COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2000

Cornelia G. Clark
Acting 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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1616

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

K. ANGELA O'DONNELL,

PLAINTIFF-APPELLANT,

V.

THOMAS MURRAY, AN INDIVIDUAL, ROSE MURRAY, AN INDIVIDUAL, AND MURRAY'S IRISH HOUSE, INC.,

DEFENDANTS-RESPONDENTS,

SECURA INSURANCE HOLDINGS, INC., MEDICARE, A DEFENDANT WITH SUBROGATION INTEREST, AND SEARS GROUP MEDICAL PLAN, A DEFENDANT WITH SUBROGATION INTEREST,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Door County: PETER C. DILTZ, Judge. *Reversed.*

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

¶1 PER CURIAM. Angela O'Donnell appeals a summary judgment dismissing her complaint against Thomas and Rose Murray, their retail store, Murray's Irish House, Inc., and their insurers, Secura Insurance Holdings, Inc., Medicare, and Sears Group Medical Plan (the Murrays). O'Donnell was injured when she fell outside the Murrays' store. The circuit court dismissed her claims after determining that the undisputed facts established that O'Donnell was a trespasser as a matter of law at the time she fell. We disagree and conclude that there is a genuine issue of material fact as to whether O'Donnell was a trespasser or a frequenter of the store when she fell.

¶2 O'Donnell was a customer at the Murrays' store on July 17, 1995. As she left the store, she decided to have her picture taken next to the store's sign. Thomas Murray testified by deposition that hundreds of patrons have done so. The sign hangs on a wooden frame and is set in a small grass area in front of the store. The grass area begins after a cement walkway which is directly in front of the store. The store and grass area are surrounded by a row of bushes on one side and a small stone fence in front. Patrons may approach the store by means of either a stairway through the bushes or a walkway through the stone fence. Both lead to the cement walkway. In her deposition testimony, O'Donnell explained that she left the walkway and walked over to the sign on the grass to have her picture taken. As she walked back, however, she tripped on an electrical cord and fell down the stairs. O'Donnell was unable to remember exactly where she fell.

¶3 The circuit court granted summary judgment, dismissing O'Donnell's claim that the Murrays violated Wisconsin's safe place statute.[1]

[1] O'Donnell's complaint also alleged a violation of common law negligence, but she does not raise that issue on appeal and we therefore do not address it.

Whether summary judgment was appropriately granted presents a question of law we review pursuant to WIS. STAT. § 802.08(2),[2] and independently of the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 316, 401 N.W.2d 816 (1987). When we examine the parties' proofs, we draw all reasonable alternative inferences in the opposing party's favor. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

¶4 O'Donnell claimed that the Murrays did not maintain a safe place for frequenters as required by WIS. STAT. § 101.11(1).[3] Frequenters are defined as "every person, other than an employe, who may go in or be in a place of employment or public building under circumstances which render such person other than a trespasser."[4] WIS. STAT. § 101.01(6). "As a general rule, a person's status as a trespasser or a frequenter is a question for the jury." ***Monsivais v. Winzenried***, 179 Wis. 2d 758, 764, 508 N.W.2d 620 (Ct. App. 1993) (citing WIS JI—CIVIL 1901).

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[2] All statutory references are to the 1997-98 edition.

[3] WISCONSIN STAT. § 101.11(1) is entitled, "Employer's duty to furnish safe employment and place" and provides:

> Every employer shall furnish employment which shall be safe for the employes therein and shall furnish a place of employment which shall be safe for employes therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.

[4] O'Donnell has not alleged sufficient facts to substantiate willful, wanton or reckless conduct, conduct necessary for establishing liability to trespassers. *See* WIS JI—CIVIL 8025; ***Monsivais v. Winzenried***, 179 Wis. 2d 758, 764, 508 N.W.2d 620 (Ct. App. 1993).

¶5 The jury instruction defining a frequenter explains that O'Donnell was a frequenter if she had an expressed or implied invitation to walk on the grass area. *See* WIS JI—CIVIL 1901; *see also* ***Monsivais,*** 179 Wis. 2d at 762. "An 'implied invitation' is one which may be reasonably assumed from the circumstances which have caused a person to be on the premises of another." WIS JI—CIVIL 1901. O'Donnell walked on the grass area to have her picture taken next to the store's sign. The sign is near a wooden bench that is also on the grass area. Both the sign and wooden bench are near the cement walkway leading to the stairs. The Murrays argue that the placement of the bench supports their position because it creates a barrier to the grass area. However, the bench does not have a back and an alternative inference, and the one in favor of O'Donnell, is that patrons may sit on the bench with their feet on the grass facing away from the store.

¶6 In his deposition testimony, Thomas Murray also explained that hundreds of people have had their picture taken at the top of the stairs on the cement walkway next to his store's sign. A reasonable inference from this evidence is that the Murrays implicitly invited people to stand next to the sign. As in ***Reddington v. Beefeaters Tables, Inc.***, 72 Wis. 2d 119, 240 N.W.2d 363 (1976), an area designed to lure attention and draw customers may be considered an area where people are implicitly invited. In ***Reddington***, an eleven-year-old boy was injured while on a restaurant's property. Although the restaurant was not open, the boy was attracted to the area by a rock garden, colored lights and a bridge. *See* ***id.*** at 122. The court held that as a matter of law, the young boy was not a trespasser. *See* ***id.*** The court explained that the restaurant's continued operation was dependent upon attracting customers to the premises and that the intriguing display area "could have no purpose but to attract the public to the

premises to inspect the garden and, it was hoped, to dine at the restaurant."[5] ***Id.*** at 123.

¶7 Here, people routinely have their pictures taken next to the store's sign and there is also a bench on the grass area. Giving O'Donnell the benefit of reasonable inferences from these facts, she could have reasonably assumed that she was implicitly invited to walk on the grass area. This presents a genuine issue of material fact foreclosing summary judgment.

By the Court.—Judgment reversed.

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

[5] The Murrays' reliance on ***McNally v. Goodenough***, 5 Wis. 2d 293, 92 N.W.2d 890 (1958), ***Grossenbach v. Devonshire Realty Co.***, 218 Wis. 633, 261 N.W.2d 742 (1935), and ***Monsivais,*** 179 Wis. 2d at 764, is misplaced, as in each of these cases the plaintiff was not implicitly invited onto the owner's property.