COURT OF APPEALS
DECISION
DATED AND RELEASED

May 6, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0681

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

JAMIE P. FRITZ AND JUDITH FRITZ,

PLAINTIFFS-CO-APPELLANTS,

V.

MID-STATES FOOTWEAR CORPORATION AND AMERICAN STATES INSURANCE COMPANY,

DEFENDANTS-THIRD PARTY PLAINTIFFS-APPELLANTS,

V.

JOE WILDE COMPANY, INC., AND EMPLOYERS MUTUAL CASUALTY COMPANY, A FOREIGN INSURANCE CORPORATION,

THIRD PARTY DEFENDANTS-RESPONDENTS,

LIBERTY MUTUAL INSURANCE COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Reserve Judge. *Affirmed.*

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

PER CURIAM. Jamie P. Fritz, a United Parcel Service driver, was injured when an overhead door fell on him as he was leaving Mid-States Footwear Corporation after making a delivery. He and his wife, Judith Fritz, appeal from an order granting summary judgment and dismissing their claim against the Joe Wilde Company.[1] Mid-States also appeals from the order, which also dismissed its third-party action against Wilde. We conclude that the evidentiary materials before the trial court on the motion for summary judgment failed to raise an issue of material fact concerning whether Wilde breached a duty of care because the Fritzes and Mid-States did not controvert Wilde's *prima facie* showing that its inspection and repair of the door was not negligent. Consequently, we affirm the order.

Mid-States is a wholesale distributor of imported finished goods. According to the deposition testimony of Robert Steingart, a Mid-States' manager, three trucks make deliveries to or pick up shipments from its facility daily. Usually three to five trucks stop each day, but busy days can bring up to ten trucks to the facility. The facility has three small dock entries and two large entries. Steingart indicated that drivers generally preferred to use a particular dock,

[1] Wilde's insurer, Employer's Mutual Casualty Company, was named as a party, as was Mid-States' insurer, American States Insurance Company. Where this opinion refers to actions or positions taken during the litigation by Wilde or by Mid-States, the reference includes its respective insurer.

identified by the parties as number two, because it has the most side clearance. The dock has a manually operated overhead door with a pull-down rope.

On March 1, 1994, while making a delivery to Mid-States using dock number two, Fritz grabbed the cord and pulled down to close the door. Fritz claims that the door collapsed on his head causing severe injuries. According to the Fritzes' answers to Wilde's interrogatories, the engineer they hired to inspect the overhead door indicated that the door malfunctioned because a number of the rollers on the door were so worn they ran over the lip of the track on the door.

During the four years preceding Fritz's injury, Wilde made all repairs to the overhead doors at Mid-States' facility. Invoices submitted as part of the summary judgment materials indicated that Wilde had made repairs to "door #2" in May 1993, approximately ten and one-half months before Fritz was injured. The company had also repaired an unidentified door in November 1993, approximately four months before Fritz's injury, and there was contradictory evidence[2] concerning whether this work was done on door number two. Both repairs were required because the door or doors had been hit.

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[2] During their respective depositions, neither Mark Boyde, the technician who made the repairs, nor Robert Steingart, the Mid-States' employee responsible for calling Wilde to repair damaged doors, was willing to say with certainty which door was repaired in November. Boyde's deposition contained the following questions and answers regarding the repairs made in November:

> Q: And do you know which of the little doors?
> A: No, I don't recall which one it was.
> Q: And is there anything on this [invoice] which would refresh your recollection as to which of the doors it would have been in the little door area?
> A: There's nothing on here saying – I know it was one of the dock doors, but I don't know which one it was, no.
> ….
> Q: And, as you sit here today, do you remember the work that you did in November of 1993?

(continued)

The Fritzes sued Mid-States for negligence and violation of the safe-place statute. Mid-States filed a third-party complaint against Wilde, claiming that the company had negligently repaired and maintained door number two. In an amended complaint, the Fritzes named Wilde as a defendant and alleged that the company failed to inspect the door and that it failed to correct the door's defective condition when it knew or should have known the "rotors" were not operating properly, were worn, and were likely to jump the track.

