COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2334

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

CHRISTINE M. BRYANT AND JOSEPH BRYANT,

PLAINTIFFS-APPELLANTS,

V.

STANLEY STRATIL, NORCO WINDOWS OF WISCONSIN, INC. AND JELD-WEN, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Rusk County: FREDERICK A. HENDERSON, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Christine and Joseph Bryant appeal a summary judgment dismissing their claims of intentional tort against Christine's co-worker,

Stanley Stratil. They contend that material facts are in dispute, and therefore summary judgment is precluded. We agree that conflicting inferences may be drawn from the uncontested facts and reverse.

BACKGROUND

¶2 The uncontested evidence shows that on December 16, 1997, Christine Bryant entered the lunchroom of her employer, Norco Windows of Wisconsin, Inc. She was there for the sole purpose of eating her lunch. After she placed her lunch on a table and went to the vending machines for soda and chips, Bryant began to sit down but missed the chair seat. She fell to the floor. As a result, she suffered injuries to her right knee. She testified that after falling, she noticed Stratil, a co-worker, standing over her, laughing, and saying, "I'm sorry, but you should have seen the look on your face when you fell." She has had two knee surgeries, extensive physical therapy, and received a permanent partial disability due to this fall.

¶3 Stratil was present in the lunchroom at the time and signed a statement accepting a reprimand for "pull[ing] a chair out from behind [Bryant] when she went to sit down causing [Bryant] to miss her chair and fall on the concrete floor injuring her leg & back." The worker's compensation accident report stated that "[a]nother [employee] pulled the chair out from behind [Bryant] as she was sitting down. While taking break another [employee] pulled [Bryant's] chair out from behind her. When [Bryant] went to sit he [sic] fell to floor." The employer described the cause of the accident, "Floor and another [employee]."

¶4 The Bryants sued Stratil and both Christine and Stratil's employer, Norco of Wisconsin, Inc.,[1] for damages resulting from Stratil's assault intended to cause bodily harm. Intentional assaults are an exception under WIS. STAT. § 102.03(2) to the exclusive remedy provisions of the Worker's Compensation Act, WIS. STAT. ch. 102. Stratil moved for summary judgment, contending that the Act was Christine's exclusive remedy. The circuit court agreed and granted summary judgment.[2]

ANALYSIS

¶5 The Bryants contend that they have stated a claim for which relief may be granted and that disputes of material facts exist. They assert that the trier of fact should resolve the disputes. We agree.

¶6 We review a grant of summary judgment de novo. ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 651, 476 N.W.2d 593 (Ct. App. 1991). Summary judgment is appropriate only when there are no material facts in dispute and a party is entitled to summary judgment as a matter of law. WIS. STAT. § 802.08; ***Tomlin v. State Farm Mut. Auto. Ins. Co.***, 95 Wis. 2d 215, 218, 290 N.W.2d 285 (1980). The complaint should be dismissed as legally insufficient only if under no circumstances can plaintiffs recover. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987).

[1] Norco is now owned by Jeld-Wen, Inc.

[2] The parties dispute whether the insurance investigator's report and another employee's signed statement were properly admitted and considered by the trial court at summary judgment. We need not address these issues because we conclude that the uncontested evidence alone leads to conflicting inferences. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

¶7 If different inferences may be drawn from the facts, summary judgment should not be granted. ***Id.*** "[I]t is for the trier of the fact to draw the proper inference and not for the court to determine on summary judgment which of the two or more permissible inferences should prevail." ***Fischer v. Mahlke***, 18 Wis. 2d 429, 435, 118 N.W.2d 935 (1963). When resolution of the issues requires a determination of a person's state of mind and the party opposing summary judgment presents facts that cast doubt upon the affiant's credibility, the trier of fact must determine the affiant's credibility in weighing the evidence. ***Gouger v. Hardtke***, 167 Wis. 2d 504, 517, 482 N.W.2d 84 (1992).

¶8 The Worker's Compensation Act provides the exclusive remedy for employees injured on the job, with three statutory exceptions. *See* WIS. STAT. § 102.03(2). Only one statutory exception applies to this case. The Act does not preclude an employee from suing a co-employee for injuries "for an assault intended to cause bodily harm …." ***Id.***

¶9 Stratil claims that he did not intend to injure Bryant, citing worker's compensation cases from other jurisdictions. A Wisconsin worker's compensation case interprets the phrase "intended to cause bodily harm" by referring to the cases interpreting "intentional act" exclusion clauses in insurance policies. ***West Bend Mutual Ins. Co. v. Berger***, 192 Wis. 2d 743, 754, 531 N.W.2d 636 (Ct. App. 1995). We will apply the same analysis.

¶10 An act demonstrates an intent to cause injury if the actor subjectively intended to cause injury or if injury is "substantially certain to occur from the actor's conduct." ***Gouger***, 167 Wis. 2d at 512 (citing RESTATEMENT (SECOND) OF TORTS § 8A at 15 (1965)). "If the conduct merely creates a foreseeable risk of some harm to someone, which may or may not result, the conduct is negligent."

Id. "The principal difference between negligent and intentional conduct is 'the difference in the probability, under the circumstances known to the actor and according to common experience, that a certain consequence or class of consequences will follow from a certain act.'" ***Id.*** (quoting ***Pachucki v. Republic Ins. Co.***, 89 Wis. 2d 703, 710, 278 N.W.2d 898 (1979)). However, the magnitude of the injury does not resolve the issue. ***West Bend***, 192 Wis. 2d at 754. "A substantial certainty of any injury, great or small, may warrant inferring intent to injury as a matter of law." ***Id.*** (citing ***Gouger***, 167 Wis. 2d at 515). The certainty that a particular conduct will cause injury is a question of fact. ***Gouger***, 167 Wis. 2d at 515.

¶11 The Bryants' complaint states facts constituting a claim for intentional injury, which would not be precluded by the Act. We conclude that the evidence permits two conflicting inferences. Evidence shows that Stratil intended to pull or push the chair so that Bryant would fall on the floor. It was substantially probable that Bryant would hit the floor. A reasonable jury could infer that it was substantially probable that a 5'-5½", 190-pound adult, suddenly hitting a concrete floor, would incur bodily harm, even if the injury is minor. The jury could then infer that Stratil intended to injure her so that the exemption under WIS. STAT. § 102.03(2) would allow the suit.

¶12 Alternatively, a jury could infer that Stratil did not intend to harm Christine. In that case, her claim would be exclusively compensable under the Act. The trier of facts needs to determine which inference is appropriate. We therefore reverse the summary judgment and remand for trial.

By the Court.—Judgment reversed and cause remanded with directions.

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