COURT OF APPEALS
DECISION
DATED AND FILED

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Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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.

No. 00-3469

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

JASON RITZEL,

PLAINTIFF-APPELLANT,

ELECTRICAL CONSTRUCTION INDUSTRY HEALTH AND WELFARE PLAN,

INVOLUNTARY-PLAINTIFF,

V.

WAUSAU BUSINESS INSURANCE COMPANY, THE MARCUS CORPORATION D/B/A BUDGETEL INN, XYZ CORPORATION D/B/A R&E PROTECTIVE SERVICES, CAPITOL INDEMNITY CORPORATION AND ARTHUR TALLEY,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Jason Ritzel appeals from the circuit court judgments dismissing his action, following its decision granting summary judgment to The Marcus Corporation d/b/a Budgetel Inn and its insurer, and to Arthur Talley, an R&E Protective Services security guard working at the Budgetel where Ritzel was shot during an altercation in the Budgetel parking lot. Ritzel argues that material factual disputes exist and, therefore, that the court erred in granting summary judgment.

¶2 We conclude that the circuit court correctly determined: (1) that although factual disputes remain, Ritzel's own version of the events established, as a matter of law, that his negligence exceeded Talley's; and (2) that Ritzel's submissions in support of his safe-place claim were insufficient for the claim to survive summary judgment. Accordingly, we affirm.

I. BACKGROUND

¶3 While certain factual disputes remain, it is clear that this case presents a senseless mix of two pre-wedding gatherings, too much alcohol consumption, racially based hostility, and violence prevailing over the earnest efforts of those who tried to talk sense to others who would not listen. Although, of course, we do not resolve the factual disputes, we summarize the essential facts according to Ritzel's version, for purposes of presenting the background in this opinion.

¶4 According to the summary judgment submissions, on May 24, 1996, Jason Ritzel and his brother, Michael, went to a Budgetel Inn in Milwaukee to visit Michael's future in-laws, following a rehearsal for Michael's wedding. Also staying at the Budgetel were Taveres Calhoun, his two cousins, Michael ("Johnny") and Demark McChristian, and their father, Johnny McDonald, who was to be married the next day. The Ritzels were white; Calhoun, the McChristians, and McDonald were black.

¶5 In his deposition, Jason testified that he and his brother each had consumed three beers while visiting at the Budgetel.[1] As they were leaving the Budgetel and walking toward their vehicles, Jason heard the sound of glass breaking. They noticed broken glass behind Jason's car and, while Jason was clearing it away, a verbal confrontation began between the Ritzels and the McChristians and Calhoun. According to Jason's deposition:

> [T]hey were calling me fucking honky…. And I asked them if this was their bottle that they had broke, and they said, yes, it was, and they asked me what I was going to do about it. And I said, well, you guys should clean it up…. And it appeared that they were trying to antagonize me into a fight.

¶6 About one minute after the confrontation began, security guard Talley, who had been making his rounds of the parking lot, intervened and, according to Jason, "did try to break up the verbal altercation." In his deposition, Jason stated that one of the men arguing with him "grabbed a cloth-covered item" from a bag, pointed it at him, and said he was going to "gat" him; Jason interpreted this comment as a threat to shoot him. Talley then "made the comment

[1] An undated, unsigned page of a hospital nursing admission assessment form states that Jason "drank 7 beers tonight."

to the young man that there was no need for weapons, that he should put the weapon back in his bag." Jason said the man then "put the cloth-covered item back in his bag, grabbed the bag, [and] set the bag in his open trunk."

¶7 In his deposition, Jason testified:

> Then my brother left me and started walking toward his truck. I hopped in my vehicle and started it up. Now that I had a clear path to drive [having finished clearing the glass out of the way], I felt safe that I wouldn't get a flat tire. I backed out of my parking spot and began to drive forward heading towards the north entrance/exit, and I waited there in the parking lot just before the road … for my brother to follow behind me.

