COURT OF APPEALS
DECISION
DATED AND FILED

April 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP956 **Cir. Ct. No. 2013CV40**

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

ANTHONY W. WROBLESKI,

PLAINTIFF-APPELLANT,

V.

MICHAEL J. MEYER, M.D. AND BELLIN HEALTH CARE SYSTEMS, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed*.

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Anthony Wrobleski appeals a summary judgment dismissing his negligence claim against Michael Meyer, M.D. (Meyer) and Bellin Health Care Systems, Inc. (Bellin). Wrobleski asserts the circuit court erred when

it concluded there was no evidence that Meyer's alleged negligence—violations of numerous federal regulations governing the post-testing review process of samples that have tested positive for a controlled substance—caused Wrobleski's alleged damages. We agree with the circuit court that, given Wrobleski's inability to articulate any reason for the positive test result, let alone produce evidence linking the test result (and any corresponding damages) to any alleged act of negligence on Meyer's part, summary judgment for Meyer and Bellin was appropriate. Accordingly, we affirm.

BACKGROUND[1]

¶2 As of April 6, 2012, Wrobleski was employed as an over-the-road commercial motor vehicle operator for America's Service Line, LLC (ASL). Pursuant to regulations promulgated or adopted under the Federal Omnibus Transportation Employee Testing Act of 1991 (FOTETA), codified at 49 U.S.C. § 31306, as such an operator, Wrobleski was required to undergo mandatory, periodic drug testing. *See* 49 C.F.R. § 382.305(a) (2011).[2] The regulations place the onus for such testing on the employer. ***Id.*** Many employers use qualified

[1] Meyer and Bellin's joint brief repeatedly refers to the parties as plaintiff and defendant(s). We remind counsel that references should be to names, not party designations. *See* WIS. STAT. RULES 809.19(1)(i), (3)(a)2.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Unless otherwise noted, all citations to the Code of Federal Regulations are to the 2011 version.

service agents, like Bellin, to help fulfill their collection responsibilities under the law. *See* 49 C.F.R. § 40.15.[3]

¶3 After a laboratory has confirmed that a sample tested positive for a controlled substance, a medical review officer (MRO) is required to verify the result by conducting a "quality assurance review" of the testing process. 49 C.F.R. § 40.123(b). The MRO is a licensed physician who serves as an independent and impartial "gatekeeper" between testing laboratories and employers. 49 C.F.R. § 40.123(a). In addition to reviewing the test process and result, the MRO must determine whether there was a legitimate medical explanation for a positive test. 49 C.F.R. § 40.123(c).

¶4 On April 6, 2012, ASL notified Wrobleski he was randomly selected for drug testing. Wrobleski was directed to a facility operated by Bellin, ASL's service agent. The first sample of Wrobleski's urine was taken at approximately 11:04 a.m. The technician measured the sample's temperature and found it was more than seven degrees cooler than Wrobleski's body temperature. The technician directed Wrobleski to return to the waiting room until he could provide another sample. Wrobleski provided the second sample at approximately 12:36 p.m.

¶5 Bellin then sent the samples to LabCorp, a testing facility in Southaven, Mississippi. Both samples Wrobleski provided were tested. The first, out-of-temperature sample tested positive for marijuana metabolites in a quantity of 65 ng/mL. The MRO in this case, Meyer, subsequently canceled this test,

[3] The testing and review procedures used for purposes of 49 C.F.R. Part 382 are found in 49 C.F.R. Part 40. *See, e.g.*, 49 C.F.R. §§ 382.105, 382.407.

apparently because of the temperature disparity. However, Wrobleski's second sample also tested positive for marijuana metabolites, this time at 99 ng/mL. Both test results exceeded the relevant "cutoff concentration" for a negative test result as established by FOTETA regulations. *See* 49 C.F.R. § 40.87.

