COURT OF APPEALS
DECISION
DATED AND FILED

April 13, 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. 97-3316

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

GARY AND LISA MARIFKE, ROBERT A. AND NADEEN BALSIS, JOHN AND KAREN BARRETTE, STEVE AND CHRISTINE BAUMGARTNER, EDWARD AND MARY BETH BERNS, RONALD AND MARY BURDEN, DOUGLAS AND MARJORY BUJAK, MICHAEL AND WENDY BUTH, JONATHAN AND CAROLEE CZARNECKI, TODD AND MICHELLE EVERS, PHIL AND SUE HERZOG, KIMBERLY HINZE, KEVIN AND MICHELE HOOPLE, GARRY AND KATHY JOHNSON, CHRISTOPHER AND MICHELE KASPRZAK, DAVID AND LORI MOCCO, EWA AND ZENON PAGACZ, SCOTT AND MINDY RUTTA, JOHN AND KAREN SAGGIO AND JUSTIN AND JOAN VANABLE,

PLAINTIFFS,

CONTINENTAL INSURANCE COMPANY AND DEF INSURANCE COMPANY,

DEFENDANTS,

COUNTRY CREEK HOMES, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

V.

ALUMINUM INDUSTRIES CORP.,

THIRD-PARTY DEFENDANT-APPELLANT,

MASSACHUSETTS BAY INSURANCE COMPANY, BBB INSURANCE COMPANY, CCC INSURANCE COMPANY, DDD INSURANCE COMPANY AND HOME INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS,

JOSEPH WENDELBERGER, D/B/A J. ANTHONY CARPENTRY & GENERAL CONTRACTING, RICK GEGARE CARPENTRY, INC., GAYHART BUILDERS, INC., RURAL MUTUAL INSURANCE COMPANY AND D.H. KELLY CONSTRUCTION, INC.,

THIRD-PARTY DEFENDANTS-RESPONDENTS,

MARK THOMAS CARPENTER CONTRACTORS/BUILDERS,

THIRD-PARTY DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

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

PER CURIAM. Aluminum Industries Corp. (Aluminum) appeals from an order granting summary judgment to six individual third-party defendant carpentry subcontractors in a dispute over the installation of window frames. Aluminum claims that the trial court erred in prematurely and prejudicially

granting the summary judgment. Because there were no genuine material issues of fact, and because the trial court was obliged to grant summary judgment, we affirm.

I. BACKGROUND

This appeal concerns the windows and doors that were installed in nineteen homes built in Country Creek Subdivision in Oak Creek, Wisconsin, during the latter part of 1992 or early 1993. Country Creek Homes, Inc. (Country Creek) was the general contractor. The homeowners sued Country Creek, claiming that it was negligent in not selecting the proper windows and exterior doors for their homes; in improperly installing the windows and exterior doors; and in improperly constructing the walls surrounding the windows and exterior doors. The homeowners further claimed that, as a result of these failures, the windows and exterior doors in their homes did not perform as expected. More particularly, they alleged that the windows and doors were substandard for the climate, resulting in the formation of moisture, condensation and ice on the windows, sequential rotting and staining of wood trim and drywall around the windows, and that the defects created air drafts.

Country Creek, as third-party plaintiff, sued Aluminum, alleging that if the windows and doors were defective, such defects were due to Aluminum's negligence in designing and constructing the windows and doors. Country Creek also sued the subcontractor carpenters who installed the windows and doors, claiming that they did not properly select, construct or install the windows and doors. Aluminum filed cross-claims against the subcontractor carpenters for indemnification and contribution.

The homeowners did not file any direct claim against Aluminum or the subcontractors. As relevant to this appeal, the initial summons and complaint were filed on September 12, 1995. By a scheduling conference dated August 28, 1996, the trial court ordered all parties to disclose expert witnesses, together with any written reports by the pre-trial conference date of September 17, 1997. It implemented this order by further order of July 21, 1997, that all destructive testing and discovery must be completed by August 17, 1997. The subcontractor carpenters had earlier filed motions for summary judgment which the trial court deferred until the August 17 testing and discovery deadline. The subcontractors subsequently renewed their motions for summary judgment, which the trial court granted. Aluminum now appeals from the order granting summary judgment to the subcontractors.

II. ANALYSIS

We review a grant of summary judgment in the same manner as does a trial court, although our review is done independently. *See* ***Schaller v. Marine Nat'l Bank***, 131 Wis.2d 389, 394, 388 N.W.2d 645, 648 (Ct. App. 1986). Summary judgment is appropriate if there are no material facts in dispute and those facts admit of only one reasonable inference. *See* ***Wagner v. Dissing***, 141 Wis.2d 931, 940, 416 N.W.2d 655, 658 (Ct. App. 1987). The remaining litany of summary judgment rubrics are well recognized and need not be repeated. Suffice it to say, as relevant to the disposition of this appeal, summary judgment is appropriate when sufficient time for discovery has passed and the party asserting a claim on which it bears the burden of proof at trial has failed to demonstrate the existence of an element essential to that party's case. *See* ***Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 291-92, 507 N.W.2d 136, 140 (Ct. App. 1993).

