

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 26, 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. 97-2607

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

DARRYL KUSZ,

PLAINTIFF,

V.

**THE HOME INSURANCE COMPANY, A FOREIGN
CORPORATION,**

DEFENDANT,

**THE AMERICAN BOLT CORPORATION, A WISCONSIN
CORPORATION, AND THE TRAVELERS INDEMNITY
INSURANCE COMPANY, A FOREIGN CORPORATION,**

**DEFENDANTS-THIRD-
PARTY PLAINTIFFS-RESPONDENTS,**

V.

**AMERICAN MOTORISTS INSURANCE COMPANY AND
HEADS AND THREADS COMPANY,**

**THIRD-PARTY DEFENDANTS-
APPELLANTS,**

REYNOLDS FASTENERS, INC., AND ABC INSURANCE

COMPANY,

THIRD-PARTY DEFENDANTS.

**JOHN CULLIN, DAVID SCOTT LIBECKI, BY HIS
GUARDIAN AD LITEM, RONALD L. PIETTE, AND THE
HOME INSURANCE COMPANY,**

PLAINTIFFS,

V.

**THE AMERICAN BOLT CORPORATION, A WISCONSIN
CORPORATION, AND THE TRAVELERS INDEMNITY
COMPANY, A FOREIGN CORPORATION,**

DEFENDANTS-RESPONDENTS,

V.

**HEADS AND THREADS COMPANY, A FOREIGN
CORPORATION, AND AMERICAN MOTORISTS INSURANCE
COMPANY, A FOREIGN CORPORATION,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee
County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Heads and Threads Company and its insurer,
American Motorists Insurance Company, appeal from the trial court's judgment
granted to The American Bolt Corporation and its insurer, The Travelers
Indemnity Insurance Company. Heads and Threads argues that the trial court

erred in concluding, upon cross-motions for summary judgment, that the evidence established that it was the supplier of defective bolts that caused the collapse of a billboard. We affirm.

I. BACKGROUND

The facts relevant to resolution of the appeal are undisputed. American Bolt sold bolts to the Derse Company, which used the bolts in constructing a billboard that collapsed and injured persons who filed and ultimately settled the underlying action. The cause of the collapse was traced to defects in the bolts. The bolts at first were traced to four possible suppliers. Ultimately, however, only two suppliers – Heads and Threads, and Reynolds Fasteners – emerged as possible sources.

Heads and Threads and Reynolds became direct and third-party defendants in the underlying lawsuit.¹ Reynolds moved for summary judgment, seeking dismissal of American Bolt's third-party claims. The trial court, concluding that no evidence linked Reynolds to the defective bolts, granted Reynolds's motion. The insurers for American Bolt and Heads and Threads then agreed to pay one-half of the settlement with the plaintiffs, subject to the trial court's subsequent determination of whether American Bolt could show that Heads and Threads supplied the defective bolts.

¹ As Heads and Threads explains:

The current appeal arises from consolidated actions involving Darryl Kusz, John Cullin, David Libeck, and the worker's compensation carrier, Home Insurance Company. While these actions were consolidated for purposes of discovery, the issues on appeal arise principally from the defendant/third-party plaintiff, American Bolt Corporation's third-party complaint alleging Heads and Threads was the supplier of the bolts.

American Bolt moved for summary judgment, contending that the summary judgment and dismissal granted to Reynolds established, as the law of the case, that Heads and Threads remained as the only source of the defective bolts. Heads and Threads opposed American Bolt's motion and also moved for summary judgment, contending that despite the trial court's ruling on Reynolds, the record still demonstrated that Reynolds was a possible source of the bolts.

Granting summary judgment to American Bolt, the trial court concluded that (1) the summary judgment granted to Reynolds, based on the conclusion that *no* evidence linked it to the defective bolts, foreclosed any further determination that Reynolds could have been the supplier of the bolts and, therefore, Heads and Threads remained as the only possible source; and (2) based on the undisputed evidence contained in the summary judgment submissions, Heads and Threads was, by "process of elimination," the only possible source of the bolts. We need not evaluate the trial court's second rationale because, we conclude, the trial court was correct in ruling that its summary judgment dismissing Reynolds left Heads and Threads as the only possible source of the bolts. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

II. ANALYSIS

"Summary judgment is used to determine whether there are any disputed issues for trial. Appellate courts and trial courts follow the same methodology." *Transportation Ins. Co., v. Hunzinger Const. Co.*, 179 Wis.2d 281, 289, 507 N.W.2d 136, 139 (Ct. App. 1993) (citations omitted); *see also* § 802.08(2), STATS. Although we value a trial court's decision on summary

judgment questions, our standard of review is *de novo*. See ***Scheunemann v. City of West Bend***, 179 Wis.2d 469, 475, 507 N.W.2d 163, 165 (Ct. App. 1993).