Jason clarified that after he got in his car, Michael "proceeded to his [Michael's] vehicle." Jason testified that after waiting for Michael for three or four minutes, he "became concerned" and drove back to the area of the confrontation. He observed that Michael "had pulled his vehicle out of his spot but it was parked stopped in the driving lane and [Michael] was out of the vehicle." Jason got out of his car and Michael told him that he was "asking the security guard to make sure that the glass got cleaned up" while the McChristians and Calhoun "were continuing to harass and trying to provoke."[2]

¶8 McDonald then appeared at a second floor window of the Budgetel. Talley said that McDonald called for the McChristians and Calhoun to come back inside. When they did not do so, however, McDonald came from his hotel room with two young nephews in tow. According to Jason, McDonald tried to calm down the McChristians and Calhoun and, when one of them began walking toward

[2] According to the police report recording Talley's interview with a detective, Michael Ritzel, the McChristians, and Calhoun "refused to listen" and continued to argue, exchanging racial slurs.

the Ritzels with the neck of a broken bottle in his hand, McDonald grabbed his arm and told him to put down the glass.

¶9 Jason then described the confrontation with McDonald:

> At this time [McDonald] said why don't you get your asses out of here to me and my brother, and I made the comment why don't you just shut up. He appeared to get very upset at that and he started coming at me.… He threw a couple of punches which missed. As I was running backwards facing him he was throwing punches at me[,] and my brother came and grabbed him.

The McChristians and Calhoun then entered the fray, hitting Michael repeatedly while he was held by McDonald. Jason, who was an electrician, retrieved from his car a piece of metal conduit, approximately three feet long, and used it to hit McDonald "across the back side of the ribs." Jason testified that after striking McDonald, "it went blank."[3] According to the police report, Talley stated that when it appeared that Jason was going to "attempt to swing" the conduit again, Calhoun pulled a gun from the gym bag (which Talley said was on the hood of Calhoun's car), ran toward Jason, and shot him.

¶10 Jason acknowledged that during the first stage of the altercation, before he drove away, Talley had tried to defuse the situation. Jason agreed with defense counsel's statement that Talley "was apparently successful in d[e]fusing the situation initially because it appeared that everyone was going to go about their business." Jason also conceded that he had had the opportunity to leave the parking lot before he was shot. He testified:

[3] According to the police report, Talley said that Jason struck McDonald while McDonald was held by Michael Ritzel.

> Q: There were a number of occasions before you were shot that you and your brother could have gotten in your cars and driven out; true?
>
> A: Yes.
>
> Q: There wasn't any time before you were shot that you personally were physically restrained from getting in your car and driving away; true?
>
> A: True.
>
> Q: And your brother as well from what you were able to observe could have gotten in his car and walked away or rather driven away from the situation?
>
> A: Yes.

Jason again testified that both he and his brother could have left the scene:

> Q: At one point you were already at the exit and your brother was at his own car and the three black guys were standing next to their car?
>
> A: Correct.
>
> Q: And at that point as you indicated earlier there was nothing that would have prevented your brother from getting into his car and you two driving off?
>
> A: Correct.

¶11 Nevertheless, Jason testified that he felt Talley "should have had the police called immediately," and that he believed that if the Budgetel "would have had proper cameras with clear pictures [of that section of the parking lot, Budgetel personnel] might have been able to see this altercation from inside the building and could have called the police and prevented the whole thing from happening." Subsequently, Jason's counsel reiterated those themes in opposing summary judgment. Rejecting the arguments, however, the circuit court concluded that although a question of fact existed as to whether Talley was negligent, it was "completely speculative as to whether or not any action on [Talley's] part … would have made a difference in the shooting." Further, the court concluded that,

as a matter of law, "Jason's negligence exceeded Talley's negligence." Commenting on Jason's conduct, the court explained, in part:

> He's intoxicated to one degree or another. He gets involved in an ugly, nasty and violent confrontation, knowing that this is an ugly, nasty situation, knowing that a weapon is probably present on the scene. He returns to the scene after leaving and chooses at that point to continue the confrontation rather than to try to tell somebody to get help, rather than try to tell his brother to get out of there. By his own admissions, his answer to this problem is to come back to the scene and tell [McDonald], who at least initially he agrees is a peacemaker, … to shut up. That's his contribution to the situation and it is clearly one of considerable negligence.

