶9, 324 N.W.2d 180, 781 N.W.2d 503. The ultimate question before this court, then, is whether there are any material facts in dispute—on the issues of duty of care and contributory negligence as well as recreational immunity—that entitle Kropp to a trial. *See Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751. Thus, Kropp needed to persuade us that summary judgment was improperly granted, and here a complete argument would have addressed all reasons that Kropp was aware of that the football organizations were advancing to support summary judgment in their favor.

¶5 Accordingly, we affirm the circuit court based on Kropp’s failure to respond to the football organizations’ alternative arguments. *See United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (lack of response in reply brief taken as a concession).

¶6 We note that, even if we did not rely on Kropp’s failure to reply to the football organizations’ alternative arguments, our review of the merits of the recreational immunity issue and the alternative grounds raised by the football organizations, that is, duty of care and contributory negligence, suggests that we would affirm the circuit court on the merits based on one or more of those theories.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

