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**IN THE  
COURT OF APPEALS OF INDIANA**

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SHIRLEY JONES and LARRY JONES, )  
 )  
 Appellants-Plaintiffs, )  
 )  
 vs. )  
 )  
 HURRICANE FOODS, INC., )  
 d/b/a WENDY'S, )  
 )  
 Appellee-Defendant. )

No. 49A02-0807-CV-619

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APPEAL FROM THE MARION CIRCUIT COURT  
The Honorable Theodore M. Sosin, Judge  
Cause No. 49C01-0101-CT-64

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**April 14, 2009**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellants-Plaintiffs Shirley and Larry Jones appeal the jury's apportionment of fault and resulting verdict in favor of appellee-defendant Hurricane Foods, Inc., d/b/a Wendy's (Wendy's) on the Joneses' negligence complaint. The Joneses argue that the jury's conclusion that Shirley was 65% at fault was contrary to the evidence and to the law. Finding no error, we affirm.

### FACTS

Shirley had surgery on her foot in late April 1999. Approximately six weeks later, on the morning of June 3, 1999, she and Larry drove to a Wendy's Restaurant in Indianapolis. Shirley's foot was in a cast because of the April surgery, so she was using crutches to walk. That morning, the weather was sunny and it had not been raining, but the Joneses noticed that the parking lot and the handicapped ramp from the parking lot to the restaurant were wet. The Wendy's manager later told Larry that the area had been washed down earlier that morning.

After Larry parked the car, Shirley walked up the ramp with her crutches. She did not have any difficulty walking from the car to the ramp or walking up the ramp, though she found the ramp to be very narrow. When the Joneses reached the top of the ramp, they discovered that the door leading into the restaurant was locked. Larry went to see if another door was open.

Meanwhile, Shirley turned around and began going down the ramp. As she proceeded down the ramp, she placed the crutches on the side slope of the ramp because the ramp was too narrow. Shirley felt the crutches begin sliding and "[t]here was nothing

I could do but fall.” Tr. p. 22. The Joneses’ expert did not offer an opinion as to what caused Shirley to fall. Similarly, he did not offer an opinion about the slipperiness of the ramp.

After Shirley fell, she was taken to the hospital. As a result of her injuries, Shirley suffers from Reflex Sympathetic Dystrophy and will likely experience pain and the effects of the disorder for the rest of her life.

It is undisputed that the Wendy’s ramp did not comply with the American Disabilities Act (ADA). The slope was too steep and the ramp itself was too narrow.

On January 11, 2008, the Joneses filed a negligence complaint against Wendy’s, arguing that the ramp was hazardous and the proximate cause of Shirley’s injuries. Following the jury trial, which began on May 14, 2008, the jury found Shirley 65% at fault and Wendy’s 35% at fault, thereby finding for Wendy’s. The Joneses filed a motion to correct error on June 13, 2008, and the trial court denied the motion without hearing on June 16, 2008. The Joneses now appeal.

### DISCUSSION AND DECISION

Because the Joneses are appealing from a negative judgment, they must establish that the judgment is contrary to law to be entitled to their requested relief. Helmuth v. Distance Learning Sys. Ind., Inc., 837 N.E.2d 1085, 1089 (Ind. Ct. App. 2005). We will neither reweigh the evidence nor assess witness credibility, and will consider only the evidence most favorable to Wendy’s and all reasonable inferences that may be drawn therefrom. Id.; Bailey v. Spain, 759 N.E.2d 1157, 1161 (Ind. Ct. App. 2001).

Under Indiana's comparative fault law, when a plaintiff's contributory negligence is greater than the fault of all other persons whose fault proximately contributed to the plaintiff's damages, then the plaintiff is barred from recovery and judgment must be entered in the defendant's favor. Ind. Code §§ 34-51-2-6, -8. Contributory negligence is "conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection." Weinstock v. Ott, 444 N.E.2d 1227, 1239 (Ind. Ct. App. 1983) (quoting Mem'l Hosp. of South Bend, Inc. v. Scott, 261 Ind. 27, 36, 300 N.E.2d 50, 56 (1973)) (emphasis omitted). In other words, contributory negligence exists "if the plaintiff fails to exercise a degree of care and caution that an ordinary, reasonable, and prudent person would exercise in a similar situation." Yates v. Johnson County Bd. of Comm'rs, 888 N.E.2d 842, 852 (Ind. Ct. App. 2008).

Contributory negligence is generally a question of fact for the jury. Kennedy v. Guess, Inc., 806 N.E.2d 776, 783 (Ind. 2004). Indeed, our Supreme Court has emphasized that "[t]he process by which a jury analyzes the evidence, reconciles the views of its members, and reaches a unanimous decision is inherently subjective and is entitled to maximum deference. The Comparative Fault Act entrusts the allocation of fault to the sound judgment of the fact-finder." Paragon Family Restaurant v. Bartolini, 799 N.E.2d 1048, 1056 (Ind. 2003). But where the material facts are undisputed and only a single inference may reasonably be drawn from those facts, contributory negligence is a

question of law for the court. Rogers v. Grunden, 589 N.E.2d 248, 257-58 (Ind. Ct. App. 1992).

Here, the record reveals that Shirley noticed that the ramp was wet and realized on the way up that it was very narrow. But she kept going. On her way down the ramp, she placed her crutches on the side slopes of the ramp and the crutches slipped, causing her to fall. The jury could have concluded that if Shirley was unable to find a safe spot on the ramp to place the tip of her crutch, she could have walked down the ramp at an angle or sideways, or she could have stepped off the curb onto the parking lot.

Wendy's emphasizes that the ramp did not comply with the ADA, but the ADA is a civil rights statute and the express purpose of the Act is the elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101(b). It is well established that evidence of an ADA violation is not negligence per se in the context of a premises liability case. See Smith v. Wal-Mart Stores, Inc., 167 F.3d 286, 293-95 (6th Cir. 1999); Berge v. Columbus Cmty. Cable Access, 736 N.E.2d 517, 540 (Ohio App. 1999). The expert who testified that the ramp did not comply with the ADA expressly stated that he was not opining that the condition of the ramp caused Shirley to fall. Thus, his testimony did not unequivocally lead to the conclusion that she was not negligent.

The evidence in the record could have led the jury to find in Shirley's favor—or it could have led to the jury to find in Wendy's favor, as it did. We cannot say that the jury erred as a matter of law by concluding that Shirley was 65% at fault, thereby entering a

verdict in favor of Wendy's. Given our standard of review and the maximum deference we must apply to the jury's verdict, we affirm.

The judgment of the trial court is affirmed.

MAY, J., and BARNES, J., concur.