COURT OF APPEALS
DECISION
DATED AND FILED

April 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-0998

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

SUSAN DUDACEK, WAYNE DUDACEK, MARILYN DUDACEK, MAC NEAL HEALTH PROVIDERS, AND AETNA LIFE INSURANCE COMPANY,

PLAINTIFFS-APPELLANTS,

V.

DANIEL G. HOVLAND, HOVLAND'S TIRE AND OIL CO., INC., AND FEDERATED MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sauk County: PATRICK J. TAGGART, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

EICH, C.J. Susan Dudacek appeals from a summary judgment dismissing her action against Daniel Hovland and his liability insurer. Dudacek

sued to recover for personal injuries received when she was struck by Hovland's truck while riding her bicycle on a two-lane road in Sauk County. She alleged that Hovland's negligence in the operation of his vehicle caused the collision. Hovland's answer denied any negligence on his part; he claimed that Dudacek's negligence caused the accident and her injuries.

The trial court granted Hovland's motion for summary judgment dismissing Dudacek's complaint, and the issue on appeal is whether there are disputed issues of fact—or conflicting inferences arising out of the undisputed facts—that would render summary judgment inappropriate. We conclude that there are and we therefore reverse.

We review summary judgments *de novo*, applying a well-known methodology. ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987); § 802.08(2), STATS. We begin by considering the pleadings. If the complaint states a claim and the answer joins the issue, we examine the affidavits and other proofs filed by the party seeking judgment to determine whether they present material facts sufficient to state a *prima facie* claim or defense. ***State Bank of La Crosse v. Elsen,*** 128 Wis.2d 508, 511, 383 N.W.2d 916, 917 (Ct. App. 1986). If they do, we then consider the affidavits and proofs filed in opposition to the motion to determine whether a genuine issue of material fact exists or whether conflicting inferences may be reasonably drawn from the undisputed facts. ***Dean Med. Ctr., S.C. v. Frye,*** 149 Wis.2d 727, 730, 439 N.W.2d 633, 634 (Ct. App. 1989). If no material factual or inferential issues exist, we then consider the parties' legal arguments to determine whether summary judgment is appropriate. *See* § 802.08(2).

Still other rules guide our inquiry. We must resolve all doubts with regard to the existence of genuine and material factual issues or inferences in favor of the nonmoving party. ***Elsen,*** 128 Wis.2d at 512, 383 N.W.2d at 918. Additionally, as we have said many times in the past, summary judgment "does not lend itself to many types of cases, especially those which are basically factual and depend to a large extent upon oral testimony." ***Schandelmeier v. Brown***, 37 Wis.2d 656, 658, 155 N.W.2d 659, 660 (1968). And because negligence cases are largely factual in nature, we have recognized that summary judgment is "rarely appropriate in [such] cases." ***Beyak v. North Central Food Systems, Inc.,*** 215 Wis.2d 64, 69, 571 N.W.2d 912, 914 (Ct. App. 1997). The reasons are obvious. Determining which party is negligent—and particularly which party is more at fault where, as in this case, both are alleged to have been negligent—will usually require affidavits and counter-affidavits setting forth in detail the conduct of both parties leading up to the injury-causing incident, and "[t]he upshot is a trial on affidavits, with the trial court ultimately deciding what is peculiarly a jury question." ***Cirillo v. City of Milwaukee***, 34 Wis.2d 705, 717, 150 N.W.2d 460, 466 (1967). Trial by affidavit or deposition is, of course, precisely what the summary-judgment methodology is designed to prevent. ***Baxter v. DNR***, 165 Wis.2d 298, 312, 477 N.W.2d 648, 654 (Ct. App. 1991).

Hovland's summary judgment motion was accompanied by police reports and photographs of the accident scene, as well as excerpts of his deposition testimony and that of several other witnesses. One witness, Tammy Kemnitz, testified that she saw Dudacek leaving the campground on her bicycle. The campground driveway came down a hill or incline toward the road, and there was a stop sign in the area where the driveway entered the roadway—an area where, because of shrubbery, the driveway was not clearly visible from the road.

