COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 4, 1997

No. 96-2738-FT

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

GEORGE URBANSKI,

Plaintiff-Appellant,

v.

JAMES LUNDE AND INTEGRITY MUTUAL INSURANCE COMPANY,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Polk County: JAMES R. ERICKSON, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. This case arises out of an auto accident.[1] George Urbanski appeals a summary judgment determining that his negligence exceeded that of the other driver, James Lunde, as a matter of law, and dismissing his complaint. Urbanski argues that material issues of fact preclude summary judgment. Because we conclude that competing inferences may be

[1] This is an expedited appeal under RULE 809.17, STATS.

drawn from the facts, we reverse the judgment and remand for further proceedings.

At his deposition, Urbanski testified that after getting something to eat at Dairy Queen, he backed his car up and was pulling out of the parking lot. He stopped before pulling on to the street, and looked to his left in preparation for a right-hand turn. "[A]ll of a sudden, there was this bang."

Lunde had been traveling from the right on Highway 35 and made a left-hand turn into the driveway of the Dairy Queen, and collided with Urbanski's vehicle. Urbanski claims that he was not moving at the time, but was "sitting there, checking traffic." He never saw Lunde's vehicle before the collision. He testified that he believed the driveway served both as an entrance and exit.

Lunde testified that he momentarily stopped on Highway 35 before making a left-hand turn to allow northbound traffic to pass. He noticed a friend's car in the Dairy Queen parking lot. He did not see Urbanski's vehicle. Lunde testified that from the first time he saw Urbanski to the time of impact, each vehicle traveled four or five feet.

The investigating officer testified that it was commonplace for vehicles to use the driveway as both an exit and an entrance. At the time of the accident, the officer observed painted arrows on the driveway indicating that the driveway served as an entrance, although at the time of his deposition the arrows were probably faded away and no longer there. He testified that Urbanski stated that he was "almost at a complete stop" looking to his left for oncoming traffic.[2]

The trial court granted Lunde's and his insurer's motion for summary judgment. The court concluded that it was undisputed that Urbanski caused the accident by attempting to exit the entrance to Dairy Queen. It concluded that Urbanski's negligence exceeded Lunde's as a matter of law.

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[2] Both parties argue that the other takes liberty with the record. We confine our review to the portions of the depositions made part of the record.

When reviewing summary judgment, we apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. *See* ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 314-15, 401 N.W.2d 816, 820-21 (1987). Summary judgment is appropriate when material facts are undisputed and when inferences that may be reasonably drawn from the facts lead only to one conclusion. ***Id.*** To be entitled to summary judgment of dismissal, a moving defendant must establish a defense that would defeat plaintiff's claim. ***Grams v. Boss,*** 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). If the evidentiary facts submitted by affidavit will under any reasonable view allow an inference in support or denial of a claim of either party, "it is for the trier of 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, 939 (1963).

Negligence is the failure to exercise ordinary care under the circumstances. ***Marciniak v. Lundborg,*** 153 Wis.2d 59, 64, 450 N.W.2d 243, 245 (1990). Here, the record permits conflicting inferences with respect to the circumstances of the collision. According to Urbanski's deposition, a reasonably prudent person would have assumed that the driveway served both as an entrance and exit. The officer also testified that it was commonly used as both an entrance and an exit.

Lunde argues that painted arrows demonstrate unequivocally that the driveway served only as an entrance. Nonetheless, the officer's and Urbanski's depositions shed doubt on whether the arrows were sufficiently visible to apprise the ordinarily prudent driver that the driveway served as an entrance only.

Also, Urbanski testified that he was not moving at the time of the collision. Lunde, on the other hand, testified that he noticed his friend's car in the parking lot, but not Urbanski's. This raises a question as to lookout. Because the facts permit opposing inferences with respect to the circumstances of the accident, we are unable to conclude that Urbanski's negligence exceeded Lunde's as a matter of law.

By the Court.—Judgment reversed and cause remanded.

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