Wilde filed a motion for summary judgment. In its memorandum in support of the motion, it argued that the company did not have a duty to maintain

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A: … I keep wanting to say it's the south door, that would be door number one is what I want to say, I'm not positive.
Q: If you had to –
A: I'd say it was door number one, if I had a choice.
….
Q: And the work that was performed, you believe it would have been on number one?
A: Yeah ….

Steingart's deposition contained the following exchange:

Q: Now, do you know whether or not the work reflected on [the May and November invoices] is on the same door?
A: To the best of my knowledge, some of the work I believe was on that door.
Q: Can we say that it was door number two of the numbering that we just did a few minutes ago?
A: I would believe so. I'm not sure. But I would feel pretty confident in saying that was door number two.
….
Q: But as far as you know the rest of the work on this [November invoice] did relate to one of the smaller doors there, and you think it was door number two that we've been talking about, correct?
A: To the best of my knowledge, I believe it was door number two, yes.
Q: To the best of your knowledge, the work done on [the March 1994 invoice and the November invoice], with the exception to the reference to the big door, is the work on door number two on [Mid-States'] building?
A: To the best of my knowledge, yes.

the door because there was no on-going service contract between it and Mid-States. Alternatively, it argued that it should be granted summary judgment on public-policy grounds.

The trial court concluded that Wilde made repairs only when called upon to do so and that it had no duty to provide continuing maintenance. Concluding that liability could only be predicated upon a breach of a common-law duty, the court concluded that neither the Fritzes nor Mid-States had submitted any evidentiary materials to raise an issue of fact regarding negligence. The trial court did not address the public-policy argument.

On appeal, neither the Fritzes nor Mid-States argues that Wilde had an on-going duty to inspect the door. Rather, the Fritzes argue that Wilde had a duty to use ordinary care in the repairs and inspections it made in order to avoid causing injury to others. They argue that Wilde's summary judgment materials did not counter the amended complaint's allegation of negligent performance of repairs and inspections. Further, they contend that the trial court's ruling improperly placed the burden for a summary judgment motion on them and that it decided questions of fact. Similarly, Mid-States argues that the pleadings show a dispute concerning whether the door was negligently repaired and that Wilde did not meet its burden to establish the absence of a factual dispute.

Summary judgment is used to determine whether there are any disputed issues for trial. ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis.2d 80, 86, 440 N.W.2d 825, 827 (Ct. App. 1989). Appellate and trial courts follow the same methodology. ***Id.*** First, the pleadings are examined to determine whether the complaint states a claim for relief. ***Id.*** If the complaint states a claim and the answer joins the issue, the court examines the pleadings, depositions, answers to

interrogatories, admissions on file, and affidavits, if any. ***Id.*** If the summary judgment materials do not indicate that there is an issue of material fact and if the moving party is entitled to judgment as a matter of law, summary judgment must be entered. Section 802.08(2), STATS. All doubts on factual matters are resolved against the movant. ***State Bank of La Crosse v. Elsen***, 128 Wis.2d 508, 512, 383 N.W.2d 916, 918 (Ct. App. 1986).

The party seeking summary judgment bears the burden of making a *prima facie* showing that there are no issues of material fact. ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 290, 507 N.W.2d 136, 139 (Ct. App. 1993). If the movant fails to meet this burden, the court's review stops. ***Wagner v. Dissing***, 141 Wis.2d 931, 946, 416 N.W.2d 655, 660 (Ct. App. 1987). Summary judgment is denied even when the opposing party did not submit opposing affidavits. ***Jones v. Sears Roebuck & Co.***, 80 Wis.2d 321, 326, 259 N.W.2d 70, 72 (1977). If, however, the movant makes a *prima facie* showing entitling it to summary judgment, the opposing party must submit specific evidentiary materials to demonstrate that there is a genuine issue of material fact. ***Hunzinger Constr. Co.***, 179 Wis.2d at 291, 507 N.W.2d at 139.

The amended complaint and the third-party complaint each state a negligence claim against Wilde, which it denies in its answers. Thus, we turn to the materials submitted by Wilde to determine if it has made the required *prima facie* showing.