¶12 The summary judgment submissions also included a deposition of Dennis K. Waller, who testified that he had an investigative agency and that he also did consulting and provided expert testimony "primarily on police-related matters and use of force." Waller was critical of Talley's conduct in two respects: failing to call police, and failing to take "meaningful action to separate" the two groups. Waller conceded, however, that whether to call police "would be situational" depending upon "an assessment of the specific circumstances," and that he was unable to render any professional opinion as to whether different conduct by Talley would have prevented the shooting. Waller also testified that the Budgetel video cameras "do not adequately, at least in the copy of the videotape [of the incident] that [he] was provided, … provide a clear view of the parking lot."

¶13 Reviewing Ritzel's safe-place claim, the circuit court commented:

> [T]here is a tremendous amount of missing evidence about the actual quality of this [Budgetel video camera] tape and what would have been produced by a functioning camera that meets whatever standards one wants to apply to this situation in terms of what Budgetel ought to have had, what the practice was in checking that camera[,] whether there is

> anything negligent about watching it every second or every minute or every hour.

Thus, the court concluded, Ritzel's evidence in support of his safe-place claim was too speculative for the claim to survive summary judgment.

II. DISCUSSION

¶14 "Summary judgment is appropriate to determine whether there are any disputed factual issues for trial and 'to avoid trials where there is nothing to try.'" ***Caulfield v. Caulfield***, 183 Wis. 2d 83, 91, 515 N.W.2d 278 (Ct. App. 1994). Summary judgment methodology is well known and need not be recited here. *See* WIS. STAT. § 802.08(2) (1999-2000).[4] Our review of a circuit court's grant of summary judgment is *de novo*. ***Stipetich v. Grosshans***, 2000 WI App 100, ¶10, 235 Wis. 2d 69, 612 N.W.2d 346.

A. Negligence Claim

¶15 Ritzel first challenges the grant of summary judgment by arguing that Talley "breached his duty to use ordinary care [to protect him] from the shooting," in part by either ignoring or being ignorant of Budgetel's policy requiring immediate notification of police in circumstances like these. Thus, Ritzel contends that both Talley's and Budgetel's "actions" and "inactions" were substantial factors in causing his injuries.

¶16 Ritzel refers to case law discussing liability of various establishments for injuries suffered by their customers and guests. He fails, however, to offer anything more than minimal argument grounded in the facts of

[4] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

this case. Talley and Budgetel, in their respective briefs, carefully address all of Ritzel's possible theories. We need not belabor them all, however, because one issue is dispositive of all of Ritzel's negligence theories. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

¶17 As Talley points out, Ritzel's appellate brief "fails to even address the court's holding that as a matter of law the plaintiff's negligence was greater than any which could be attributable to either defendant." Indeed, even in his reply brief, Ritzel still fails to even mention this clearly dispositive basis for the circuit court's grant of summary judgment.

¶18 The supreme court has explained:

> A plaintiff whose negligence is greater than the negligence of any defendant cannot recover damages for that defendant's negligence. Generally, the allocation of negligence is a question for the trier of fact. However, when it is apparent to the court that the plaintiff's negligence is, as a matter of law, greater than any negligence on defendant's part, it is the court's duty to so hold.[5]

Peters v. Menard, Inc., 224 Wis. 2d 174, 193, 589 N.W.2d 395 (1999) (citations omitted; footnote added). Thus, even if we were to accept Ritzel's theories

[5] In ***Wagner v. Wisconsin Municipal Insurance Co.***, 230 Wis. 2d 633, 601 N.W.2d 856 (Ct. App. 1999), we declared:

> We have recognized that "the instances in which a court may rule that, as a matter of law, the plaintiff's negligence exceeds that of defendant are extremely rare." Furthermore, "[s]ummary judgment should only be used in the exceptional case where it is clear and uncontroverted that one party is substantially more negligent than the other and that no reasonable jury could reach a conclusion to the contrary."

