COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2015AP2354 **Cir. Ct. No. 2014CV003866**

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

ANTOINETTE LANG AND JIM LANG,

PLAINTIFFS-APPELLANTS,

WISCONSIN STATE DEPARTMENT OF HEALTH & HUMAN SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

LIONS CLUB OF CUDAHY WISCONSIN, INC., ACE AMERICAN INSURANCE COMPANY, FRYED AUDIO, LLC AND STATE FARM FIRE & CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS,

RHYTHM METHOD, LLC AND ADMINISTRATOR OF HEALTH CARE FINANCING ADMINSTRATION,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Reversed and remanded*.

Before Brennan, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Antoinette and Jim Lang (the Langs) appeal from an order dismissing their negligence case. The Langs contend that the trial court erred in dismissing the complaint[1] without making any factual findings and conclusions of law. We agree. Because the record is devoid of the findings of fact and conclusions of law required for us to review the decision, we reverse and remand for further proceedings.

BACKGROUND

¶2 While she was at an outdoor festival, Antoinette Lang (Lang) tripped and fell and was injured. In March 2014, Lang and her husband brought a negligence claim[2] against several defendants and their insurers, alleging that the cause of the fall was the negligent placement of electrical cords in a pedestrian area. The defendants were the Lions Club, which had contracted with Milwaukee County to use Cudahy Park for the festival; Rhythm Method, the band who had used the electrical cords in question for their performance in the festival; and

[1] The case was initially assigned to The Honorable Jeffrey A. Conen. Effective August 1, 2015, due to judicial rotation, it was transferred to the Honorable Dennis P. Moroney, who entered the order appealed from.

[2] The complaint also included a claim based on the safe place statute. *See* WIS. STAT. § 101.11 (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted. "[T]he safe-place statute addresses unsafe conditions, not negligent acts." ***Megal v. Green Bay Area Visitor & Convention Bureau, Inc.***, 2004 WI 98, ¶9, 274 Wis. 2d 162, 682 N.W.2d 857. The Langs later voluntarily dismissed this claim.

Fryed Audio, LLC, the contractor who set up sound and lighting for the performance.[3]

¶3 Defendants Lions Club and Fryed Audio filed summary judgment motions. Each asserted that it was immune from the negligence claim pursuant to Wis. Stat. § 895.52, which grants immunity to property owners for injury and death arising out of recreational use of their property. The Langs filed a brief in opposition to the motion arguing that the recreational immunity statute did not apply at all, or in the alternative, that it applied only to the Lions Club. A hearing was scheduled for June 2, 2015, on the motions before Judge Conen.[4]

[3] Entertainment Company International, LLC, initially named as a defendant, was dismissed by the trial court by agreement of the parties and is not relevant to the issues on appeal.

[4] We note with disapproval that the appellate record contains no affidavits, transcripts or documents of any kind as to what transpired at either this June 2, 2015 scheduled motion hearing or at the September 28, 2015 telephone conference. And yet, the respondent Lions Club filed a supplemental appendix to their brief with affidavits from its attorney purporting to recreate the off-the-record conversations between the parties and their lawyers at these two appearances. This is a violation of the appellate statutory rules. Respondent's argument section "is to contain … citations to the authorities, statutes and parts of the record relied on[.]" WIS. STAT. RULE 809.19(3)(a)2. (incorporating by reference RULE 809.19(1). "The appellant shall request a copy of the transcript of the reporter's notes of the proceedings for each of the parties to the appeal and make arrangements to pay for the transcript and copies within 14 days after the filing of the notice of appeal." WIS. STAT. RULE 809.11(4)(a). "The appendix may not be used to supplement the record, and we accordingly limit our recitation of the facts to those supported by [documents] which are in the record." ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989). Respondent's conduct is potentially sanctionable under WIS. STAT. RULE 809.83(2), but, perhaps more vexing to this court is that it cost this court additional time to unravel—as respondent, without any warning or explanation, included what appeared to be legitimate record cites to their brief that turned out to be nothing more than cites to their own appendix containing materials not part of the record.

¶4 There is no transcript or order from the June 2, 2015 proceeding, but we take judicial notice of the WCCA entry[5] for that date, which shows that the hearing did not happen, future dates were set, and the parties spoke to the court off the record in chambers. The entry for June 2, 2015, states, after noting the appearances:

> Parties are awaiting the decision at the Court of Appeals on the Karini [sic] matter. Matter adjourned for a telephone status conference on September 17, 2015 at 3:00 pm. Attorney Skemp will initiate the call. A jury trial date has been set for February 15, 2016 at 1:30 pm.

The matter was reassigned to Judge Moroney due to the August 2015 judicial rotation.

