

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 25, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 98-1079**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**TRACI A. ZIMMER,**

**PLAINTIFF-RESPONDENT,**

**V.**

**WAL-MART STORES, INC. D/B/A SAM'S CLUB, AND  
NATIONAL UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, PENNSYLVANIA,**

**DEFENDANTS-APPELLANTS,**

**THE DEAN HEALTH PLAN, INC.,**

**NECESSARY-PARTY.**

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APPEAL from a judgment of the circuit court for Dane County:  
ROBERT R. PEKOWSKY, Judge. *Affirmed.*

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

PER CURIAM. Wal-Mart Stores, Inc. and National Union Fire Insurance Company appeal from the trial court's judgment finding Wal-Mart 100% negligent for Tracy Zimmer's injury and awarding Zimmer nearly \$150,000 in damages. The issues are: (1) whether the trial court erred in finding Wal-Mart 100% negligent; and (2) whether the trial court properly awarded damages for future medical expenses and future wage loss. We resolve these issues against Wal-Mart and affirm.

Zimmer injured her knee when she slipped on some white liquid soap that had spilled on the floor of Sam's Club. The case was tried to the court. The trial court found Wal-Mart 100% negligent and awarded damages of \$146,547. The damages included \$48,694 for future medical expenses and \$12,348 for future wage loss.

Wal-Mart first argues that the trial court erred in finding it 100% negligent for Zimmer's injuries. Wal-Mart contends that Zimmer was partially at fault for not seeing the spill because she was not adequately paying attention to her surroundings. Wal-Mart points to the testimony of Robert Mills, Zimmer's companion, that the area where Zimmer slipped contained visible dirty shoe tracks through a ten-foot-wide area of spilled soap.

The trial court's finding of negligence and the apportionment of that negligence are findings of fact. *Cf. Johnson v. Misericordia Community Hosp.*, 99 Wis.2d 708, 744, 301 N.W.2d 156, 174 (1981). A trial court's findings of fact will not be set aside on appeal unless they are clearly erroneous. Section 805.17(2), STATS

The trial court found Wal-Mart had failed to follow its own protocols to keep the store safe by checking for spills and other hazards and the

spilled soap would have been clearly visible to an employee doing a safety check. The trial court further found that Wal-Mart had set up displays at eye-level and at the ends and sides of the aisles and that these displays were designed to get the customer's attention. Based on these findings, the trial court concluded that Wal-Mart was negligent for failing to detect and remedy the hazard, and that Zimmer was not negligent for failing to scan the floor in front of her. Although Wal-Mart argues to the contrary, a reasonable judge could conclude that a person walking through a store would not continually look downward, scanning the floor for potential hazards. The trial court's finding that Wal-Mart was 100% negligent is not clearly erroneous.

Wal-Mart next argues that the trial court improperly awarded Zimmer future medical expenses and future wage loss due to her injury. Wal-Mart contends that Zimmer has not shown that it is probable that she will need three future surgeries on her knee. *See McGarrity v. Welch Plumbing Co.*, 104 Wis.2d 414, 429, 312 N.W.2d 37, 44 (1981).<sup>1</sup>

Dr. Richard Glad, Zimmer's treating orthopedic surgeon, testified at trial via videotape that it was more likely than not that Zimmer's knee would deteriorate over time to the point that the surgeries would likely be necessary. As finder of fact, the trial court properly concluded that this testimony substantiated the damages claim, even though Dr. Glad made more equivocal statements before the trial. *See* § 805.17(2), STATS., (due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses). Because Zimmer's

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<sup>1</sup> The trial court concluded that Zimmer would probably undergo three future knee surgeries, repeat arthroscopy (\$5,952), a tibial varus osteotomy (\$9,060), and a total knee replacement (\$26,130).

condition involves progressive deterioration of the knee, the fact that she has not recently seen a doctor very often does not, as Wal-Mart argues, mean that she has not adequately shown that she will need future medical treatment for the injury. The trial court properly determined that Zimmer was entitled to \$61,042 for future medical expenses and wage loss.

*By the Court.*—Judgment affirmed.

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

