

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 23, 2006**

Cornelia G. Clark  
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. 2005AP1114**

**Cir. Ct. No. 2004CV373**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**RACHEL MYERS, A MINOR, BY RODNEY W. KIMES,  
HER GUARDIAN AD LITEM, RENEE MYERS AND  
PETE MYERS,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**CARRIE A. RYAN, THOMAS W. RYAN, AMERICAN  
FAMILY MUTUAL INSURANCE COMPANY, ENKEL  
CORPORATION N/K/A BALDWIN TECHNOLOGY  
CORPORATION AND BENEFIT SYSTEMS & SERVICES, INC.,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Rock County:  
JAMES WELKER, Judge. *Reversed and cause remanded for further proceedings.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Rachel, Renee and Pete Myers appeal from a judgment dismissing their personal injury action against Carrie A. Ryan, Thomas W. Ryan, American Family Mutual Insurance Company, Enkel Corporation n/k/a Baldwin Technology Corporation and Benefit Systems & Services, Inc. The issue is whether the trial court properly determined on three of the defendants' motion for summary judgment that a three-year statute of limitations barred the action. We reverse because we conclude that at least a material fact dispute remains whether the three-year limitation applies to the Myers' claim.

¶2 The Myers sued the respondents to recover damages for an injury Rachel Myers, then age seven, suffered in a July 1998 recreational boating accident on the Rock River between Beloit and Janesville. They commenced their action in March 2004.

¶3 Federal law imposes a three-year statute of limitations on suits for recovery of personal injury damages arising out of maritime torts. 46 U.S.C. App. § 763a (2004). A maritime tort is one that occurs in "navigable" waters of the United States and significantly relates to traditional maritime activity. *Executive Jet Aviation v. Cleveland*, 409 U.S. 249, 253, 268 (1972).

¶4 Based on their assertion that the three-year federal limitation applied, three of the defendants moved for summary judgment. Their proofs consisted of a 1975 report of the U.S. Army Corps of Engineers describing the nineteenth century use of the Rock River for interstate commerce, including the rafting of logs to market, and steamboat travel. As to its use in 1975, the report noted that "at the present time numerous dams and bridges across the river would significantly obstruct any commercial navigation on Rock River." The report identified seventeen dams along the 330-mile course of the river from its source to

the Mississippi River, including nine in Wisconsin. In a supplemental affidavit, the defendants presented evidence that Illinois residents had commercial dealings with a recreational boat dealer on the stretch of water where Rachel's accident occurred.

¶5 The Meyers opposed the defendants' motion. In opposition to the movants' proofs, the Myers submitted an affidavit stating that the accident occurred on a stretch of the river between the Wisconsin Power and Light dam in Beloit and a dam in Janesville. The 1975 Corps of Engineers' report identifies the same dams, placing them 14.8 miles apart. In a supplemental affidavit, the Myers added that the dams do not have locks to allow the passage of marine traffic. The parties did not dispute that Rachel's boating accident occurred between the Janesville and Beloit dams. They disagreed only as to whether the stretch of river between the dams was "navigable" for maritime law purposes.

¶6 From the proofs the trial court concluded that the river was navigable for maritime law purposes, and consequently Myers' suit was filed beyond the applicable three-year statute of limitations. The court granted summary judgment to defendants. That ruling is the subject of this appeal.

¶7 We conduct our review independently and without deference to the trial court's summary judgment decision. *Selzer v. Brunsell Bros., Ltd.*, 2002 WI App 232, ¶10, 257 Wis. 2d 809, 652 N.W.2d 806. Where, as here, the pleadings join material issues of fact and law, we examine the moving party's affidavits to determine if they establish a prima facie case for judgment. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232-33, 568 N.W.2d 31 (Ct. App. 1997). If they do, we next examine the opposing party's affidavits to determine if they establish a material fact dispute, entitling them to a trier of fact's resolution of the issue. *Id.*

¶8 The definition of “navigable” under maritime law, or admiralty law as the federal courts phrase it, is more restrictive than the definition of “navigable” used to determine federal authority under the commerce clause of the United States Constitution. *Chapman v. United States*, 575 F.2d 147, 151 (7th Cir. 1978). Water is “navigable,” in the maritime context, only “[i]f it is presently used, or is presently capable of being used, as an interstate highway for commercial trade or travel in the customary modes of travel on water.” *LeBlanc v. Cleveland*, 198 F.3d 353, 359 (2nd Cir. 1999). Historical commercial use, therefore, does not establish navigability. *Id.* at 356-59. “Commercial trade or travel in the customary modes of travel on water” means activities related to the business of commercial shipping. *See Adams v. Montana Power Co.*, 528 F.2d 437, 439 (9th Cir. 1975).

¶9 The Meyers contend that a factual dispute exists as to the navigability of the Rock River, and that “[t]he evidence before the court relating to navigability of the Rock River at Beloit was competing.” We agree. While WIS. STAT. § 802.08(6) permits a court to award summary judgment to the opponent of a motion for summary judgment, we accept the Meyers’ assertion that a factual dispute exists, which, of course, precludes summary judgment. The Meyers’ proofs indicate that the Beloit and Janesville dams have no locks, which allows a reasonable inference that boats cannot engage in interstate commercial trade on the stretch of the river between them. *See LeBlanc*, 198 F.3d at 359 (natural and artificial obstructions that effectively prohibit use of a river as an interstate highway for shipping defeat admiralty jurisdiction); *see also Adams*, 528 F.2d at 438-39 (maritime jurisdiction does not lie on dam-obstructed river no longer traversed by commercial maritime shipping).

¶10 In sum, we agree with the Meyers that their submissions, at a minimum, put in dispute facts bearing on whether the federal statute of limitations is triggered. We note that the parties' briefs do not well develop whether, under the undisputed facts submitted by the Meyers, the pertinent waterway is not "navigable" under applicable federal law. It is sufficient to say here that we decline to fully develop and resolve an analysis that might entitle the Meyers to a ruling on this topic in their favor.

¶11 For the reasons above, we conclude the trial court erred by granting summary judgment to three of the defendants. We grant the only relief requested by the Meyers, a remand for further proceedings.

*By the Court.*—Order reversed and cause remanded for further proceedings.

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