¶6 On April 9, 2012, Meyer telephoned Wrobleski. Meyer told Wrobleski he tested positive for marijuana and asked whether Wrobleski could explain the test result. Wrobleski said he could not. Wrobleski alleges that during this conversation, Meyer failed to inform, or misinformed, Wrobleski of several matters required by FOTETA regulations. Specifically, Wrobleski alleges that Meyer:

- Failed to explain, contrary to 49 C.F.R. § 40.131(a), that if Wrobleski declined to discuss the test results, Meyer would verify the test as positive;
- Failed to explain, contrary to 49 C.F.R. § 40.135(b), the verification process and advise Wrobleski that Meyer's decision to verify would be based on information Wrobleski provided during the interview;
- Failed to warn Wrobleski, contrary to 49 C.F.R. § 40.135(d), that any medical information Wrobleski provided during the interview could be disclosed to third parties without Wrobleski's consent; and
- Failed to offer Wrobleski an opportunity to present a legitimate medical explanation for the test result, contrary to 49 C.F.R. § 40.137(b).[4]

¶7 Wrobleski also alleges Meyer failed to inform, or misinformed, him about matters relating to split specimen testing. In "split specimen" collection, the urine sample is divided into two containers, only one of which is tested initially. If the primary sample tests positive, the employee has the right to request that a

[4] We note Wrobleski's deposition testimony, in which Wrobleski stated Meyer asked whether he could explain the positive test result, appears to contradict this particular allegation.

second laboratory test the split sample. *See* 49 C.F.R. §§ 40.171, 40.175. Wrobleski alleges Meyer:

- Failed to notify Wrobleski that he could request split specimen testing, and failed to apprise Wrobleski of the procedures for such testing, both contrary to 49 C.F.R. § 40.153(a);
- Failed to inform Wrobleski that he had seventy-two hours to request split specimen testing, contrary to 49 C.F.R. § 40.153(b);
- Failed to tell Wrobleski how to contact Meyer to request the split specimen testing, contrary to 49 C.F.R. § 40.153(c);
- Failed to tell Wrobleski, contrary to 49 C.F.R. § 40.153(d), that he would not be required to pay for a split specimen test and that ASL would have to ensure the test took place; and
- Failed to tell Wrobleski that additional tests of the split specimen, such as DNA tests, are not authorized, contrary to 49 C.F.R. § 40.153(e).

¶8 Wrobleski was ultimately terminated from ASL and filed the present lawsuit against Meyer and Bellin. Wrobleski alleged that he did not use marijuana at any time in 2012, and that the test result Meyer reported was a false positive.[5] He also alleged that he had, in fact, requested split specimen testing, but that, to his knowledge, no such test was ever performed. Wrobleski alleged that Meyer's violation of federal regulations was actionable negligence that resulted in Wrobleski's wage loss and inability "to obtain full-time employment as an over-the-road commercial motor vehicle operator …."[6] Because Meyer was a Bellin

[5] To bolster his claim, Wrobleski presented evidence that several drug tests taken after his termination were negative for controlled substances.

[6] Wrobleski also sought damages based solely on the alleged FOTETA violations. Wrobleski does not appeal the circuit court's determination that FOTETA does not give rise to a private cause of action.

employee, Wrobleski also sought to hold Bellin responsible for Meyer's alleged negligence under the doctrine of respondeat superior.[7]

¶9 After Wrobleski commenced litigation, Meyer and Bellin, through defense counsel, informed Wrobleski that the split specimen was still available for testing and requested that Wrobleski consent to it being tested. Wrobleski refused, and Meyer and Bellin then filed a motion for summary judgment and a motion to compel Wrobleski to submit the split specimen for testing. The motion for summary judgment asserted that even if Wrobleski's allegations were correct, he failed to show any causal connection between the regulatory violations and his damages. This failure existed because Wrobleski could not explain how any of the alleged violations—all of which occurred *after* specimen collection and testing—could have produced the false positive, which itself caused all of his damages.