At the summary judgment hearing on April 21, 1997, following the submission of evidence and briefs, the attorneys for American Bolt, Reynolds, and Heads and Threads each argued extensively whether any evidence linked either Reynolds or Heads and Threads to the defective bolts. The trial court concluded that, although “there’s tons of dispute of fact,” none of the disputed facts was a “genuine dispute of material fact.” The trial court granted Reynolds’s motion for summary judgment, dismissing it from the case. Heads and Threads did not appeal.

At the summary judgment hearing on June 23, 1997, the trial court clarified that its April 21, 1997 decision granting summary judgment to Reynolds was based not on the insufficiency of evidence linking Reynolds to the defective bolts, but rather, on the fact that “there’s *no evidence* that those bolts were supplied by Reynolds.” (Emphasis added.) By contrast, regarding Heads and Threads, the court explained: “There is strong evidence that Heads [and Threads] supplied the defective bolt. They’re the only ones that could have provided the bolt given the process of elimination, and, therefore, I think that, certainly, Heads [and Threads] is not in the same position as Reynolds.”

Heads and Threads argues that, because American Bolt had the burden of proof to establish by the preponderance of the evidence that Heads and Threads was the supplier, it (Heads and Threads) should have been allowed to establish its defense that another supplier – Reynolds – was also a possible source of the bolts. Thus, it contends, “to defeat summary judgment, Heads and Threads must demonstrate *merely that a factual issue exists as to whether Reynolds is a*

possible source of the bolts, not that Reynolds is a probable source.” (Emphasis added.) We disagree.

Heads and Threads, by not appealing the trial court’s April 21, 1997 summary judgment decision, accepted the trial court’s determination that *no evidence* established Reynolds as the supplier. This became the law of the case. “Because the law of the case is a question of court practice, and not an inexorable rule, it requires the exercise of judicial discretion.” *State v. Brady*, 130 Wis.2d 443, 448, 388 N.W.2d 151, 154 (1986) (citation omitted). Here, in granting American Bolt’s motion for summary judgment, the trial court did not apply the law of the case doctrine out of “rigid adherence” to its earlier ruling. See *Univest Corp. v. General Split Corp.*, 148 Wis.2d 29, 39, 435 N.W.2d 234, 238 (1989). Rather, it decided the summary judgment motions on June 23, 1997 in a manner that was substantively and logically consistent with its earlier summary judgment decision dismissing Reynolds from the case. Thus, in basing its June 23 summary judgment decision, in part, on its April 21 summary judgment decision, the trial court properly exercised discretion.

Heads and Threads argues, however, that it should not be saddled with the law of the case from the trial court’s April 21 decision because it “had no standing to appeal the Reynolds dismissal.” Heads and Threads is wrong. A party “aggrieved in some appreciable manner by the judgment” has the right to appeal, and “[a] person is aggrieved if the judgment bears directly and injuriously upon his or her interests.” *Koller v. Liberty Mut. Ins. Co.*, 190 Wis.2d 265, 266, 526 N.W.2d 799, 800 (Ct. App. 1994). Therefore, Heads and Threads could have appealed the trial court’s determination that Reynolds was not a possible supplier; having failed to do so, Heads and Threads, on June 23, had to face American

Bolt's summary judgment motion unprotected by any possibility that Reynolds was the supplier.²

By the Court.—Judgment affirmed.

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

² Heads and Threads also argues that it should have been granted summary judgment because, American Bolt's case, "[a]s with its case against Reynolds," also "failed ... [to] establish a direct causal link between Heads and Threads and the accident bolts in question." As American Bolt responds, however, "[t]he testimony of American Bolt's warehouse manager, Robert Gogin, that Heads & Threads was American Bolt's *only* supplier of raised 'G' bolts during the relevant time frame is enough in and of itself to satisfy American Bolt's burden on summary judgment." We agree. Such evidence, in combination with *no evidence* that Reynolds was the supplier, and no evidence that any other source could have supplied the defective bolts, was sufficient to defeat Heads and Threads's motion for summary judgment.

Further, as Heads and Threads reminds us, American Bolt had the burden to show *by the preponderance of the evidence* that Heads and Threads was the supplier. If, however, Heads and Threads's opposition to summary judgment was based on its theory that Reynolds was a possible supplier, and if the evidence established that it (Heads and Threads) and Reynolds were the only possible suppliers, then, to defeat summary judgment, Heads and Threads would have had to have shown that Reynolds was more than "merely ... a possible source." After all, being "merely ... a possible source" could include being nothing more than even a 1% or 2% possibility. If, however, only Reynolds and Heads and Threads were the possible suppliers, then Heads and Threads would have had to have submitted evidence that Reynolds was at least a 50% possibility – *at least as possible a source* as Heads and Threads. Otherwise, as a matter of simple arithmetic and pure logic, the preponderance of evidence necessarily established Heads and Threads as the supplier. See *Transportation Ins. Co. v. Hunzinger Const. Co.*, 179 Wis.2d 281, 290, 507 N.W.2d 136, 139 (Ct. App. 1993). ("The ultimate burden ... of demonstrating that there is sufficient evidence ... to go to trial at all (in the case of a motion for summary judgment) is on the party that has the burden of proof on the issue that is the object of the motion.").

