COURT OF APPEALS
DECISION
DATED AND FILED

April 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-2423

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

STEPHEN D. ARTUS,

PLAINTIFF-APPELLANT,

CAROLE T. ARTUS AND UNITED HEALTHCARE,

PLAINTIFFS,

V.

TOWN OF THREE LAKES, WAUSAU UNDERWRITERS INSURANCE COMPANY, LLOYD E. HARRIS AND STATE FARM FIRE & CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Stephen Artus appeals a summary judgment dismissing his personal injury claim against the Town of Three Lakes, Lloyd Harris, and their insurers. Artus argues that the trial court erroneously decided disputed issues of material fact with respect to Harris's and the Town's negligence. Because Artus's proofs fail to demonstrate a prima facie case with respect to Harris's or the Town's negligence, we affirm the judgment.

¶2 This case arises from a snowmobile accident. On December 23, 1998, at approximately three in the afternoon, Artus and his son were traveling on the hard-packed snow surface of Winkler Road in the Town of Three Lakes at forty to fifty miles-per-hour. The area on which they were traveling was a marked snowmobile trail.

¶3 Without warning, Artus's snowmobile became entangled in a piece of fencing wire that was frozen to the ground. Artus was thrown from his snowmobile and suffered a broken leg. Inspection revealed that the fence wire was frozen into the traveled surface of the snowmobile trail.

¶4 The Town clerk averred that no one had informed him about wire in the road and there was no written record of any notice of that fact to his knowledge. Harris, who owned property adjacent to the accident site, maintained that Artus lacked sufficient evidence to find Harris negligent. The trial court granted the Town's and Harris's motions for summary judgment.

STANDARD OF REVIEW

¶5 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is

appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08.[1] On summary judgment, the court does not decide issues of material fact, rather, it decides whether there are disputes of material fact. ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980).

¶6 If the pleadings state a claim for relief and present an issue fo material fact, the inquiry shifts to the moving party's affidavits. ***Id.*** at 338. To establish a prima facie case for summary judgment, a moving party defendant must show facts constituting a defense that would defeat the plaintiff's claim. ***Voss v. City of Middleton***, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). If it does so, the court examines the plaintiff's affidavits and other proofs for evidentiary facts to determine whether a genuine dispute exists as to any material fact. ***Id.*** A prima facie case for summary judgment is established when evidentiary facts are stated that, if they would remain uncontradicted by the opposing party's affidavits, resolve all factual issues in the moving party's favor. ***Walter Kassuba, Inc. v. Bauch***, 38 Wis. 2d 648, 655, 158 N.W.2d 387 (1968).

¶7 In considering whether to grant summary judgment on a negligence claim, the court must be able to say that no properly instructed, reasonable jury could find, based on the facts presented, that a defendant failed to exercise ordinary care. ***Ceplina v. South Milw. Sch. Bd.,*** 73 Wis. 2d 338, 342-43, 243 N.W.2d 183 (1976). If "reasonable inferences leading to conflicting results can be drawn from undisputed facts," summary judgment should be denied. ***Maynard v. Port Publ'ns, Inc.***, 98 Wis. 2d 555, 563, 297 N.W.2d 500 (1980). "[I]t is for the

[1] All references to the Wisconsin statutes are to the 1997-98 version unless otherwise noted.

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).

¶8 We must keep in mind, however, that "building an inference upon an inference" has been described as speculation. ***Home Savings Bank v. Gertenbach***, 270 Wis. 386, 404, 71 N.W.2d 347 (1955). Circumstantial evidence may establish the material facts, ***Reichert v. Rex Accessories Co.***, 228 Wis. 425, 439, 279 N.W. 645 (1938), but must dispel speculation and doubt. ***Rumary v. Livestock Mortgage Credit Corp.***, 234 Wis. 145, 147, 290 N.W. 611 (1940).

DISCUSSION

A. Harris's negligence

¶9 In his brief, Artus makes the following assertions to support his challenge to the summary judgment.

> Upon his release from the hospital, [Artus] returned to the accident scene and observed the fence wire on the road and similar square type pig wire on the fence and lying next to the fence on the adjoining property. The wire on the ground next to the nearby fence appeared to be of the same mesh and gauge as the wire on the roadway that caused the accident.
>
> The adjoining property and fence was owned by [Harris]. The fence was constructed by Harris utilizing 5 inch mesh fence in 1997. On January 2, 1999, *it was observed that the fencing utilized by Harris in the construction of the fence had unraveled to the extent that it encroached upon the snowmobile trail along Winkler Road.* Fence wire was also observed entangled in various pine trees located between the Harris' fence and the paved portion of Winkler Road, and one of the small pine trees had grown through the mesh of the fencing material. Photographs taken on January 2, 1999 show the fence consisting of wooden fence poles and the 5 inch mesh fence wire, and the wire lying on

> the ground near the fence among several trees. (Emphasis added.)