¶10 The circuit court granted Meyer and Bellin's summary judgment motion without directly addressing the motion to compel. The court concluded Wrobleski failed to provide any evidence demonstrating that Meyer's "alleged FOTETA violations were a substantial factor in Wrobleski being terminated." Moreover, the court concluded that Wrobleski could, at best, only allege that a timely split specimen test *might* have exonerated him, given both that Wrobleski

[7] The doctrine of respondeat superior allows a non-negligent employer to be held liable for a negligent employee's actions in certain circumstances. ***Lewis v. Physicians Ins. Co. of Wis.***, 2001 WI 60, ¶12, 243 Wis. 2d 648, 627 N.W.2d 484. "It arises due to the employer's control or right of control over the employee; because of this control or right of control, the negligence of the employee is imputed to the employer in certain circumstances." ***Id.*** Wrobleski does not allege any independent acts of negligence by Bellin. Because we conclude Wrobleski has failed to demonstrate any way in which Meyer caused his damages, it follows that Bellin is also not liable.

could not identify what caused the positive test result in the first instance, and his refusal to have the split specimen tested, even if belatedly. Wrobleski now appeals.

DISCUSSION

¶11 We review a grant of summary judgment de novo. ***Enea v. Linn***, 2002 WI App 185, ¶11, 256 Wis. 2d 714, 650 N.W.2d 315. Summary judgment must be granted to a moving party if there is no genuine issue of material fact for trial and that party is entitled to judgment as a matter of law. ***Chapman v. B.C. Ziegler & Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425 (citing WIS. STAT. § 802.08(2)). The purpose of the summary judgment procedure is to "avoid trials where there is nothing to try." ***Kasbaum v. Lucia***, 127 Wis. 2d 15, 24, 377 N.W.2d 183 (Ct. App. 1985).

¶12 When reviewing a grant of summary judgment, we follow the same methodology as the circuit court. ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 115-16, 334 N.W.2d 580 (Ct. App. 1983). First, we examine the complaint to determine whether it states proper claims for relief. ***Chapman***, 351 Wis. 2d 123, ¶2. If so, and if the pleadings join issue on such claims, we then analyze the evidentiary record—including any affidavits, depositions, answers to interrogatories, and admissions—to determine whether there is any genuine issue of disputed fact that is material to those claims. ***Id.*** "In evaluating the evidence, we draw all reasonable inferences … in the light most favorable to the non-moving party." ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781.

¶13 Here, Wrobleski appeals the circuit court's determination that he failed to demonstrate any causal nexus between his alleged damages and Meyer's

alleged negligence (i.e., breach of the FOTETA regulations).[8] Causation is an essential element of a negligence claim, *see* ***Gritzner v. Michael R.***, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906, and a finding of cause "will not automatically flow" from the finding that a person breached a duty of care, *see* ***Fondell v. Lucky Stores, Inc.***, 85 Wis. 2d 220, 226-27, 270 N.W.2d 205 (1978).

¶14 Causation is a "question of whether the breach of the duty is a substantial factor in causing the harm from which damages are claimed." ***Id.*** at 227. A defendant's conduct is a substantial factor if it "'has such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense.'" ***Fischer v. Ganju***, 168 Wis. 2d 834, 857, 485 N.W.2d 10 (1992) (quoting ***Clark v. Leisure Vehicles, Inc.***, 96 Wis. 2d 607, 617-18, 292 N.W.2d 630 (1980)). The plaintiff must prove "an unbroken sequence of events … wherein the negligence of a party is actively operating at the time of the injury producing accident and this actively operating negligence was a cause in fact of the accident." ***Fondell***, 85 Wis. 2d at 227.

¶15 We are here concerned with whether there exists a genuine issue of material fact regarding causation. The alleged negligent acts—which we accept as true for summary judgment purposes—are those concerning Meyer's failure to follow the FOTETA regulations governing the post-testing MRO review. Wrobleski alleges the breach of these regulations caused various damages that

[8] Wrobleski also contends the circuit court "erred by failing to consider the question of whether Dr. Meyer and Bellin owed him a duty of care and the related question of whether public policy considerations favor imposition of liability on Dr. Meyer and Bellin." Given our conclusion that Wrobleski's negligence claims fail as a matter of law due to the lack of any evidence of causation, these issues are not dispositive in this case and need not be addressed. *See* ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶48, 326 Wis. 2d 300, 786 N.W.2d 15.

included "loss of income, loss of ability to work in his chosen profession, mental anguish, humiliation, damage to reputation, and other compensable harm."

