COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2019

Sheila T. Reiff
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP162 **Cir. Ct. No. 2017CV51**

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

MELINDA WAGNER,

PLAINTIFF-APPELLANT,

THE CHARTER OAK FIRE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY, TRISHA J. STRATMAN AND ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

HEALTHPARTNERS INSURANCE COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Reversed and cause remanded.*

Before Sherman, Blanchard and Fitzpatrick, JJ.

¶1 FITZPATRICK, J. In this lawsuit initiated in the La Crosse County Circuit Court, Melinda Wagner claims that she was injured in an auto accident. Wagner requests monetary damages from the driver of the other vehicle, Trisha Stratman; Stratman's insurer, Allstate Property and Casualty Insurance Company; and Wagner's auto underinsurer, Acuity.[1] The Insurers moved for summary judgment requesting that Wagner's claims against them be dismissed pursuant to the doctrine of judicial estoppel. According to the Insurers, Wagner failed to disclose her claims against the Insurers in her previous bankruptcy, that failure was clearly inconsistent with Wagner's lawsuit against the Insurers and, as a result, judicial estoppel applies. *See* ***Olson v. Darlington Mut. Ins. Co.***, 2006 WI App 204, ¶¶8-11, 296 Wis. 2d 716, 723 N.W.2d 713 (judicial estoppel requires that positions taken by a party in two separate cases be "clearly inconsistent"). The circuit court granted the Insurers' motion, and Wagner appeals.

¶2 Under Wisconsin law, the application of judicial estoppel also requires that any failure of Wagner to disclose her claims against the Insurers in the bankruptcy court was caused by "cold manipulation" rather than mistake. *See* ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996).[2] We conclude that

[1] We will refer to those parties collectively as "the Insurers" except where the nature of the reference requires otherwise.

[2] Wisconsin case law states that judicial estoppel "has never been applied where plaintiff's assertions were based on fraud, inadvertence, or mistake." *See, e.g.*, ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996) (quoting ***State v. Fleming***, 181 Wis. 2d 546, 558, 510 N.W.2d 837 (Ct. App. 1993)). That use of the term "fraud" is reasonably read as the party against whom judicial estoppel is asserted being the victim of fraud. No party raises fraud as an issue, so we ignore that aspect of case law. In addition, we discern no difference in this context between "inadvertence" and "mistake" and, for convenience, we refer only to mistake.

there are genuine issues of material fact regarding whether any failure of Wagner to disclose her claims against the Insurers in her bankruptcy was based on mistake rather than an intentional failure to disclose. Therefore, summary judgment was not appropriate. Accordingly, we reverse the order of the circuit court and remand for further proceedings consistent with this opinion.

BACKGROUND

¶3 The parties do not dispute the following material facts.

¶4 In April 2015, while Wagner was in the course of her employment, a car she was driving was in a collision with a car driven by Stratman. Wagner alleges that she was injured in that collision and that her injuries were caused by Stratman's negligence.

¶5 In November 2015, Wagner filed a petition for a Chapter 7 bankruptcy in the United States Bankruptcy Court for the Western District of Wisconsin. Wagner was represented by an attorney in that bankruptcy. A schedule filed with the petition required Wagner to disclose "Other contingent and unliquidated claims of every nature." In response, Wagner stated: "Workers compensation claim – lawsuit not filed yet." Wagner did not disclose, in her initial bankruptcy schedules, any potential personal injury claims against the Insurers related to the April 2015 car accident.

¶6 Less than two weeks after Wagner filed for bankruptcy protection, an attorney then representing Wagner regarding her personal injury claims (who was not a member of the same law firm representing Wagner in the bankruptcy) sent a letter to Allstate demanding payment of its $100,000.00 policy limits. We will refer to this as "the demand letter." The demand letter also gave notice to

Acuity, Wagner's own auto insurer, of Wagner's intent to pursue an underinsured motorist claim against Acuity. The Insurers did not make any payments to Wagner based on the demand letter.