For negligence to exist, a defendant must have a duty of care, it must breach the duty, and the breach must cause an injury. ***Johnson v. Seipel***, 152 Wis.2d 636, 643, 449 N.W.2d 66, 68 (Ct. App. 1989). A party who makes repairs to a building or structure has a common-law duty to use ordinary care when

making the repairs to avoid causing injury to another person. *See* ***Colton v. Foulkes***, 259 Wis. 142, 146-47, 47 N.W.2d 901, 903-04 (1951).

In the brief supporting its summary judgment motion, Wilde argued that because it performed repairs on an "as needed" basis and did not have a service contract with Mid-States, it had no right to control the operation and maintenance of door number two. Wilde submitted an affidavit to support its argument, which the Fritzes and Mid-States do not deny. Citing ***Colton***, the Fritzes and Mid-States argued in their summary judgment briefs that Wilde's duty arose as a result of the company's negligent repair and inspection of the door.

This claim of negligent repair and inspection was alleged in the pleadings and denied by Wilde; thus, we review Wilde's affidavit to determine whether it presents any proof that Wilde did not negligently inspect and repair door number two. We conclude it does.

Wilde's affidavit included excerpts from the deposition of Patrick McGowan, Sr., Wilde's vice-president. He indicated that when the company was called to repair a door, the company expected the service technician to advise the owner if a door needed additional work beyond that necessary to complete the specific repair. He further indicated that if a technician observed that rollers had deteriorated, the technician would probably replace them and bill for the work.

Mark Boyde was the technician who made the May and November repairs. He testified at his deposition that his routine practice was to take a door off the frame, tighten or replace the hinges, and check the rollers. If a roller was broken, if it had a "lot of play in it," or if the bearings were wearing out, he would install a new roller. After oiling and adjusting the door, he checked the door's balance and made sure it was operating properly. Boyde further deposed that if a

roller did not have a "lot of play in it" and the door appeared to be operating properly, there was no way to determine if the roller was defective. When specifically asked, he indicated that if an invoice did not show that he had replaced rollers, then there was nothing wrong with the rollers on a door. Copies of the invoices for the May and November repairs were identified during McGowan's deposition and attached to the affidavit. Neither indicated that rollers had been replaced.

Excerpts from Fritz's deposition indicated that the door operated properly after Boyde made repairs in May and November. Fritz's deposition testimony indicated that he made trips to Mid-States' facility almost daily, routinely using dock number two. He deposed that he did not have problems with the door until the day it collapsed on him. The door had never stuck, jammed, or been "out of kilter," and he had not had any difficulty closing the door. This evidence of proper operation is significant when considered with information regarding the usage of door number two. Steingart deposed that three to five trucks came to the facility on a daily basis and that drivers preferred to use dock number two.

Wilde made a *prima facie* showing that door number two was properly repaired and inspected, whether repaired in May or November. Under the summary judgment methodology, the burden shifted to the Fritzes and Mid-States to present evidentiary materials showing the existence of an issue of material fact.

The only material in either the Fritzes' affidavit or in Mid-States' affidavit to refute Wilde's *prima facie* showing was the Fritzes' attorney's response to Mid-States' interrogatories. The answer summarized the tentative

conclusions of the Fritzes' expert witness. Although § 802.08(2), STATS., allows consideration of answers to interrogatories, this answer may not be relied upon to defeat Wilde's motion. Evidentiary facts must be presented by affidavit or other proof by one having personal knowledge of those facts or be based on evidence that would be admissible at trial. ***Leszczynski v. Surges***, 30 Wis.2d 534, 538-39, 141 N.W.2d 261, 264-65 (1966). The attorney's hearsay summary of the expert's conclusions is not based on personal knowledge, and it is not admissible evidence. Thus, the Fritzes and Mid-States could not rely on the attorney's answers to defeat Wilde's motion. Neither the Fritzes nor Mid-States controverted the evidentiary facts presented to show that the repairs and inspections Wilde performed were not done negligently. Accordingly, the trial court properly granted summary judgment to Wilde.

By the Court.—Order affirmed.

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