¶16 Meyer and Bellin's summary judgment motion argued, in part, that Wrobleski failed to establish a causal link between the regulatory violations and his alleged damages. Meyer and Bellin observed that Wrobleski could not explain, at his deposition, the presence of marijuana metabolites in the two urine samples he provided on April 6, 2012. Accordingly, Meyer and Bellin argued Wrobleski could not causally connect the positive test of the second sample, which was the sole reason for his termination, to any act of negligence on their part. Meyer and Bellin asserted that "[w]hat Mr. Wrobleski is really claiming is that he suffered damages as a result of [his employer's] decision to terminate his employment—not because Defendants violated FOTETA."

¶17 In his brief in response to the summary judgment motion, Wrobleski conceded he was terminated solely because of the positive urine test.[9] However, Wrobleski asserted he was "branded as a drug user" because of Meyer's actions, not his employer's. Wrobleski argued that, given the reputational interests at stake, any party who violates the FOTETA regulations governing post-testing MRO review should be deemed to have caused all damages flowing from a positive test result, regardless of whether that party was actually responsible for the test result.

[9] In fact, Wrobleski faulted Meyer and Bellin for failing to offer evidence to suggest that he was discharged for any reason *other* than the positive drug tests, apparently under the belief this would bolster his arguments regarding causation.

¶18 Wrobleski resurrects this argument on appeal. He does not indicate what evidence, if any, demonstrates a link between the alleged regulatory breaches and his being "branded a drug user." If Wrobleski was "branded a drug user," it was only because he, as a matter of undisputed fact, failed a drug test—regardless of whether he actually used marijuana. To create a genuine issue of material fact, Wrobleski must provide some evidence that the alleged negligent acts were a substantial factor in bringing about what we assume, for purposes of summary judgment, was a false positive test result.

¶19 Wrobleski has failed to meet this burden. Wrobleski concedes he cannot show, by testimony or otherwise, that *any* of the alleged negligent acts caused his samples to test positive for marijuana. Instead, he asserts, without citation to any relevant authority, that "traditional concepts of causation do not necessarily apply in cases where the plaintiff knows something went badly wrong but may not have access to a full explanation of what happened." Wrobleski's argument boils down to nothing more than a bald attempt to rewrite Wisconsin negligence law governing causation, simply because he has not demonstrated a genuine issue of material fact regarding the existence of a causal nexus in this case.

¶20 The only authorities Wrobleski provides to support his proposed rule are foreign cases, none of which actually support his claim against Meyer and Bellin in this case. ***Burton v. Southwood Door Co.***, 305 F. Supp. 2d 629 (S.D. Miss. 2003), involved issues regarding federal removal and preemption of state law claims; the district court did not reach the merits of the plaintiff-employee's negligence claim, and certainly did not conclude—as Wrobleski argues—that the employee's claim "was allowed to proceed" despite the absence of any causal connection to his damages.

¶21 Both ***Southern California Gas Co. v. Utility Workers Union, Local 132***, 265 F.3d 787 (9th Cir. 2001), and ***Atchison, Topeka and Santa Fe Railway Co. v. United Transportation Union (CT&Y)***, 175 F.3d 355 (5th Cir. 1999), were reviews of arbitration awards reinstating employees who were terminated for failing drug tests under collective bargaining agreements; those courts did not—and, indeed, could not, under the applicable standard of review—independently decide questions of causation. Similarly, ***Reames v. Department of Public Works***, 707 A.2d 1377 (N.J. Super. Ct. App. Div. 1998), did not involve a negligence claim; the court reviewed an administrative decision upholding a public employee's termination for failing a drug test and concluded the test was constitutionally defective under the Fourth Amendment because it did not substantially comply with federally prescribed procedures. ***Id.*** at 1377, 1382. Wrobleski is not a public employee, and he does not raise any constitutional claims.