¶7 In January 2016, the trustee assigned to Wagner's bankruptcy conducted a proceeding generally known as a "first meeting of creditors" pursuant to 11 U.S.C. § 341 (2012).[3] At that time, Wagner gave the following answers to these questions from the trustee:

> T: Do you have a right to file a lawsuit or make a claim for money against somebody?
>
> MW: Yes.
>
> T: Who?
>
> MW: It would be – it's from my car accident. It's the reason I'm filing bankruptcy. It's with Allstate. But the liability was $100,000 and my medical bills are $85,000. So, I – it's only – a wash.
>
> T: Do you have an attorney on this case?
>
> MW: I do.
>
> …. [name of the attorney in the personal injury case is given]
>
> T: Is this related to the workmen's comp?
>
> MW: Yes.

¶8 In March 2016, the bankruptcy court granted a bankruptcy discharge to Wagner and closed the case.

[3] All references to the United States Code are to the 2012 version unless otherwise noted.

¶9 In January 2017, Wagner started this lawsuit, including claims against the Insurers. The law firm representing Wagner in this case is neither the same as her previous bankruptcy counsel nor the law firm that authored the demand letter. The Insurers filed a motion for summary judgment requesting dismissal of Wagner's claims against them based on judicial estoppel. In support, the Insurers argued that Wagner had not disclosed her claims against the Insurers in the bankruptcy proceeding and, as a result, the position taken by Wagner in her bankruptcy is clearly inconsistent with the claims against the Insurers in this action. In the alternative, the Insurers moved for summary judgment based on Wagner's lack of standing. The Insurers argued that, under federal bankruptcy law, Wagner's claims against the Insurers remained with Wagner's bankruptcy estate, and only the bankruptcy estate had standing to initiate this lawsuit.

¶10 After the Insurers' summary judgment motion was filed, Wagner's counsel in this lawsuit informed the bankruptcy trustee of this lawsuit and Wagner's claims against the Insurers. At the trustee's request, in November 2017 the bankruptcy court reopened Wagner's bankruptcy case so Wagner could amend her schedules filed in that court. The trustee was reappointed to Wagner's bankruptcy case by the bankruptcy court. Wagner amended her schedules in the bankruptcy court and disclosed a "Potential Personal Injury lawsuit" against the Insurers and claimed a $50,000.00 state law exemption.[4]

[4] Pursuant to 11 U.S.C. § 522(b)(3), Wagner may assert federal law or state law exemptions that allow her to claim assets exempt from distribution to her creditors. In the reopened bankruptcy case, Wagner asserted a Wisconsin law exemption of $50,000.00 concerning her personal injury claim against the Insurers pursuant to WIS. STAT. § 815.18(3)(i)1.c. (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

¶11 At the time of the hearing on the Insurers' motion for summary judgment, the circuit court was aware of the reopening of Wagner's bankruptcy and the amendment of her bankruptcy schedules. At that hearing, the circuit court granted the Insurers' motion for summary judgment based on judicial estoppel and dismissed Wagner's claims in this action.

¶12 Wagner appeals.

DISCUSSION

¶13 Wagner contends that the circuit court erred by granting summary judgment in favor of the Insurers. We agree and conclude that there is a genuine issue of material fact regarding the application of judicial estoppel based on the summary judgment record developed to date.

I. Standard of Review and Summary Judgment Methodology.

¶14 We review the circuit court's entry of summary judgment de novo, applying the same methodology as the circuit court. ***Cole v. Hubanks***, 2004 WI 74, ¶5, 272 Wis. 2d 539, 681 N.W.2d 147. Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2).

¶15 Here, the Insurers are the moving parties and, as such, "bear[] the burden of establishing the absence of a genuine, that is, disputed, issue of material fact." ***Midwest Neurosciences Assocs. v. Great Lakes Neurosurgical Assocs.***, 2018 WI 112, ¶80, 384 Wis. 2d 669, 920 N.W.2d 767. We review summary judgment materials "in the light most favorable to the non-moving party," here Wagner. ***Id.*** Also, "if more than one reasonable inference can be drawn from the

undisputed facts, summary judgment is not appropriate." ***Schmidt v. Northern States Power Co.***, 2007 WI 136, ¶47, 305 Wis. 2d 538, 742 N.W.2d 294.