¶5 The WCCA entry for September 11, 2015, shows that on that date Attorney Neal Schellinger for Fryed submitted a dismissal order under the five-day rule with a cover letter saying the parties agreed that the ***Carini***[6] case decided the Lang matter, and the dates should be taken off. Attorney Anthony Skemp timely objected to the dismissal by a letter filed on September 14, 2015, advised the court that Judge Conen had never ruled on the summary judgment motions, and requested a hearing on the motions. The trial court issued a Notice of Hearing on September 14, 2015, setting the case for a "Telephone status conference" on September 21, 2015, stating: "This case is scheduled at the above date and time to address Mr. Skemp's letter of September 11, 2015 wherein he objects to

[5] WCCA is Wisconsin Circuit Court Access, a website that reflects information entered by court staff, and we take judicial notice of the WCCA records. *See* WIS. STAT. § 902.01. *See also* ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

[6] ***Carini v. ProHealth Care, Inc***., 2015 WI App 61, 364 Wis. 2d 658, 869 N.W.2d 515.

Mr. Schellinger's proposed order. I would respectfully request that Mr. Skemp initiate the conference call with the parties and the court."

¶6 The September 21, 2015 telephone scheduling conference was rescheduled to September 28, 2015. WCCA notes the parties' appearances that date and states, "Telephone conference held between the court and the parties in chambers. Attorney Schellinger to send in new order to dismiss." There is no transcript or other documentation of what transpired at this September 28 telephone scheduling conference that is part of the appellate record. There is no written stipulation for dismissal. Nonetheless, the trial court signed the dismissal order on September 30, 2015. Nowhere in the record or the order are there any findings of fact or conclusions of law or any explanation for the basis of the dismissal order. The Langs appeals from the order.

DISCUSSION

¶7 The order appealed from here is not specific as to the basis for dismissal. Although the only motions pending before the trial court at the time of the dismissal order were the respondents' motions for summary judgment, the order does not refer to summary judgment or any other motion for that matter. Neither does the dismissal order contain any reference to a stipulation for dismissal. No hearing was ever held; no findings of fact or conclusions of law were ever entered. The last record entry before the dismissal order was the trial court's own Notice of Hearing setting a hearing on the respondents' request for dismissal and Lang's timely objection to it. Thus, there is nothing for this court to review to determine if the dismissal was proper.

¶8 We are only able to review what is in the record. If the trial court's intention was to grant summary judgment, it must create a record that is

reviewable on appeal. There is a well-established methodology for our review of summary judgment:

> When this court is called upon to review the grant of a summary judgment motion, as we are here, we are governed by the standard articulated in section 802.08(2), … and we are thus required to apply the standards set forth in the statute just as the trial court applied those standards.

Green Spring Farms v. Kersten, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We cannot do that here because we have no idea what standards the trial court applied or how.

¶9 Our supreme court addressed this situation in a case where, like this one, summary judgment was granted without findings of fact or conclusions of law:

> The trial court granted the defendants' motion for summary judgment but failed to file any findings of fact or conclusions of law or a memorandum opinion disclosing upon what grounds it granted the defendants' motion for summary judgment. The absence of either or both creates a difficult situation for this court on review because of the inability to determine the basis of the trial court's conclusion.

Oosterwyk v. Corrigan, 19 Wis. 2d 464, 473, 120 N.W.2d 620 (1963). *See also* ***Larry v. Harris***, 2008 WI 81, ¶29, 311 Wis. 2d 326, 752 N.W.2d 279 (emphasizing the necessity for a trial court to "thoroughly explain the legal and equitable bases for its decision[.]") The court noted that even the United States Supreme Court had "repeatedly emphasized" the importance of this responsibility:

> In ***Public Service Commission of Wisconsin v. Wisconsin Telephone Co.***, Mr. Chief Justice Hughes [of the United States Supreme Court] stated: "We have repeatedly emphasized the importance of a statement of the grounds of decision, both as to facts and law, as an aid to litigants and to this court." This court, likewise, emphasizes the importance of either findings of fact and conclusions of law

> or a memorandum opinion so as to disclose the grounds upon which the trial court reached its determination.

Oosterwyk, 19 Wis. 2d at 473-74.

In the absence of such a record, "the only appropriate course for this court is to remand the cause to the trial court for the necessary findings." *See* ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 108, 293 N.W.2d 155 (1980).

¶10 Respondent Lions Club attempts to argue on appeal that the Langs *waived* any argument that the trial court should have issued a written decision. For proof of waiver, the Lions Club inappropriately cited to its own supplemental appendix at page 617 containing counsel's affidavit, created March 17, 2016–after the notice of appeal was filed and long after the proceedings in the circuit court were completed. The affidavit is not part of the appellate record. *See* above ¶3, n.4. Even if it was, it is nothing more than one party's rendition of a proceeding and lacks any opportunity for rebuttal by the Langs or factual finding by the trial court. We will not consider it. *See* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) ("Assertions of fact that are not part of the record will not be considered.").

¶11 We therefore reverse the dismissal and remand for further proceedings consistent with this decision as to each of the defendants under the facts of this case.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.