Kemnitz, who was standing near the stop sign, saw the collision, and the "next thing [she] remember[ed] is the truck slammed on [its] brakes and stopped just to the right of [her] …. [a]nd that's basically all [she] remember[ed]." Kemnitz agreed that she did not remember "if [Dudacek] stopped or not or slowed down or what she did before she entered the roadway." She acknowledged that she also did not know "what [Dudacek's] speed was." After Kemnitz testified that she "didn't exactly see … if she stopped or not," Kemnitz was asked whether, "based upon the amount of time from the time you saw her going down the hill until the time of the accident, isn't it your conclusion … that … she didn't stop?" She answered, "Yes."[1]

In his deposition, Hovland testified that the speed limit in the area was thirty-five miles per hour and that, while he "had no idea" how fast he was going, "it wasn't very fast…. I would guess, around 30 miles an hour at the most …." He stated that he saw Dudacek's bicycle come out of the driveway, apparently intending to cross the road. He said she passed through the lane in which he was driving, crossed the highway centerline and then made a U-turn back into his lane, where the collision occurred. In his deposition, Hovland was unsure of the distance between his truck and Dudacek when he first saw her, but in a prior statement to police he said it was approximately "four or five carlengths at the most." According to Hovland, as soon as he saw Dudacek he immediately applied his brakes and drove off the road to the right. He said he didn't know whether his wheels skidded when he applied the brakes.

[1] Kemnitz had also testified that no more than five seconds had elapsed between the time she first saw Dudacek riding down the hill toward the road and the impact. She did not testify, however, as to the distance between the road and the point she first observed Dudacek, or provide any other locational data.

Hovland's motion was also supported by the deposition testimony of Michael Deakin, the police officer who investigated the accident. Officer Deakin testified that Hovland's truck left forty feet of "locked wheel" skid marks on the pavement and the area immediately off the roadway. He had initially reported that the skid marks measured 192 feet. He explained in his deposition that forty feet represented locked-wheel braking and the remainder may have come from a combination of a soft road surface and a slight veering of the Hovland vehicle, or from braking action which was not "hard" enough to lock the vehicle's wheels. Deakin declined to estimate the speed of either Hovland's vehicle or Dudacek's bicycle prior to the collision. Deakin also testified that from Hovland's vantage point on the road, the campground driveway was obscured by shrubbery, a large sign and a hill. Photographs taken by Deakin at the scene, as well as the deposition testimony of other witnesses, appear to confirm that description. Deakin also inspected Dudacek's bicycle and stated that while the handlebar lever controlling the rear-wheel brake was working properly, the "cheater bar"—a second lever mounted adjacent to the center stem of the bars—did not fully apply the brake pads to the rear wheel.[2]

Finally, Hovland offered the deposition testimony of an expert witness, Robert Krenz, who estimated the speed of Hovland's vehicle. According to Krenz, 192 feet of skid marks—the figure stated in Deakin's initial report—would place Hovland's speed at fifty-four to sixty miles per hour. Using Deakin's

[2] Hovland also offered deposition testimony of one of Dudacek's friends who stated Dudacek had told her she was having a problem with her bicycle brakes, and that of a bicycle mechanic who examined the bicycle after the accident and stated that the rear brake was not working. His testimony does not indicate whether he had tested the handlebar lever, the "cheater" lever, or both.

"corrected" figure of forty feet, however, would set his speed at approximately thirty-five miles per hour.

Dudacek submitted no affidavits or proofs in opposition to Hovland's motion. She argued to the trial court that because conflicting inferences can reasonably be drawn from Hovland's proofs, summary judgment was inappropriate. The trial court disagreed. It ruled first that no dispute existed over the fact that Dudacek had failed to stop at the stop sign. It based that determination solely on the deposition testimony of Tammy Kemnitz. Recognizing the equivocal nature of Kemnitz's testimony, the court nonetheless referred to Kemnitz's "conclusion" that Dudacek did not stop based on her estimate of the time elapsing between her first observation of Dudacek and the collision, and concluded that "in all likelihood [Dudacek] did not make a complete stop at the stop sign." The court then said that only one reasonable inference could be drawn from the testimony relating to Hovland's speed: he "was not speeding."[3]

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[3] The court stated in this regard:

> [Dudacek] argue[s] that Hovland … [was] speeding based … on the testimony given by Tammy Kemnitz that when she was looking for cars on [the] road, she did not see Hovland's truck at first glance, but then saw the truck after looking for a second time. The court believes this testimony alone *cannot overcome the … testimony* by Hovland and evidence regarding Hovland's stopping distance given by Robert Krenz which demonstrate that Hovland was not speeding.

(Emphasis added.)

The emphasized language suggests that the court may have been weighing the evidence, which it may not do on a summary judgment motion because deciding the credibility of the witnesses and the weight to accord their testimony (and other evidence in the case) is for the trier of fact. ***Pomplun v. Rockwell Int'l Corp.,*** 203 Wis.2d 303, 306-07, 552 N.W.2d 632, 633 (Ct. App. 1996).

