

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 4, 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. 98-3042-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WARREN T. YANISCH AND MARJORIE M. YANISCH,

PLAINTIFFS-APPELLANTS,

**DONNA SHALALA AS SECRETARY OF THE UNITED STATES
DEPARTMENT OF HEALTH SERVICES ON BEHALF OF
MEDICARE PART A AND MEDICARE PART B,**

INVOLUNTARY-PLAINTIFF,

V.

**CHIPPEWA YELLOW BUS COMPANY, INC. AND
LANCER INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Warren and Marjorie Yanisch appeal a summary judgment that dismissed their negligence lawsuit against the Chippewa Yellow Bus Company, Inc.¹ The Yanisches were passengers on a Chippewa tour bus driven by Melvin Bjugstad returning to Wisconsin from New York City. At Belvidere, Illinois, Bjugstad suffered a stroke, and his bus careened into a toll booth, thereby causing the Yanisches' injuries. Bjugstad had no prior knowledge of any stroke susceptibility and claimed he experienced his only symptoms at sixty-five miles per hour, just two seconds before losing consciousness. On these facts, the trial court ruled that Bjugstad had exercised ordinary care under the circumstances and that he was not negligent as a matter of law. The trial court correctly granted summary judgment if there was no dispute of material fact and Chippewa deserved judgment as a matter of law. *See Powalka v. State Life Assur. Co.*, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). On appeal, the Yanisches argue that the record contains competing reasonable inferences requiring a trial. We reject their arguments and affirm the summary judgment.

The Yanisches contend that the evidence creates disputed issues of fact. We disagree. Bjugstad testified that he experienced the first symptoms—seeing “bright lights”—near the Belvidere exit, located one to one-and-one-half miles before the toll plaza. Two seconds later, he lost consciousness, still a good distance from the toll plaza. The Yanisches consider this testimony inherently incredible, pointing to other facts. First, they state that it defies common experience that an unconscious man could drive a bus one to one-and-one-half miles at sixty to sixty-five miles per hour without losing control of the vehicle until reaching the toll plaza. Second, Bjugstad told a physician he could see the

¹ This is an expedited appeal under RULE 809.17, STATS.

toll booth before he lost consciousness, but a police officer testified that the toll booth was not visible from the spot where Bjugstad claimed to lose consciousness. Third, a passenger near the front of the bus reported that the bus slowed down near the toll booth, implying that the driver was in control. The same passenger saw Bjugstad reach in his back pocket near the toll booth, evidently for toll money. This was consistent with Bjugstad's testimony that he kept toll money in his shirt pocket and pants pocket, but had none in his shirt pocket that day. In short, the Yanisches claim that the true facts must be different than what Bjugstad claims.

We are satisfied that the Yanisches have not shown a bona fide dispute of material fact on the issue of negligence. Negligence is the failure to exercise ordinary care under the circumstances. See *Marciniak v. Lundborg*, 153 Wis.2d 59, 64, 450 N.W.2d 243, 245 (1990). The undisputed evidence is that Bjugstad experienced symptoms—"bright lights"—seconds before he lost consciousness. From that point forward, Bjugstad was physically unable to stop the bus, regardless of where he was located. Additionally, Bjugstad had no prior knowledge or medical history that he might have a stroke while driving. Moreover, the only reasonable interpretation of the facts is that Bjugstad suffered the stroke near the toll plaza, not one-and-one-half miles away. In other words, Bjugstad had no meaningful forewarning of losing consciousness, took what evasive action he could in a very short time frame, and exercised ordinary care under the circumstances. What the Yanisches offer in rebuttal is speculation and conjecture, not enough to make other reasonable interpretations of the facts or disputes of material fact. In short, we have no basis to reverse the trial court's summary judgment.

By the Court.—Order affirmed.

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