¶22 Wrobleski also cites the unreported decision in ***Webster v. Psychemedics Corp.***, No. 2010-01087-COA-R3-CV, 2011 WL 2520157, *1 (Tenn. Ct. App. June 24, 2011), as an example of a case in which the plaintiff employee's negligence claims were permitted to go to trial despite a lack of evidence regarding causation. This characterization of ***Webster*** is inaccurate; the court refused to consider the defendant's argument that there was insufficient evidence of causation and remanded to the lower court for further proceedings. ***Id.*** at *8. Moreover, Wrobleski overlooks a key fact in ***Webster***—namely, that the defendant was the laboratory that tested the plaintiff's sample and confirmed that it contained a prohibited narcotic. Here, Wrobleski has not impleaded the lab; he has sued only the MRO and his employer's service agent.

¶23 Finally, Wrobleski cites ***Kindernay v. Hillsboro Area Hospital***, 851 N.E.2d 866 (Ill. App. Ct. 2006). There, the plaintiff alleged she suffered "lost wages and emotional distress due to the defendant's failure to administer her drug test" in accordance with the applicable Department of Transportation regulations. ***Id.*** at 870. The jury returned a verdict for the plaintiff on her negligence claim. ***Id.*** at 873. On appeal, the defendant challenged the sufficiency of the evidence regarding causation to support the jury verdict. ***Id.*** at 875.

¶24 Unlike Wrobleski, the plaintiff in ***Kindernay*** was able to articulate how, precisely, the defendant caused her damages, and she offered evidence at trial to support that theory. The ***Kindernay*** plaintiff's theory was that the sample tested was not her own, and that the defendant was at fault for the switch by failing to secure the collection restroom. ***Id.*** at 876. In support of this theory, the plaintiff testified that an unknown woman left her sample in the restroom immediately before the plaintiff entered. ***Id.*** at 871. In this context, the court concluded the plaintiff's evidence, along with reasonable inferences from that evidence, supported the jury's finding. ***Id.*** at 876. Unlike Wrobleski, the plaintiff in ***Kindernay*** supported her case with more than her assertion that she did not use marijuana.[10] *See* ***id.***

¶25 Here, Wrobleski has presented no explanation, let alone evidence, as to how Meyer and Bellin's alleged negligence could have possibly caused his samples to test positive for marijuana. Whereas the plaintiff in ***Kindernay***

[10] It is not apparent from the court's opinion in ***Kindernay v. Hillsboro Area Hospital***, 851 N.E.2d 866 (Ill. App. Ct. 2006), whether the plaintiff actually testified she did not use marijuana before her drug test. Rather, the court stated that based on her testimony, "a reasonable jury could find that it was more likely than not that the test result was a false positive, in that the plaintiff had not used cannabis." ***Id.*** at 876.

supplied evidence that procedural errors in sample collection could have caused a positive result of the wrong sample, all of the alleged negligent acts in this case occurred *after* sample collection, processing and testing.

¶26 Wrobleski suggests that the circuit court erroneously focused on his refusal to have split specimen testing performed on a sample "that was then nearly two years old." The crux of Wrobleski's argument appears to be that timely testing of the split specimen might have yielded a negative result, which would have required Meyer to cancel the test. *See* 49 C.F.R. § 40.187. However, Wrobleski concedes he has no idea what the result of a timely split specimen test might have been.

¶27 This concession is fatal to this aspect of Wrobleski's negligence claim. Wrobleski leaves open the possibility that the split specimen test might have reconfirmed the initial positive result. In such a scenario, none of the alleged negligent acts regarding split specimen testing would have made any difference. Moreover, Wrobleski does not assert his request for split specimen testing would have delayed the reporting of his initial positive result to his employer, nor does he argue a negative split specimen test would have precluded his termination.

