COURT OF APPEALS
DECISION
DATED AND FILED

June 15, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-0292

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

IRENE STUSSY, A MINOR BY HER GUARDIAN AD LITEM, KEVIN C. O'KEEFE, AND HER PARENTS, DONALD AND VERA STUSSY,

PLAINTIFFS-APPELLANTS,

V.

NORTH CRAWFORD SCHOOL DISTRICT, WAUSAU INSURANCE COMPANIES, BRUCE A. MCKITTRICK, ABC INSURANCE COMPANY, AND DEF INSURANCE COMPANY,

DEFENDANTS,

TOWN OF UTICA,

DEFENDANT-RESPONDENT,

CRAWFORD COUNTY HUMAN SERVICES DEPARTMENT,

SUBROGATED PARTY-DEFENDANT.

APPEAL from a judgment of the circuit court for Crawford County: GEORGE S. CURRY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Irene Stussy appeals from a judgment dismissing her personal injury complaint against the Town of Utica.[1] The issues are whether the trial court erred in the jury instructions and in denying a motion to change a verdict answer on negligence. We disagree with Stussy's arguments and affirm.

¶2 Stussy alleged that she was injured when the school bus in which she was riding drove off a rural gravel road after encountering a muddy stretch. The following factual background appears to be undisputed, at least for the purpose of this appeal. For several days, the Town of Utica was working on the stretch of road where the accident occurred. The work included the use of a road grader to push soil from the right-of-way on one side of the road to the other side. The crew was instructed to grade stray soil off the gravel road at the end of the workday. The school bus accident occurred in the early morning hours, before the crew began work. The night before, a heavy rain fell in the area. The bus driver testified that he came around a curve and hit the muddy area, which caused the bus to slide out of control. At trial, Stussy attempted to make a factual case that the Town crew failed to clear stray soil from the road properly on the day before the accident, and that the heavy overnight rain then turned that soil to mud.

¶3 On appeal, Stussy argues that the trial court erred by not giving her jury instruction to clarify the standard instruction, WIS JI—CIVIL 8035. The

[1] Stussy appears by her guardian ad litem. Stussy's parents are also appellants, but in this opinion we will refer to them collectively as "Stussy."

standard instruction states that before the jury could find the Town liable for a defective highway, it must find that the Town had actual or constructive notice of the defect. Stussy's proposed instruction stated that there is no requirement of notice if the Town itself created the defect, and she cited a case for that proposition, ***Kosnar v. J.C. Penney Co.***, 6 Wis. 2d 238, 242, 94 N.W.2d 642 (1959). The trial court declined to give the instruction.[2]

¶4 The trial court has wide discretion in issuing jury instructions based on the facts and circumstances of each case, and if the instruction given adequately covers the law, we will not find error in the refusal to give another instruction, even if that one is also a correct statement of law. *See* ***State v. Kemp***, 106 Wis. 2d 697, 705-06, 318 N.W.2d 13 (1982).

¶5 Stussy argues that the trial court was wrong because, by first instructing the jury that notice was required, but then not instructing it that no notice is necessary if the defendant created the defect, the instruction misled the jury with a "one-sided, unbalanced" statement of law that did not take into account the facts and circumstances of the present case.

¶6 In the ***Kosnar*** case, the court quoted with approval from a source which stated that there are "obvious reasons" why notice is not required when the defendant is alleged to have created the hazard, because a person who is actively negligent necessarily has that knowledge. ***Kosnar***, 6 Wis. 2d at 242. For this same reason, we conclude that the instruction in this case was not sufficiently misleading to be reversible error. The jury was told that it would have to find that

[2] In reviewing the trial court's decision, we are assuming there is an error in the transcript. As we read the transcript, the passage from page 12, line 15, to page 13, line 20, was actually spoken by the court, not counsel.

the Town had actual or constructive notice of the defect. However, even without Stussy's proposed clarification, if the jury had concluded that the Town's road work created the defect, we believe it would be sufficiently clear to the jury, for the reason described above as "obvious," that the Town necessarily had notice of any defect which it actively created with its own road work.

¶7 Stussy also argues that the court erred by not giving a second instruction she proposed, which was entitled "Duty of Town of Utica." On appeal, Stussy focuses on that part of this proposed instruction which stated that if a roadway is not reasonably safe for public travel because of a defect, then the municipality has a duty to reasonably warn travelers that the road is not reasonably safe. She argues that it was error not to give this instruction because there was evidence that the Town breached this duty by not warning travelers of the mud on the roadway.

¶8 In declining to give this proposed instruction, the trial court decided that the information in it was adequately covered by the instruction based on WIS JI—CIVIL 8035 that the court was already going to give. We conclude the court did not erroneously exercise its discretion. It is difficult to see how the instruction about the duty to warn would have added to the jury's consideration of the facts. The only evidence that could indicate the Town knew about a hazard is the same evidence that would show the Town was negligent in clearing the roadway. In other words, the only evidence that could suggest the Town knew about a hazard is the evidence that the Town itself created the hazard. Presumably, if the jury accepted that evidence, it would find, by applying WIS JI—CIVIL 8035, that the Town was negligent in creating the hazard. It is reasonable to conclude that it would be redundant to then ask the jury to decide whether the town failed to warn about the hazard it created.

¶9 Stussy also argues that the trial court erred by denying her motion to change the jury's answer to a question on the special verdict. The question asked whether the Town was negligent with regard to the maintenance of the roadway at the accident site. The jury answered "no." Stussy argues that there is no credible evidence to find that the Town was not negligent. The test for reviewing a motion to change an answer is whether, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to support the jury's answer. *See* WIS. STAT. § 805.14(1) (1997-98).[3]

¶10 Stussy argues that negligence was the only reasonable conclusion because the mud was in the location where the Town was doing the road work, and, with no evidence of mud coming from a slide down the surrounding embankment, the only reasonable inference was that it was left over from the Town's work. The Town argues that there was credible evidence the mud came from a slide. In her reply brief, Stussy argues for the first time that even if the mud came from a slide, the slide resulted from the Town's negligence in creating the site's condition.

¶11 We conclude that the jury could reasonably find that Stussy failed to meet her burden of proof. We first address Stussy's contention that even if the mud came from a slide, the slide was caused by the Town's negligence. Neither Stussy nor the Town has cited any evidence of record regarding the condition in which the Town left the embankment on the previous day. Even if there was testimony about the physical condition of the embankment, testimony by an engineering or construction expert might be necessary to establish that the

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

condition was unreasonable. The fact that a slide occurred would not, by itself, necessarily mean the embankment was left in an unreasonable condition.

¶12 The remaining question, then, is whether the jury was obliged to conclude that the mud on the road resulted from soil left by the Town on the previous day. Stussy asserts that there is "no evidence" that the mud came from a slide down the embankment. However, it is not necessary for there to be credible evidence of an alternative explanation for the mud. Stussy's burden was to prove that the Town caused the mud, and the Town is free to deny that claim without having any burden to prove an alternative explanation. However, even if the Town did have to provide such evidence, there was evidence from the bus driver's deposition. At trial the driver testified he was uncertain where the mud came from, but he agreed that at his deposition he said he had gone up the hill on the day of the accident, and that it appeared the dirt had been running down the hill.

¶13 In addition to that evidence, the driver testified at trial that when he passed through the same section of road on the previous afternoon, after the road crew had finished for the day, the road was properly graded down to gravel. This was sufficient evidence for the jury to conclude that, whatever other cause there might be for the mud, it was not caused by the Town leaving dirt on the road.

By the Court.—Judgment affirmed.

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