The mere allegation of a factual dispute will not defeat an otherwise properly supported motion for summary judgment. *See* ***Kenefick v. Hitchcock***, 187 Wis.2d 218, 224, 522 N.W.2d 261, 263 (Ct. App. 1994). The party moving for summary judgment must explain the basis for its motion and identify those submissions and pleadings demonstrating the absence of a genuine issue of material fact. *See* ***Hunzinger***, 179 Wis.2d at 292, 507 N.W.2d at 140. If the movant does so, the party against whom a motion for summary judgment has been brought cannot sit upon its pleadings, but must set forth specific evidentiary facts that would be admissible showing that there is a genuine issue for trial. *See* § 802.08(3), STATS. If the party opposing summary judgment fails to meet this burden, summary judgment shall be entered against the party. *See* ***Larson v. Kleist Builders, Ltd.***, 203 Wis.2d 341, 345, 553 N.W.2d 281, 283 (Ct. App. 1996).

Aluminum first claims that the trial court erred because there are issues of material fact that preclude summary judgment in favor of the subcontractors. We are not convinced. Because Aluminum manufactured the windows, its claim against the carpentry subcontractors is based on a theory that the carpenters negligently installed the windows. To establish negligence there must be proof of: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct of the defendant and the injury; and (4) a loss or damage as a result of the injury. *See* ***Erickson v. Prudential Property & Cas. Ins. Co.***, 166 Wis.2d 82, 88, 479 N.W.2d 552, 554 (Ct. App. 1991).

The carpenter subcontractors filed their motions for summary judgment in June 1997, almost two years after the filing of the first complaint. In the interim, as reflected in the record, discovery efforts constituting gargantuan proportions took place. Even the trial court, concerned about the adequacy of

discovery, delayed consideration of the summary judgment motions until the plaintiffs had sufficient opportunity to develop their theory of the claim. Finally, the court ordered an end to discovery and, at the behest of the subcontractors, heard the motions on September 17, 1997. Included in the voluminous record before it, the trial court considered the proposed expert opinions of Dr. Tage C.G. Carlson on behalf of Country Creek, Tom Feiza and Elvin Atkinson on behalf of Aluminum, and Gary Etzel on behalf of the homeowners. Etzel's report, in fact, concluded that the installation of the windows that he inspected met industry standards. As for the other three opinions, the trial court concluded that they were lacking in two respects: (1) they were not offered to the requisite degree of certainty to provide a basis sufficient to support a negligent installation claim; or (2) they failed to offer any causal connection between the installation work and the damages sustained by the homeowners. *See* ***McGarrity v. Welch Plumbing Co.***, 104 Wis.2d 414, 430, 312 N.W.2d 37, 45 (1981). We agree with the trial court's conclusions. From our review of the record, we conclude that there were no genuine issues of material fact presented regarding the negligence of the subcontractors and, therefore, the trial court did not err in so concluding.

Aluminum's second claim of error is couched in terms of prejudice. It asserts that it was improper to grant the third-party subcontractors' motions for summary judgment before the plaintiffs-homeowners explained their claims. It argues that the dismissal prejudices Aluminum because the homeowners could still assert a negligent installation claim at trial, but Aluminum will not be able to transfer any liability for a negligent installation claim to the subcontractors. If the homeowners are able to develop any theory of liability, Aluminum reasons that it will be unable to pursue its cross-claims against the subcontractors for indemnification or contribution. Relying on a Missouri court of appeals decision,

Southard v. Buccaneer Homes Corp., 904 S.W.2d 525, 530 (Mo. Ct. App. 1995), it argues that a third-party defendant cannot, as a matter of law, establish that it is entitled to summary judgment before a plaintiff explains the bases for its claim. This is so, because the plaintiffs' evidence may raise the possibility of recovery from the third-party defendant. *See* ***id.*** at 530. Aluminum argues that because the subcontractors did not establish that the homeowners had explained the bases for their claims, the subcontractors are not entitled to summary judgment. We reject this contention for two reasons.

First, ***Southard*** is not the law in Wisconsin, and ought not be the law unless good reason dictates that result. Summary judgment is one of the procedural means intended to weed out baseless litigation and avoid trials where there is nothing to try. In ***Hunzinger***, we declared that "once sufficient time for discovery has passed" and no evidence has been produced against the moving party, that party is entitled to summary judgment. *See* ***id.***, 179 Wis.2d at 291-92, 507 N.W.2d at 140. ***Southard*** holds to the contrary. *See* ***id.***, 904 S.W.2d at 530 ("the absence of a fact question" does not automatically entitle moving party to summary judgment even though non-moving party has the burden on that issue). Thus, under ***Southard***, as long as a defendant remained in a case, a third-party defendant could never utilize the procedural remedy of summary judgment to establish that a non-moving party has not, and cannot, prove its case. In Wisconsin, once the moving party has demonstrated the absence of a genuine issue of material fact which has not been rebutted, the trial court has no discretion,

it must grant summary judgment. *See* § 802.08(3), STATS.[1] Since Aluminum did not fulfill the obligations imposed upon it by the summary judgment statute and case law interpreting it, it can hardly claim to be prejudiced by the trial court's grant of summary judgment to the third-party defendant subcontractors. We therefore affirm.[2]

By the Court.—Order affirmed.

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

[1] ***Southard v. Buccaneer Homes Corp.***, 904 S.W.2d 525 (Mo. Ct. App. 1995), can also be distinguished from our present case factually because there was admissible expert opinion that the product, i.e., the furnace, was defective in certain respects, *see* ***id.*** at 527-28, and finally, unlike this case, the third-party defendants had not fulfilled their discovery obligations, *see* ***id.*** at 529.

[2] Subcontractor D.H. Kelly Construction, Inc., filed a motion seeking costs, fees and attorney fees on the basis that Aluminum's appeal was frivolous. We deny the motion.