On the basis of those two determinations—"in all likelihood" Dudacek did not make a complete stop at the stop sign, and Hovland was not speeding—the court stated:

> The court *finds* that Dudacek had a duty to check for oncoming traffic and a duty to use the proper exit lane when leaving the … driveway in order to cross … [the r]oad.[4] Since … Dudacek did not use ordinary care when crossing … [the r]oad, she was at least fifty-one percent causally negligent.

(Emphasis added.)

Recognizing the rule stated earlier in this opinion that summary judgments are inappropriate in most negligence cases, Hovland, citing ***Johnson v. Grzadziewlewski***, 159 Wis.2d 601, 465 N.W.2d 503 (Ct. App. 1990), argues that this is precisely the type of negligence case in which summary judgment *should* be utilized. Johnson was injured when, along with some friends, he "expressed" an elevator car in a college dormitory—a bit of derring-do that involved holding the "inner" elevator doors open and manipulating the exposed above-door controls in order to cause the car to descend very rapidly. In this instance, the elevator stopped halfway between the first and second floors after its descent, and, rather than simply allowing the inner doors to close and then riding the elevator to a designated floor in the normal manner—or buzzing for assistance—Johnson squeezed through the door and began climbing upwards through the space between the car and the walls of the elevator shaft in order to gain access to a lever he believed would open the outer doors to the second floor. The lever he pulled, however, started the car moving and he was crushed between the car and the wall.

[4] The court did not discuss in its decision any testimony relating to either Dudacek's lookout or number or nature of any "lanes" in the campground driveway.

He sued the manufacturer of the elevator system (among others), and the trial court granted summary judgment dismissing his action.

Affirming the trial court, we began by noting, "Where the evidence of the plaintiff's negligence is so clear and the quantum so great, and where it appears that the negligence of the plaintiff is as a matter of law equal to or greater than that of the defendant, it is not only within the power of the court but it is the duty of the court to so hold." ***Id***. at 608, 465 N.W.2d at 506. We concluded that ***Johnson*** satisfied that test because the plaintiff had intentionally undertaken "a dangerous and intentional misuse of an elevator, which can foreseeably lead to the grave injury that occurred," and then, ignoring "several clearly available safe means of exit" from the predicament in which he found himself, elected an even more dangerous means of escape. ***Id***. at 608-09, 465 N.W.2d at 506.

An obvious contrast exists between the acts of the plaintiff in ***Johnson*** and those of Dudacek in this case. Johnson intentionally and deliberately embarked on an inherently and obviously dangerous escapade when he attempted to squeeze his way upward in an elevator shaft and activate a control lever he was unfamiliar with. Dudacek's acts, on the other hand, were neither deliberate nor reckless: she is alleged to have been simply negligent in the manner in which she rode her bicycle. And, as we have indicated, the only "facts" on which the trial court based its determination that Dudacek was more negligent than Hovland were: (1) the "likelihood" that she had not come to a full stop at the stop sign; and (2) the expert opinion that Hovland was not speeding.

Additionally—and more importantly—we are not satisfied that these facts, and the inferences reasonably arising from them, are free from dispute. The "stop-sign" evidence was not that Dudacek had, in fact, been observed riding

through the sign.[5] As we have indicated, the only witness on the point, Kemnitz, stated quite clearly that she "didn't exactly see … if [Dudacek] stopped or not." She only inferred that, "based upon the amount of time from the time [she] saw her going down the hill until the time of the accident," Dudacek did not stop. Even in the absence of contradictory testimony from another witness, we think that a jury—not the trial court on a summary judgment motion—is the proper body to assess the validity of Kemnitz's conclusion, especially on an issue so crucial to the case. It is settled law that a jury is not required to accept an expert's opinion, even where it is uncontradicted, ***State v. Fleming***, 181 Wis.2d 546, 561, 510 N.W.2d 837, 842 (Ct. App. 1993), and we believe that rule applies equally to the opinions and conclusions of lay witnesses.