¶10 Artus observes that an abutting landowner may be held liable for dangerous conditions in a public way created by the landowner's active negligence. *See* WIS. STAT. § 81.17;[2] *see also* ***Jasenczak v. Schill***, 55 Wis. 2d 378, 382, 198 N.W.2d 369 (1972). He rhetorically inquires: "Could a jury find that by leaving a coil or section of loose fence wire near a public roadway Harris was creating a condition in which it was foreseeable that some of the fence wire may get on the roadway?"

¶11 Harris, on the other hand, claims that Artus's characterization of the issue rests on a flawed premise. He points out that the argument in Artus's brief that we italicize is derived from his counsel's affidavit.[3] Harris argues: "No

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[2] WISCONSIN STAT. § 81.17 "**Highway defects; liability of wrongdoer; procedure**" reads:

> Whenever damages happen to any person or property by reason of any defect in any highway or other public ground, or from any other cause for which any town, city, village or county would be liable, and such damages are caused by, or arise from, the wrong, default or negligence thereof and of any person, or private corporation, such person or private corporation shall be primarily liable therefor; but the town, city, village or county may be sued with the person or private corporation so primarily liable. If the town, city, village or county denies its primary liability and proves upon whom such liability rests the judgment shall be against all the defendants shown by the verdict or finding to be liable for the damages; but judgment against the town, city, village or county shall not be enforceable until execution has been issued against the party found to be primarily liable and returned unsatisfied in whole or in part; on such return being made the defendant town, city, village or county shall be bound by the judgment. The unpaid balance shall be collected in the same way as other judgments.

[3] The record reveals that Harris is correct; the italicized language is derived from Artus's counsel's affidavit.

witness has provided testimony that the Harris fence material ever encroached upon Winkler Road, proper." Harris further asserts that while photographs show "some small amount of excess fencing material in close proximity to the Harris fence, there is no evidence documenting its proximity to Winkler Road" or that the "fence material was loose or movable."

¶12 We are persuaded that Artus's theory of recovery impermissibly seeks to impose liability on Harris through piling one inference atop another. First, there is no direct evidence that the wire fencing in the roadway originated with Harris. The fence in question was not shown to be a particularly unique or unusual type of fence to be found in rural Wisconsin. Artus asks us to infer that because of observed similarities with Harris's fence, the piece in the roadway belonged to Harris. Next, Artus asks us to infer that the piece of Harris's fence ended up in the roadway because Harris negligently left a coil or loose section of fence near the edge of the road. There is no direct evidence demonstrating that Harris negligently left loose fencing near the road. In order to reach this conclusion, we would have to first infer that the fencing was Harris's, and next infer that he negligently left a portion of it near the road. This line of reasoning requires the building of "an inference upon an inference" and constitutes speculation. Because speculation is an insufficient basis upon which to find a fact, Artus has failed to demonstrate sufficient facts to support a prima facie claim that it was Harris who caused the debris in the road.

¶13 We reject the supposition that Artus's counsel's affidavit creates an issue of material fact. We recognize that Artus's counsel's affidavit indicates that he visited the accident site. Nonetheless, in reply, Artus provides no counter-argument to Harris's response. Therefore, we accept Harris's contention that the italicized language derived from counsel's affidavit reflects his theory of liability

rather than evidentiary facts. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted).

B. The Town's negligence

¶14 Next, Artus argues that whether a municipality is liable for highway-related negligence is generally a fact question for the jury. The Town does not dispute this general proposition. It maintains, however, that to impose liability, Artus must show that the Town had either actual or constructive notice of the debris. According to the Town, this would require a showing that the Town actually knew that the wire was on the road, or should have discovered it based upon the length of time that the wire had existed on the road.

¶15 The Town is correct. Before a municipality may be found negligent because of insufficient highway maintenance, it must first have had notice through its officers or employees. This notice may be either actual notice of the defect or constructive notice where the defect existed for such a time before the accident that the municipality in the exercise of ordinary care should have discovered it in time to remedy the defect. *See* ***Forbus v. City of La Crosse***, 21 Wis. 2d 171, 174, 124 N.W.2d 66 (1963); *see also* WIS. STAT. § 81.15.

¶16 Artus does not refute this contention, but claims that the proofs submitted demonstrate actual or constructive notice. We disagree. The record fails to reveal that the Town had actual notice of the fence wire frozen onto the road. The record also fails to indicate the length of time the wire was on the road in order to impose constructive notice. Artus contends that we should infer that because it was imbedded in ice, and because some trees had grown up in similar fencing, the piece was on the road a sufficient length of time to impose

constructive notice. We reject this argument as speculative. As the trial court pointed out, wire could become imbedded in ice in a number of hours. Also, the fact that trees have grown up around other fencing was not probative of the piece of fencing in question. We conclude that the record fails to reveal a prima facie case supporting actual or constructive notice on the part of the Town.

CONCLUSION

¶17 In response to a motion for summary judgment, the adverse party must submit "opposing affidavits [that] shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3). "[T]he adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party." ***Id.*** While there is no dispute that fencing debris was frozen on the snowmobile trail, the record is insufficient to establish a genuine issue that Harris negligently caused the debris in the road, or that the Town had actual or constructive notice. We conclude, therefore, that the trial court correctly entered a summary judgment of dismissal.

By the Court.—Judgment affirmed.

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