Id. at 637 (quoting ***Hansen v. New Holland N. Am., Inc.***, 215 Wis. 2d 655, 669, 574 N.W.2d 250 (Ct. App. 1997)), *review denied*, 2000 WI 102, 237 Wis. 2d 259, 618 N.W.2d 749.

regarding the possible negligence of Talley and Budgetel, we still would affirm the grant of summary judgment for the simple reason that Ritzel has not challenged the conclusion that, as a matter of law, his negligence exceeded that of either defendant.[6]

B. Safe-Place Claim

¶19 Ritzel also argues that the circuit court erred in granting summary judgment on his safe-place claim. He clarifies that he is not arguing that any action or inaction of Talley or any other Budgetel employee falls under the safe-place statute, but rather, only that "the faulty security camera system of the Budgetel fits under the safe-place statute," WIS. STAT. § 101.11.

¶20 Ritzel and Budgetel debate whether the alleged faulty operation of a security camera (of allegedly inadequate quality) may be considered an "unsafe condition" under WIS. STAT. § 101.11, and whether, in this case, any such faulty operation may be deemed causal of Ritzel's injuries. We need not resolve the former dispute, however, because, clearly, on the latter, the circuit court correctly concluded that Ritzel's safe-place theory was based not on evidence, but on pure speculation. Indeed, even a reading of *Ritzel's* argument on appeal establishes the wholly speculative nature of his theory:

[6] Moreover, Ritzel does not even take exception to what may be an overstatement, in Talley's brief, of the circuit court's conclusion. Talley writes that the court "held that the plaintiff's negligent conduct was greater than any negligence attributable to Mr. Talley *or the hotel* as a matter of law." (Emphasis added.) Although one could argue that such a conclusion was *implicit* in the court's summary judgment comments, its *explicit* conclusion regarding relative negligence was with respect to Ritzel and Talley. Still, Ritzel's failure to offer any challenge to Talley's characterization of the circuit court's conclusion, much less any argument on the issue with respect to either Talley or Budgetel, leaves this basis for summary judgment secure regarding both defendants. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted argument deemed admitted).

> The Budgetel was equipped with a security camera system that oversaw the activity in the parking lot. One of the security cameras oversaw the north end of the parking lot, [where the shooting occurred,] recording activities at that location. Plaintiff's expert as well as the police were given the VCR cassette tape removed from the security camera on the day of the incident. Upon viewing this tape, both plaintiff's expert and the police reported that the images from the north parking lot camera were blurry and out of focus. Finally, plaintiff's expert testified that "…the video camera set up as I viewed it both on site and through the videotape are inadequate to view the activities in the parking lot."
>
> If the camera overlooking the north parking lot was not faulty, the front desk clerk would have been alerted to the altercation in the parking lot. Had the front desk clerk been alerted to the altercation in the parking lot, he could have placed a call to the police department before Mr. Ritzel was shot. As it was, the clerk had the opportunity to see nothing more than a bunch of blurry and out[-]of [-]focus figures.

(Record references omitted.)

¶21 To survive a motion for summary judgment, the party against whom the motion is made must establish the existence of a genuine issue of material fact by submitting evidentiary material "set[ting] forth specific facts." WIS. STAT. § 802.08(3); *see* ***Transp. Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 290-92, 507 N.W.2d 136 (Ct. App. 1993). As we noted, "once sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial 'to make a showing sufficient to establish the existence of an element essential to that party's case.'" ***Transp. Ins. Co.***, 179 Wis. 2d at 291-92.

¶22 Here, Ritzel has the burden of proving causation. As the circuit court perceived, however, and as Ritzel's own argument reveals, his causation theory is purely speculative. He first attributes the blurry image of the video to the possibility that the Budgetel video camera was faulty. He then attempts to connect

possibilities: that a better video camera would have provided an adequate video image of the altercation in the parking lot; that a Budgetel desk clerk would have been watching a video monitor at that exact time; that the clerk would have called police; that police would have responded to the scene immediately; that the arrival of police at the parking lot would have been in time to prevent the shooting; and that the presence of police would have succeeded in preventing the shooting. Ritzel's summary judgment submissions, however, provided nothing to carry those possibilities from the realm of pure speculation. *See* WIS. STAT. § 802.08(3) (providing that if adverse party does not "set forth specific facts showing that there is a genuine issue for trial," summary judgment, "if appropriate, shall be entered against such party").

By the Court.—Judgments affirmed.

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