We also note that Hovland's contributory-negligence claim against Dudacek includes allegations that she was negligent in maintaining the rear brake on her bicycle. He bases the claim on the testimony of Dudacek's friend that Dudacek had said sometime prior to the accident that her brakes were not working properly, and on the testimony of a bicycle mechanic that, after the accident, the rear brake was not working properly. Officer Deakin, however, testified that he, too, tested the bicycle's rear brake and that when the lever on the curl of the handlebar was depressed, the calipers and pads functioned properly. He said that only the auxiliary cheater bar appeared to be malfunctioning. Neither the mechanic nor the other witness mentioned anything about levers or cheater bars. It thus appears that, to determine that the condition of the rear brake on Dudacek's bicycle had a causal relationship to the accident, one would have to infer that she

[5] We also note that no evidence provided the precise location of the stop sign with respect to either the driveway or the road.

attempted to brake by using the cheater bar, rather than the handlebar lever; and we think it is equally reasonable to infer that, apparently knowing of problems with the cheater bar, she would be equally likely to use the bicycle's handlebar lever.[6]

With respect to Hovland's possible negligence, the trial court ruled, as we have said, that the evidence was uncontradicted that Hovland was driving within the speed limit. We have already discussed the unsettled nature of Deakin's testimony with regard to his measurements at the scene—the measurements upon which the expert witness, Krenz, based his estimates of Hovland's speed. At the least, Deakin's testimony gives rise to a reasonable inference that Hovland may have begun applying his brakes before the locked-wheel skid marks began. Hovland testified, for example, that he did not recall whether his vehicle began to skid when he applied his brakes. Additionally, inconsistencies in Hovland's testimony give rise to conflicting inferences of his speed. He stated, for example, that he had no idea how fast he was driving, although he believed it was no more than thirty miles per hour, and that everything happened "so fast" that he had no time to avoid the collision. Yet, he also testified that he saw Dudacek enter the road, ride through his lane across the centerline, negotiate a U-turn and ride back into his lane, and then turn again in his direction before he hit her—all this occurring, presumably, as his vehicle traveled only four or five car lengths, according to his own estimate.

[6] We also note that, in his statement to the police, Hovland said that by the time Dudacek saw his truck approaching, "she was already committed to the point she couldn't do anything"—suggesting that operation of her brakes, even if in prime working condition, would have been irrelevant.

In addition to Deakin's measurements, and the expert testimony based on those measurements, the crucial evidence in this case is the testimony of the three eyewitnesses to the accident: Kemnitz, Hovland and Dudacek. In ***Dobratz v. Thomson,*** 155 Wis.2d 307, 323, 455 N.W.2d 639, 646 (Ct. App.1990), *rev'd on other grounds,* 161 Wis.2d 502, 468 N.W.2d 654 (1991), a case involving an accident between a boat and a water-skier, we had this to say about the appropriateness of disposing of such a case by summary judgment: "Negligence is rarely determinable on motions for summary judgment. This is particularly true in a case such as this where determining what happened at and just before a collision is dependent upon an assessment of the instantaneous observations and impressions of several eyewitnesses." ***Id.***

We think this case proves the rule. It has gaps and potential inconsistencies, and resolving those inconsistencies will necessarily involve assessments of the weight, and perhaps the credibility, of the witnesses' testimony—assessments the law leaves to the factfinder. ***Pomplun v. Rockwell Int'l Corp.,*** 203 Wis.2d 303, 306-07, 552 N.W.2d 632, 633 (Ct. App. 1996). It also is a comparative negligence case—both parties claim the other's negligence caused Dudacek's injuries—and the supreme court has held that summary judgment is particularly inappropriate in such cases.

> Summary judgment is a poor device for deciding questions of comparative negligence. What is contemplated by our comparative-negligence statute … is that the totality of the causal negligence present in the case will be examined to determine the contribution each party has made to that whole. It is the "respective contributions to the result" which determine who is most negligent, and by how much. A comparison, of course, assumes the things to be compared are known, and can be placed on the scales. If a defendant, on summary judgment, is to be permitted to set forth in his [or her] affidavits the conduct of the plaintiff, and seek summary judgment on the ground that the

> plaintiff's negligence outweighs his [or her] own as a matter of law, the only recourse to the plaintiff is to set forth in his [or her] counteraffidavits all of the conduct of the defendant. The upshot is a trial on affidavits ….

Cirillo, 34 Wis.2d at 716-17, 150 N.W.2d at 466 (citations and footnotes omitted).

As we have indicated, we must resolve all doubts concerning the existence of genuine and material factual or inferential issues in Dudacek's favor. ***Elsen,*** 128 Wis.2d at 512, 383 N.W.2d at 918. And while this is not a case, like ***Cirillo***, involving counter-affidavits, the deposition testimony of the eyewitnesses to the accident—each of whom was extensively cross-examined about his or her observations—can reasonably give rise to competing inferences.

By the Court.—Judgment reversed and cause remanded.

Not recommended for publication in the official reports.