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DISTRICT II

July 17, 2019

To:

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Circuit Court Judge
Fond du Lac County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2018AP1852 Louis A. White v. F.D.L Pro LLC d/b/a Wisco Partners, L.L.P. and Rural Mutual Insurance Company (L.C. #2016CV517)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Louis A. White appeals from an order granting summary judgment to F.D.L. Pro LLC d/b/a/ WISCO Partners, L.L.P. and its insurer, Rural Mutual Insurance Company (collectively, "Holiday Inn"), dismissing a premises liability claim, and ordering sanctions. Upon reviewing the briefs and the record, we conclude at conference the case is appropriate for summary

disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] Because we hold that summary judgment was properly granted and the sanctions was within the court's discretion, we affirm.

White has an undisputed many-decades history of back problems. In October 2015, he took a "disability room" at the Holiday Inn that included a specialized shower seat of a type he never had used. He contends a pin to secure the chair legs was missing so that the legs collapsed, causing him to fall.[2] White said he told a hotel employee, but not management, about the incident as he left for the event for which he was in town. There is no record of a report, despite hotel policy and training that employees document guest injuries.

White claims the fall exacerbated his chronic back problems. He first sought medical treatment two and a half months later. He saw nurse practitioner Bonnie Kosik and eventually was referred to neurosurgeon Andrew Beaumont. Beaumont initially opined that White's treatment stemmed from the incident and in mid-2016 performed spinal surgery on White.

White filed suit alleging, among other things, negligence, a safe-place statute violation, and violations of state and Americans with Disability Act (ADA) handicap standards. When it became clear at Beaumont's deposition that White had not disclosed his significant back-related history—injections, opioids, physical therapy, gait and balance disturbances that resulted in

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] We will avoid "alleged[ly]" and "claimed" in conjunction with "fall," "fell," and "incident." The issue is not whether White fell, but whether he proved that the shower-chair pin was missing and, if so, that Holiday Inn was responsible such that its claimed negligence was the causal link between his fall and his subsequent medical and surgical treatment.

frequent falls, or that the same surgery was recommended in 2014—Beaumont testified that he could not link White's medical care to the shower-chair incident.

White then produced an affidavit from Koski that drew a causal connection between his fall and the subsequent treatment and surgery. The circuit court concluded that a nurse practitioner was unqualified to opine as a medical expert on causation and granted Holiday Inn's motion to bar evidence of medical care and expenses. White moved for relief from the order. After White nonetheless provided Koski's affidavit to Beaumont, Beaumont revised his opinion.

Beaumont's changed view based on the opinion of an unqualified expert did not persuade the court. It denied White's motion for relief, found his conduct egregious, and sua sponte sanctioned him $1,031.45 for Holiday Inn's documented fees and costs. White refused to pay. Holiday Inn moved for summary judgment on liability. Finding that "absolutely no jury … could even faintly consider" in White's favor, the court granted Holiday Inn's motion and dismissed the case for White's refusal to comply with the sanction order. White appeals.

WISCONSIN STAT. § 802.08 governs summary judgment methodology. It is appropriate if the submissions establish "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Sec. 802.08(2). Our review is de novo, ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987), but we benefit from the circuit court's analysis, ***Northern States Power Co. v. National Gas Co.***, 2000 WI App 30, ¶7, 232 Wis. 2d 541, 606 N.W.2d 613 (Ct. App. 1999).

Negligence ordinarily is an issue for the factfinder. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶2, 241 Wis. 2d 804, 623 N.W.2d 751. Summary judgment in a negligence case may be appropriate, however, where the court is "able to say that no properly

instructed, reasonable jury could find, based on the facts presented, that [the defendant] failed to exercise ordinary care." ***Id.***, ¶2 (citations omitted).

White contends that whether Holiday Inn made sure that the chair legs were properly secured creates a genuine issue of material fact as to negligence. He offered nothing, however, to show that he exercised ordinary care or that Holiday Inn failed to do so. He did not read the chair instructions; test its sturdiness; or examine, or ask motel personnel to examine, its assembly before or after his fall. There simply is no evidence the pin was not inserted. A finding of negligence cannot be based upon speculation. *See* ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 460, 267 N.W.2d 652 (1978).[3] White produced no qualified expert who could establish the requisite causal connection between the alleged negligence and his injuries. As the circuit court observed, no reasonable jury could find in his favor. Summary judgment thus was proper. *See* ***Dean Med. Ctr., S.C. v. Frye***, 149 Wis. 2d 727, 734-35, 439 N.W.2d 633 (Ct. App. 1989).

White also contends he was wrongly sanctioned for challenging Holiday Inn's motion to bar evidence of his medical care and expenses. He argues, mistakenly, that absent a finding of bad faith, the court had no authority to sanction him monetarily and by dismissing his case.

A circuit court has both statutory and inherent power to impose sanctions for a violation of a pretrial court order. ***Hefty v. Strickhouser***, 2008 WI 96, ¶71, 312 Wis. 2d 530, 752 N.W.2d

[3] With no proof of negligence, White's ADA and safe-place statute violation claims also necessarily fell away. As for his ADA claim, he cites to 28 C.F.R. pt. 36, App. A § 4.20, which states that bathtub seats "shall be mounted securely and shall not slip during use." Similarly, a violation of the safe-place statute, WIS. STAT. § 101.11, requires proof of actual or constructive notice. *See* ***Kaufman v. State St. Ltd. P'ship***, 187 Wis. 2d 54, 59, 522 N.W.2d 249 (Ct. App. 1994).

820. We review the court's decision to impose sanctions and the appropriateness of them under an erroneous exercise of discretion standard. ***Lee v. GEICO Indem. Co.***, 2009 WI App 168, ¶16, 321 Wis. 2d 698, 776 N.W.2d 622. This includes the "decision of which sanctions to impose, including dismissing an action with prejudice." ***Industrial Roofing Servs. v. Marquardt***, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898.

The court cautioned White time and again to cease further motion practice. While the court recognized counsel's zealous advocacy, it concluded there was nothing to justify pushing on with a wholly speculative case and that the continued and "completely unfounded" motions were "an embarrassment to" and "a burden on" the legal system. Ordering the monetary sanction and the dismissal for refusing to pay it represent a proper exercise of discretion.

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals