COURT OF APPEALS
DECISION
DATED AND FILED

February 26, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP455 **Cir. Ct. No. 2009CF3351**

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

ROBERT GERBERS AND BETTY GERBERS,

PLAINTIFFS-APPELLANTS,

V.

AMCO INSURANCE COMPANY D/B/A ALLIED INSURANCE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: MARC A. HAMMER, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Robert and Betty Gerbers appeal a directed verdict in favor of their homeowner's insurance carrier, AMCO Insurance Company d/b/a Allied Insurance. The Gerberses argue they presented sufficient credible evidence

that window failures in their home were caused by a "sudden and accidental" event. Viewing the evidence in the light most favorable to the Gerberses, the testimony at trial established that excessive heat from an unknown source caused their windows to fail. This was insufficient to establish a "sudden and accidental" event. Accordingly, we affirm.

BACKGROUND

¶2 The Gerberses built their home in 2001. They purchased Hurd windows from Pahl Windows and Door, which was owned by Jim Pahl.

¶3 In late summer/early fall of 2008, the Gerberses began having problems with all the windows in their home. Bug infestations, water infiltration, and drafts became common. In addition, window surfaces became reflective and wrinkled, and a black, tarry substance pulled out of the frame. A representative from Pahl Windows and Door was unable to pinpoint the cause. Jim Pahl then contacted Hurd, which had since been sold, and was advised that Hurd would no longer honor warranties.

¶4 The Gerberses filed suit against AMCO, alleging that the damage was caused by "excessive sun and heat exposure." AMCO refused to cover the damage, asserting the windows were defective and the damage was not caused by a covered peril. AMCO filed three summary judgment motions, all of which were denied, and the case proceeded to trial.[1]

[1] In the course of denying AMCO's third summary judgment motion, the circuit court noted the Gerberses were likely to face a significant hurdle at trial:

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¶5 The court granted AMCO's motion for a directed verdict at the close of the Gerberses' evidence. It concluded that the evidence presented, when viewed in the light most favorable to the Gerberses, provided "an insufficient basis to suggest that the jury could come back and make any reasonable or rational finding that there was a sudden and accidental event." The court noted this was the first finding the jury would have been required to make on the special verdict form.

DISCUSSION

¶6 The parties agree the threshold issue for the jury was whether a "sudden and accidental" event caused the window failures.[2] They also agree on

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> The Pahl affidavit specifically states that "it is [Pahl's] professional opinion that heat exposure over a short period from inside and/or outside the home caused the initial window failures." While the Court has opined that the Gerbers seem likely to have troubles meeting their burden at trial … the analysis on summary judgment is the same.

[2] Neither party directs us to policy language or case law requiring a "sudden and accidental" event, although the parties' briefs use that phrase repeatedly. *See* WIS. STAT. RULE 809.19(1)(d) and (1)(e) (requiring appropriate references to the record and citation to legal authority). Below, AMCO cited ***Glassner v. Detroit Fire & Marine Insurance Co.***, 23 Wis. 2d 532, 536, 127 N.W.2d 761 (1964), for the proposition that plaintiffs invoking their homeowners insurance have "the burden of establishing not only that damage occurred, but that it was fortuitous, i.e., that is resulted from a 'risk,' as contrasted with being an ordinary and almost certain consequence of the inherent qualities and intended use of the property." The "sudden and accidental" language cited by the parties may be an offshoot of the ***Glassner*** rule. Regardless, we will decide the case as framed by the parties, using the "sudden and accidental event" standard. *See* ***Techworks, LLC v. Wille***, 2009 WI App 101, ¶27, 318 Wis. 2d 488, 770 N.W.2d 727 (court of appeals will not address issues that are neither briefed nor adequately developed).

In addition, we note that AMCO cites exclusively to its appendix, contrary to WIS. STAT. RULE 809.19(1)(d) and (3)(a)2. *See* ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322 (briefs must contain appropriate citations to the record). We admonish all counsel involved in this appeal that future violations of the rules of appellate procedure may result in sanctions.

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the standard of review: In ruling on a motion made at the close of a plaintiff's case, a circuit court may not grant the motion "'unless it finds, as a matter of law, that no jury could disagree on the proper facts or the inferences to be drawn therefrom,' and that there is no credible evidence to support a verdict for the plaintiff." ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995) (quoting ***American Family Mut. Ins. Co. v. Dobrzynski***, 88 Wis. 2d 617, 625, 277 N.W.2d 749 (1979)). In other words, we will reverse if, taking all credible evidence and reasonable inferences in the light most favorable to the party against whom the motion was made, there is any credible evidence to sustain a finding in favor of the nonmoving party.[3] *See* ***Warren v. American Family Mut. Ins. Co.***, 122 Wis. 2d 381, 384, 361 N.W.2d 724 (Ct. App. 1984); *see also* WIS. STAT. § 805.14(1), (3).

¶7 The Gerberses argue they have presented sufficient credible evidence of a "sudden and accidental" event. They direct us to Robert Gerbers' testimony that in early fall of 2008, he noticed insect infestations around the windows, cold air, and water on the window sills. They had not previously experienced these problems. Based on this testimony, the Gerberses contend the

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All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[3] This standard of review presupposes that the circuit court makes certain credibility determinations when ruling on the evidence. Because of the trial court's superior ability to assess the evidence, appellate courts give substantial deference to the trial court's determinations as to credibility and the weight and relevancy of the evidence. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388-89, 541 N.W.2d 753 (1995). Therefore, an appellate court should not overturn a decision to dismiss for insufficient evidence unless the record reveals that the circuit court was "clearly wrong." ***Id.*** However, in ***Weiss*** our supreme court addressed the tension between these standards and held that a circuit court is "clearly wrong" when it grants a directed verdict against a party whose claim is supported by credible evidence. ***Id.*** at 389-90.

jury could infer "that the problems in the windows occurred suddenly and without warning."

¶8 Robert's testimony constitutes sufficient credible evidence of sudden window failure, but that is all. It was not necessary to present evidence of the exact date and time when the windows were damaged; we agree with at least that much of the Gerberses' argument. However, Robert's testimony fails to connect the sudden window failure with an accidental event. In fact, Robert was not qualified as an expert and was permitted to testify only about his first-hand observations. The circuit court barred him from offering testimony regarding the cause of the window failures, and instructed the jury to disregard any of his testimony "regarding a theory as to the problems that may or may not have occurred regarding these windows." The Gerberses do not challenge these rulings on appeal.

¶9 The Gerberses assert Pahl's testimony fills the evidentiary lacuna regarding an accidental event. When asked for his opinion about the cause of the window failures at trial, Pahl acknowledged he did not have a degree, but "[j]ust from seeing windows over the years … I felt it was from a heat buildup …." Pahl also acknowledged writing in a letter that "[t]he excessive heat has also melted the sealant that holds the glass to the metal channel and loses [sic] the ability to stick causing the Insul 8 glass to fail and wrinkle in the openings." This was the only testimony Pahl offered concerning causation.

¶10 The Gerberses concede that Pahl did not explicitly identify heat buildup or excessive heat as a "sudden and accidental" event. However, they assert the natural inference from Pahl's testimony is that "excessive heat is a sudden and accidental event" because it is "related to weather." We disagree. In

the absence of any evidence regarding the cause of the heat buildup that apparently melted the sealant, the jury would have been required to speculate that the heat was generated by an accidental event. *See* ***Village of Whitefish Bay v. Hardtke***, 40 Wis. 2d 150, 153, 161 N.W.2d 259 (1968) (jury findings based on conjecture and speculation cannot stand).

¶11 Further, any arguable inference that the heat buildup could be attributed to weather was essentially eliminated at trial.[4] Richard testified his property did not receive excessive sun, at least not relative to his neighbors, and he conceded the sun was an unlikely source of any excessive heat. The inside of his home would occasionally get hot in the summer, but not as hot as 120 degrees. Indeed, Richard conceded that 80 to 90 degrees were normal temperatures in Green Bay during the summers, and the temperatures in 2008 were consistent with that range. He also conceded these temperatures did not constitute excessive heat. When asked where the excessive heat came from, Richard stated he did not know.

¶12 In summary, neither Richard nor Pahl was able to explain what caused the heat buildup, let alone establish that a "sudden and accidental" event led to the window failures. Given this lack of evidence, the circuit court appropriately granted a directed verdict for AMCO.

¶13 The Gerberses seem to argue that because they successfully opposed three summary judgment motions, and presented the same evidence at trial, they necessarily proved the existence of a "sudden and accidental" event. This argument ignores the differing standards applicable during the summary judgment

[4] We presume, for the sake of argument, that weather-related phenomena (hailstorms, lightning, and the like) qualify as sudden and accidental events.

and trial phases of litigation. Summary judgment is granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2). In this case, the circuit court concluded there was a sufficient factual dispute to proceed to trial on the Gerberses' "excessive heat" theory. At trial, the Gerberses were required to offer credible evidence that the window failures were attributable to a "sudden and accidental" event. *See* ***Kruse v. Horlamus Indus., Inc.***, 130 Wis. 2d 357, 362-63, 387 N.W.2d 64 (1986) (discussing ordinary burden of proof). They did not do so. The Gerberses were not assured victory merely because their claim survived summary judgment.

By the Court.—Judgment affirmed.

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