¶16 "Determining the elements and considerations involved before invoking the doctrine of judicial estoppel are questions of law which we decide independently." ***Petty***, 201 Wis. 2d at 347; ***Olson***, 296 Wis. 2d 716, ¶3; ***Gatzke & Ruppelt, S.C. v. Feerick***, 2007 WI App 143, ¶17, 302 Wis. 2d 464, 736 N.W.2d 172. If those elements and considerations have been met, it is then within the discretion of the circuit court to invoke, or not invoke, judicial estoppel. ***Petty***, 201 Wis. 2d at 346-47; ***Olson***, 296 Wis. 2d 716, ¶3.

II. Judicial Estoppel.

¶17 "Judicial estoppel is properly invoked 'to prevent a party from adopting inconsistent positions in legal proceedings.'" ***Olson***, 296 Wis. 2d 716, ¶4 (quoting ***State v. English-Lancaster***, 2002 WI App 74, ¶18, 252 Wis. 2d 388, 642 N.W.2d 627); ***Petty***, 201 Wis. 2d at 347. The purpose of judicial estoppel is to preserve the integrity of the judicial system and prevent litigants from playing "fast and loose with the courts." ***Petty***, 201 Wis. 2d at 347 (quoting ***State v. Fleming***, 181 Wis. 2d 546, 557, 510 N.W.2d 837 (Ct. App. 1993)); ***Olson***, 296 Wis. 2d 716, ¶4 (quoting ***English-Lancaster***, 252 Wis. 2d 388, ¶18).

¶18 The doctrine of judicial estoppel "is not directed to the relationship between the parties but is intended to protect the judiciary as an institution from the perversion of judicial machinery." ***Gatzke***, 302 Wis. 2d 464, ¶16 (quoting ***Petty***, 201 Wis. 2d at 346).

¶19 The doctrine of judicial estoppel "requires a showing" of the following: (1) the party to be estopped convinced the first court to adopt its

position; (2) the party against whom judicial estoppel is sought must have taken a later position in another court that is "clearly inconsistent" with the earlier position; and (3) the facts at issue are the same in both cases. ***State v. Miller***, 2004 WI App 117, ¶31, 274 Wis. 2d 471, 683 N.W.2d 485 (citing ***Salveson v. Douglas Cty.***, 2001 WI 100, ¶38, 245 Wis. 2d 497, 630 N.W.2d 182). In addition, as we explain in more detail below, a "fundamental requirement" for the application of the doctrine is that the position taken by the party against whom judicial estoppel is asserted was taken intentionally and was not a result of the party having been mistaken. ***Petty***, 201 Wis. 2d at 347, 353-54 ("The doctrine looks toward cold manipulation, not an unthinking or confused blunder.")

¶20 The Insurers assert, and Wagner does not dispute, that the first element of judicial estoppel is satisfied because the bankruptcy court adopted the position that she took in her bankruptcy schedules. More specifically, Wagner does not contend that her answer to the trustee's question, referring to the potential for a personal injury action, was sufficient to constitute an assertion of the claim in the bankruptcy proceedings. Also, Wagner concedes that the final element, that the facts at issue are the same in both cases, has been satisfied by the Insurers. We now focus on the requirement that Wagner's assertions were intentional rather than based on mistake and the second element of judicial estoppel, that Wagner's

assertions made to the bankruptcy court were clearly inconsistent with the claims she makes in this lawsuit.[5]

¶21 The only viable basis advanced by the Insurers for the application of judicial estoppel is that the position taken by Wagner in the bankruptcy court is clearly inconsistent with her initiation of this lawsuit, and we now discuss that factual basis. First, we conclude that there is a genuine issue of material fact as to whether any inconsistencies in Wagner's assertions in the bankruptcy court and the initiation of this action in the circuit court were based on mistake rather than intentional conduct, and we remand for further proceedings on this issue. Second, we discuss matters the circuit court may consider on remand.