¶28 Indeed, Wrobleski's reply brief critically undermines his own case by presenting a hypothetical fact pattern under which neither Meyer nor Bellin bear any responsibility for the allegedly flawed test. According to Wrobleski, the cause of the alleged false positive could have been, as in ***Kindernay***, a "mix up in the specimens," in which case the split specimen sample would test positive, just like the primary sample. Under this hypothetical, neither Meyer nor Bellin's adherence to the standard of care (assuming without deciding that standard is

defined by the FOTETA regulations) would have prevented Wrobleski from being terminated or suffering reputational or any other harm from which he seeks relief.

¶29 Ultimately, this hypothetical, like any hypothetical supporting a finding of liability on the part of Meyer and Bellin, is entirely speculative. Wrobleski has failed to cite any evidence in the record on which a reasonable jury could find, even based on an inference to be drawn from the circumstances, that Meyer and Bellin's failures were a substantial factor in bringing about the claimed damages. More is required:

> The cause of [the plaintiff's] loss could be attributed to a condition to which no liability attaches or to one for which liability does attach. Because there is no credible evidence upon which the trier of fact can base a reasoned choice between the two possible inferences, any finding of causation would be in the realm of speculation and conjecture.

Merco Distrib. Corp. v. Commercial Police Alarm Co., 84 Wis. 2d 455, 460, 267 N.W.2d 652 (1978). A judgment cannot rest on conjecture, unproven assumptions or mere possibilities. ***Id.*** at 461. Even viewing all evidence regarding disputed issues of fact in Wrobleski's favor, including all reasonable inferences, Wrobleski's causation argument still rests on conjecture and mere possibilities.

¶30 Finally, Wrobleski suggests a res ipsa loquitur instruction would be appropriate in this case as an alternative method of establishing causation. Res ipsa loquitur is a rule of circumstantial evidence which permits, but does not require, an inference of negligence to be drawn by the jury. ***McGuire v. Stein's Gift & Garden Ctr., Inc.***, 178 Wis. 2d 379, 389, 504 N.W.2d 385 (Ct. App. 1993). "The doctrine applies where there is insufficient proof available to explain an injury-causing event, yet the physical causes of the accident are of the kind which ordinarily do not exist in the absence of negligence." ***Id.***

¶31 A res ipsa instruction is unavailable to Wrobleski in this case. The doctrine is applicable only if: (1) the event is the kind that does not ordinarily occur in the absence of negligence; and (2) the agency or instrumentality causing the harm was within the exclusive control of the defendant. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶34, 241 Wis. 2d 804, 623 N.W.2d 751. With respect to the first requirement, Wrobleski has neither alleged nor presented any evidence that a false positive result on a drug test obtains only through the MRO's negligence and, by extension, that of his or her employer.[11] More importantly, Wrobleski's request for a res ipsa instruction falls far short on the second requirement. Contrary to Wrobleski's argument, Meyer and Bellin did not exclusively control the drug-testing process.[12] At least two other entities were involved: the professional courier who physically transported the samples to LabCorp for testing, and LabCorp itself.

¶32 A plaintiff cannot survive summary judgment simply by "rest[ing] upon the mere allegations or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial." ***Board of Regents of Univ. of Wis. Sys. v. Mussallem***, 94 Wis. 2d 657, 673, 289 N.W.2d 801 (1980). Wrobleski has failed to articulate any causal nexus between his alleged damages and Meyer's alleged negligence, let

[11] We believe expert testimony on this point would be required. A layman would not be able to say, as a matter of common knowledge, that the alleged false positive could not have resulted even if Meyer and Bellin exercised due care (assuming, again, that the standard of care is defined by reference to the applicable FOTETA regulations). *See* ***Lecander v. Billmeyer***, 171 Wis. 2d 593, 601, 492 N.W.2d 167 (Ct. App. 1992).

[12] In an attempt at obfuscation, Wrobleski observes that he had no control over the process after he delivered his sample to Bellin on April 6, 2012. The res ipsa doctrine's second element, however, focuses on the defendant's control over the situation, not the plaintiff's control or lack thereof.

alone produce evidence of causation sufficient to allow his negligence claim to proceed to trial. We reject Wrobleski's invitation in this case to ignore well-settled Wisconsin law on negligence, including the fundamental requirement of causation.

By the Court.—Judgment affirmed.

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