COURT OF APPEALS
DECISION
DATED AND RELEASED

October 23, 1997

NOTICE

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.

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

No. 97-1676-FT

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

ROGER WALKER AND JUDITH WALKER,

PLAINTIFFS-APPELLANTS,

V.

DENNIS SCHRIMPF,

DEFENDANT-RESPONDENT,

COUNTY OF MARQUETTE AND CITY OF MONTELLO,

DEFENDANTS,

GENERAL CASUALTY CO.,

DEFENDANT-RESPONDENT,

WAUSAU INSURANCE CO., WISCONSIN COUNTY MUTUAL AND PRUDENTIAL INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Marquette County: JOHN R. STORCK, Judge. *Affirmed.*

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

PER CURIAM. Plaintiff-appellants Roger and Judith Walker (the Walkers) appeal from a circuit court order granting summary judgment to defendants Dennis Schrimpf and his insurance carrier, General Casualty Co. (Schrimpf). Because we conclude that summary judgment was proper, we affirm the order.

BACKGROUND

In late May 1994, Judith Walker exited a car driven by Roger Walker to attend a yard sale on Dennis Schrimpf's property in the City of Montello, Marquette County, Wisconsin. While crossing the publicly owned terrace[1] area in front of Schrimpf's house, she fell into a three inch to six inch deep indentation, suffering left knee injury which required surgery to repair. The Walkers brought suit against Schrimpf,[2] alleging that, as the owner of the abutting property, he negligently permitted the indentation to exist. The Walkers' theory was that twenty years earlier Schrimpf removed a tree on the terrace area that had ultimately rotted away leaving a dangerous condition. They theorized that as Schrimpf carried away bits of the stump as it rotted over the years, he made the indentation worse than it would otherwise have been. They also argued that

[1] As defined by CITY OF MONTELLO ORDINANCE § 5-4-2(f), a "terrace area[]" is "the land between the normal location of the street curbing and sidewalk. Where there is no sidewalk, the area four feet from the curb line shall be deemed to be a terrace...."

[2] The Walkers also sued Marquette County, the City of Montello and their insurers. However, the Walkers have appealed only against Schrimpf.

Schrimpf, having the best notice of the condition, was obligated to mark the area to prevent mishaps.

All parties brought motions for summary judgment.

Finding that Schrimpf had no duty of care to the Walkers, the circuit court granted Schrimpf's motion for summary judgment. The Walkers appeal.

STANDARD OF REVIEW

On review of a summary judgment order, we adopt the same methodology as the trial court. Our review is therefore de novo. ***Reel Enters. v. City of La Crosse.***, 146 Wis.2d 662, 667, 431 N.W.2d 743, 746 (Ct. App. 1988). Under § 802.08(2), STATS., we must determine whether a genuine issue exists as to any material fact. Where, as here, both parties move for summary judgment, the court may assume there is no dispute as to the facts, because by moving for summary judgment, both parties assert they believe no material dispute exists as to the facts. *See* ***Powalka v. State Mut. Life Assurance Co.***, 53 Wis.2d 513, 518-19, 192 N.W.2d 852, 854 (1972). We determine questions of law without deference to the circuit court. ***Ball v. District No. 4 Area Bd.***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984).

ANALYSIS

The Walkers argue that the circuit court erred in granting summary judgment when it held as a matter of law that Schrimpf was neither actively negligent, nor did he owe the Walkers a duty of care. The Walkers argue that Schrimpf created the indentation by carrying away bits of rotten wood over the years from a decaying stump. Relying solely on ***Kull v. Sears, Roebuck & Co.***, 49 Wis. 2d 1, 181 N.W.2d 393 (1970), the Walkers argue that, like the abutting landowner in

Kull, Schrimpf created the conditions which caused Judith Walker's injury, and was therefore liable in damages. We reject this argument.

The facts of this case are distinguishable from ***Kull***. In that case, a Sears department store dug up a city-owned terrace area about a year prior to the accident underlying the appeal, to install drainage for a parking lot leased by Sears. Here, by contrast, the original tree on the public terrace was cut down by local authorities twenty years before Judith Walker's accident as part of routine tree maintenance. In ***Kull***, the excavation was for the benefit of Sears, and was conducted privately for them. By contrast, the tree removal here was for the benefit of the community,[3] and was conducted by local authorities. In ***Kull***, the excavation created a depression about twelve inches wide, six to eight inches long and eight to ten inches deep, described by the court as a "hole." ***Kull***, 49 Wis.2d at 9, 181 N.W.2d at 397. By contrast, the depression here was acknowledged by the plaintiffs to be three inches to six inches deep, and is described by them as an "indentation."

The law applicable here is also distinguishable from that applicable in ***Kull***. The ***Kull*** court held Sears liable on the theory that Sears was responsible for maintenance of an underground fixture it installed on city land for Sears' benefit, because Sears' use of the terrace area for its own purposes gave rise to a duty not to "create a defective or dangerous condition for persons who might cross the area." ***Kull***, 49 Wis.2d at 9, 181 N.W.2d at 398. The court specifically noted that the city did not install the drainpipe which created the hole, but Sears did. ***Id.*** at 11, 181 N.W.2d at 399. Here, by contrast, case law exists which specifically exempts abutting landowners from liability unless they have "created the defect"

[3] The tree, located on the publicly owned terrace area, was removed because it was dying.

on the public way by "active negligence." ***Id***. at 7, 181 N.W.2d at 396-97, *quoting* ***Peppas v. Milwaukee***, 29 Wis. 2d 609, 617, 139 N.W.2d 579, 583 (1966). As appellants concede, Schrimpf did not cut down the tree, local authorities did. Therefore, Schrimpf did not "create the defect."

The Walkers argue that, although Schrimpf did not cut down the tree, his actions of carrying away rotting pieces of stump for many years constituted "active negligence" because it contributed to the indentation. We reject this argument for two reasons. First, the ***Peppas*** court held that the adjoining landowner was not liable because the depression in the concrete driveway into which the plaintiff stumbled was caused "solely by natural deterioration in the concrete, and the [defendants] did not contribute to the condition in any manner." ***Peppas,*** 29 Wis.2d at 617, 139 N.W.2d at 583. Likewise, the tree stump here rotted by natural deterioration, without any assistance from Schrimpf.

Second, Schrimpf's action in carrying the already rotten wood away is not "active negligence." The original stump was six inches to eight inches high. Had it been left to rot in place, it would have provided a projecting obstacle underfoot. Removing a rotten obstacle of that height is not "a want of ordinary care under the circumstances," and hence not "negligence." *See* ***Koback v. Crook,*** 123 Wis. 2d 259, 268, 366 N.W.2d 857, 861 (1985). Additionally, Schrimpf was

under a responsibility to "maintain" his terrace area.[4] Carrying away rotten wood is one way of discharging that obligation.[5]

By the Court.—Order affirmed.

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

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[4] As set forth in CITY OF MONTELLO ORDINANCE § 5-2-8(c), "[e]very owner of land in the City whose land abuts a terrace is required to maintain ... the terrace directly abutting such land...."

[5] However, the level of Schrimpf's maintenance does not give rise to a cause of action by the Walkers because:

> [E]ven though the municipality, by ordinance, may impose upon the individual landowner some duty with respect to the care and maintenance of a public way, the individual is not burdened with the responsibility for injuries arising from his neglect to perform the duty in the absence of any statutory provision to that effect because the primary duty to maintain public ways may not be delegated.

Hagerty v. Village of Bruce, 82 Wis. 2d 208, 214, 262 N.W.2d 102, 104 (1978) (citation omitted).