A. Judicial Estoppel Cannot Be Based on Mistake.

¶22 "Because the rule looks toward cold manipulation and not unthinking or confused blunder, [judicial estoppel] has never been applied where

[5] Before addressing these two areas, we first clarify the factual basis for the Insurers' argument by addressing the requirement that Wagner's assertions were made to a court. Application of the doctrine of judicial estoppel requires not only that a party advance clearly inconsistent positions, but that the positions are specifically made to a court. *See* ***State v. Miller***, 2004 WI App 117, ¶31, 274 Wis. 2d 471, 683 N.W.2d 485; ***Gatzke & Ruppelt, S.C. v. Feerick***, 2007 WI App 143, ¶23, 302 Wis. 2d 464, 736 N.W.2d 172. The Insurers argue that there were three positions advanced by Wagner that are grounds for the application of judicial estoppel. We conclude that two of those three grounds were not advanced to a court by Wagner and, accordingly, cannot form the basis for the application of judicial estoppel.

First, the Insurers contend that judicial estoppel should be applied because, within two weeks after Wagner filed for bankruptcy protection, Wagner's then personal injury attorney sent the demand letter to Allstate demanding its $100,000.00 policy limits. Obviously, the demand letter to Allstate can not be a basis for the application of judicial estoppel because that letter did not advance a position in any court. Rather, the letter was a part of settlement negotiations. For the same reason, we reject the Insurers' second basis, namely, that the demand letter is a basis for the application of judicial estoppel because the letter put Acuity "on notice" of Wagner's intent to pursue an underinsurance motorist claim with Acuity as a result of the collision with Stratman.

plaintiff's assertions were based on … mistake." ***Petty***, 201 Wis. 2d at 347 (quoting ***Fleming***, 181 Wis. 2d at 558); *see also* ***Gatzke***, 302 Wis. 2d 464, ¶16.[6]

¶23 In briefing in this court, the Insurers do not contend that the summary judgment materials establish that Wagner's purported inconsistent positions were intentional rather than based on mistake. Rather the Insurers simply assert that all judicial estoppel elements have been "satisfied."

¶24 Pursuant to summary judgment methodology, the circuit court's grant of summary judgment must be reversed.

¶25 Because this issue comes to us on summary judgment, we first examine the moving party's submissions to determine whether those constitute a prima facie case for summary judgment. *See* ***Gross v. Woodman's Food Mkt., Inc.***, 2002 WI App 295, ¶30, 259 Wis. 2d 181, 655 N.W.2d 718. Moving party defendants, such as the Insurers, state a prima facie case for summary judgment by showing a defense that would defeat the claim. ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). We conclude that the Insurers have not made a prima facie showing in favor of summary judgment.

¶26 The record at this stage is insufficient on the question of whether Wagner's position in the bankruptcy court regarding her claims against the Insurers was intentional or, instead, based on mistake. Various competing

[6] On this aspect of judicial estoppel, Wisconsin law appears to be distinct from federal case law relied on by the Insurers. As an example, in some federal courts, judicial estoppel may be applied even if "the earlier statement was made in good faith." ***Guay v. Burack***, 677 F.3d 10, 16, 20 (1st Cir. 2012) (quoting ***Thore v. Howe***, 466 F.3d 173, 184 n.5 (1st Cir. 2006)).

inferences can be drawn from that record. As examples, the schedules initially filed in the bankruptcy court by Wagner did not list her claims against the Insurers and referred only to a worker's compensation claim. But, the record is devoid of information about why Wagner's bankruptcy attorney submitted the bankruptcy schedules in that manner. Next, Wagner's statements about her personal injury claims at the first meeting of creditors, including her specific reference to Stratman's insurer, Allstate, are ambiguous. Wagner's exact meaning in those statements and the extent of her understanding of her claims against the Insurers cannot be understood only from those statements. Third, on this record it is not known whether the various attorneys representing Wagner at different times communicated with each other about Wagner's claims and the extent of their explanation of the claims to Wagner.

¶27 For those reasons, we cannot conclude that the only reasonable inference is that Wagner intentionally, as a matter of "cold manipulation," failed to disclose her claims against the Insurers to the bankruptcy court or that Wagner initiated this action with the intent to evade the interest of the bankruptcy estate in this action. *See* ***Schmidt***, 305 Wis. 2d 538, ¶47 (if more than one reasonable inference can be drawn from the undisputed facts, summary judgment is not appropriate). Therefore, summary judgment must be denied, and we remand this matter to the circuit court for further proceedings on this issue.[7]

[7] The Insurers argue that Wagner did not develop an argument in the circuit court that she was allowed to amend her bankruptcy schedules and that, as a result, Wagner has forfeited the right to make this argument on appeal. But, further authority is not needed beyond the bankruptcy court's order. After the bankruptcy court charged with administering Wagner's bankruptcy made the decision to reopen the bankruptcy and amend her schedules, Wagner was entitled to amend her bankruptcy schedules and was not required to cite further authority supporting that amendment.

(continued)

¶28 To assist the circuit court and the parties, with the benefit of full briefing and oral argument, we now touch on subjects that may arise on remand, depending on the course of future litigation, which could involve the judicial estoppel topic. We stress that the circuit court may consider any issues that it thinks appropriate on remand, and we do not intend to limit the court's choices in determining the next steps in this litigation.

B. Standing.

¶29 From the time the Insurers filed their appellate briefs to the time of oral argument, they substantially changed their position on whether Wagner has standing to pursue this lawsuit. More specifically, the Insurers first argued that Wagner lacks standing to pursue this action because her claims against them were the exclusive property of the bankruptcy estate, rather than the property of Wagner. *See* ***Lakewood Credit Union v. Goodrich***, 2016 WI App 77, ¶15, 372 Wis. 2d 84, 887 N.W.2d 342 (pre-bankruptcy claims, including potential causes of action, remain part of the bankruptcy estate even if the debtor failed to disclose the claim to the bankruptcy court and a bankruptcy discharge has been granted). However, the Insurers changed position on the standing issue at oral argument and now agree that Wagner has standing to pursue this lawsuit. Not surprisingly, Wagner has consistently contended that she has standing to pursue this lawsuit.

The Insurers also argue that the bankruptcy court's reopening of the bankruptcy estate was meaningless. Rather, the Insurers contend that the important act was the discharge in bankruptcy of Wagner in 2016. The Insurers rely on ***Cox v. Zale Delaware, Inc.***, 239 F.3d 910, 917 (7th Cir. 2001). We reject this argument. The context of that bankruptcy-related case has nothing to do with the application of judicial estoppel, and the generalized statements about bankruptcy law lifted from that case by the Insurers are never tied in any meaningful way to this case.

¶30 We note this vacillation by the Insurers for two reasons. First, it left Wagner without an opportunity to brief the standing issue in this court in light of the Insurers' concession about standing. Second, whether Wagner's initiation of this lawsuit is "clearly inconsistent" with the position Wagner took in the bankruptcy court may turn in part on the issue of whether Wagner has standing to prosecute this action. *See* ***Petty***, 201 Wis. 2d at 350 n.5, 353 ("The doctrine [of judicial estoppel] is only applied when the positions taken by a party are truly inconsistent" and are "irreconcilably inconsistent."); ***Olson***, 296 Wis. 2d 716, ¶¶8-11 (positions must have more than an appearance of inconsistency; the positions must be "clearly inconsistent").

C. Wagner's Creditors.

¶31 In the event that litigation following remand results in the circuit court concluding that Wagner's assertions were intentional rather than based on mistake, and that Wagner's positions in the bankruptcy court and circuit court were clearly inconsistent, then the Insurers will presumably ask the court to exercise its discretion to determine that judicial estoppel should be applied so as to result in dismissal of Wagner's claims against the Insurers. We now address an additional issue addressed by the parties on appeal, involving the rights of bankruptcy creditors, that could bear on the court's exercise of discretion in the event that it reaches that point.

¶32 Allstate asserts that, in applying judicial estoppel, the circuit court appropriately "placed particular emphasis on protecting the rights of creditors in bankruptcy proceedings." Wagner argues that Allstate has never described how the creditors in her bankruptcy would be harmed by Wagner's prosecution of this action in light of the re-opening of the bankruptcy.

¶33 This court has addressed an analogous issue. In ***Coconate v. Schwanz***, 165 Wis. 2d 226, 477 N.W.2d 74 (Ct. App. 1991), the circuit court dismissed Coconate's claims against the maker of a note in Coconate's favor, which was a claim that Coconate failed to list as an asset during his divorce proceedings, based on the doctrines of judicial estoppel and collateral estoppel. ***Coconate***, 165 Wis. 2d at 229. In reversing, this court discussed ***Oneida Motor Freight, Inc. v. United Jersey Bank***, 848 F.2d 414 (3d Cir. 1988), and held that the analysis in ***Oneida*** was "unpersuasive and inapposite." ***Id.*** at 232. We now review the analysis of ***Oneida*** in ***Coconate*** and discuss its potential applicability to this case as it concerns protection of Wagner's bankruptcy creditors.

¶34 Oneida sued the United New Jersey Bank for breaching loan agreements with Oneida. ***Id.*** Prior to that, Oneida, in bankruptcy court schedules, had failed to list Oneida's potential claim against the bank. ***Id.*** The federal appeals court, relying on equitable and judicial estoppel, dismissed Oneida's claims because the bankruptcy schedules were inconsistent with Oneida's later attempt to bring an action against the bank. ***Id.*** This court noted, in discussing ***Oneida***, that the effect of the preclusion of the claim against the bank "was to deprive Oneida's other creditors of a potential source of money to satisfy Oneida's debts" and precluded Oneida "from seeking damages against the bank, and alleged wrongdoer, effectively resulting in inequitable consequences to Oneida's other creditors, who were innocent third parties." ***Id.*** at 232-33. This court recognized that "the doctrines of estoppel are based on principles of equity and justice." ***Id.*** at 233. In recognizing that dismissal of a lawsuit based on judicial estoppel may harm innocent third parties such as creditors of a plaintiff, this court then concluded that "such use of estoppel is not authorized in Wisconsin." ***Id.***

¶35 The parties do not dispute that, in the event that there is a judgment entered against the Insurers in this lawsuit, it will be the re-opened bankruptcy estate that will be entitled to execute on that judgment. That is, the judgment amount, potentially less $50,000.00, for Wagner's state law bankruptcy exemptions noted earlier, would be available to benefit her creditors in the bankruptcy.

¶36 To repeat, however, Allstate relies on alleged harm to those same creditors as a basis to dismiss this lawsuit with prejudice based on judicial estoppel. We have difficulty reconciling that argument with the holding of ***Coconate***. If this case is dismissed with prejudice, the chance of Wagner's creditors receiving any money based on this personal injury suit through her re-opened bankruptcy drops to zero. Rather than protecting Wagner's creditors, it appears that the Insurers may be the only persons or entities who would be protected by the application of judicial estoppel. For these reasons, the reasoning of ***Coconate*** may be pertinent to a future exercise of the circuit court's discretion.[8]

[8] In 2018, the bankruptcy trustee commenced a lawsuit (the "trustee's lawsuit"), La Crosse County Case No. 18CV116, on behalf of the bankruptcy estate against the Insurers based on the same claims made by Wagner in this case. Wagner is a party to that action. In this court, Allstate advances the argument that dismissal of Wagner's claims in this case based on judicial estoppel causes any claims of the bankruptcy estate in the trustee's lawsuit also to be dismissed with prejudice. We reject this argument. First, the bankruptcy trustee is not a party to this lawsuit. We do not have authority, nor will the circuit court on remand, to dismiss claims made by the bankruptcy trustee in a separate action. Second, the doctrine of judicial estoppel cannot apply in these circumstances to the bankruptcy trustee because no party has argued that any activities of the bankruptcy trustee satisfy the elements of judicial estoppel.

CONCLUSION

¶37 For the foregoing reasons, we reverse the order of the circuit court granting summary judgment and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.