COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-0271

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

WILLIAM P. FISCHER AND LORETTA A. FISCHER, HUSBAND AND WIFE AND WEST AMERICAN INSURANCE COMPANY,

PLAINTIFFS-RESPONDENTS,

V.

ANDRAY A. ZHURBAS AND CON-WAY TRANSPORTATION SERVICES, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Reversed and cause remanded with directions.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Andray A. Zhurbas appeals from the trial court's order denying his motion for summary judgment. Zhurbas argues, among other

things, that the trial court erred in denying his motion for summary judgment because no material facts were in dispute. We agree, and reverse the order. We, therefore, do not reach the other issues he raises. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (if a decision on one point disposes of an appeal, the appellate court will not decide the other issues raised).

I. BACKGROUND

¶2 Zhurbas was driving a truck when he hit a patch of black ice on an overpass, slid off the expressway, through a guardrail, and down an embankment. Minutes later, William Fischer approached the same overpass in his car, hit the patch of black ice, slid off the expressway, passed through the area where the guardrail had been, and down the same embankment, suffering injuries. Fischer and his wife sued Zhurbas, alleging that Zhurbas negligently drove his vehicle, took out the guardrail, and caused their injuries. Zhurbas moved for summary judgment, arguing that "the undisputed material facts establish that both accidents were unavoidable." The trial court denied the motion, finding "there is a material issue of fact in regard to defendant's negligence as to management and control and lookout."

II. DISCUSSION

¶3 We review the trial court's denial of summary judgment *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987). WISCONSIN STAT. § 802.08(2) sets forth the standard by which summary judgment motions are to be judged:[1]

[1] All references to the Wisconsin Statutes are to the 1997–98 version unless otherwise noted.

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

We review the trial court's decision by applying the same standards and methods as did the trial court. *See* ***Green Spring Farms***, 136 Wis. 2d at 315, 401 N.W.2d at 820. Summary judgment should be granted only where the moving party shows the right to judgment with such clarity as to leave no room for controversy. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473, 477 (1980).

¶4 A moving party can properly meet the burden of establishing that summary judgment is appropriate by demonstrating that there are no facts of record that support an element on which the opposing party has the burden of proof. *See* ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291, 507 N.W.2d 136, 140 (Ct. App. 1993). To defeat the motion for summary judgment, the party asserting the claim must then "make a showing sufficient to establish the existence of an element essential to that party's case." ***Id.***, 179 Wis. 2d at 292, 507 N.W.2d at 140 (citation omitted). Irrelevant facts that are disputed, however, cannot be relied upon to defeat an otherwise properly supported motion for summary judgment. *See* ***Hilkert v. Zimmer***, 90 Wis. 2d 340, 342, 280 N.W.2d 116, 117 (1979). "The elements in a cause of action for negligence are: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." ***Hunzinger***, 179 Wis. 2d at 293, 507 N.W.2d at 140 (citation omitted). We conclude that the trial court erred in determining that there was "a material issue of fact in regard to defendant's negligence as to management and control and lookout." Therefore, we reverse the trial court's order denying summary judgment to Zhurbas.

¶5 A driver has a duty to use ordinary care to look out for the condition of the highway ahead and about him for traffic signs, markers, obstructions to vision, and other things that might warn the driver of possible danger. *See* WIS JI–CIVIL 1055. "To satisfy this duty of lookout, the driver must use ordinary care to make observations from a point where the driver's observations would be effective to avoid the accident." ***Id.*** Here, the summary judgment submissions consisted of the depositions and affidavits of Zhurbas, Fischer, and Deputy Kenneth Sowinski. All three agreed that the accidents were unforeseeable and unavoidable. According to Zhurbas, "my truck hit what I believe to have been a patch of ice," which was "unseeable" [*sic*] and then he "just went out [*sic*] the road." Fischer testified that "all of a sudden I just went right off [the road]" and there was nothing he could have done to avoid the accident. Deputy Sowinski stated that a driver "approaching the overpass would not be able to see that black ice," and he didn't write any citations because he "didn't think this was an avoidable accident." Thus, Zhurbas has demonstrated that there is no evidence in the record to support a finding that he breached his duty to maintain a proper lookout.

¶6 The trial court erroneously determined that "factual controversies [exist] for a jury to consider and decide." The Fischers argue, and the trial court held, that a genuine issue regarding Zhurbas's causal negligence existed because Zhurbas did not know that overpasses freeze faster than regular roadways and because of a dispute regarding whether the roadway was wet or dry. First, the court noted that Zhurbas described the roadway as "not bone dry, but it was dry" while Deputy Sowinski described the roadway as "wet." Regardless of whether the road was wet or dry, however, the undisputed evidence indicates that the icy condition was not visible. Second, the court cited testimony by Zhurbas that

revealed "his lack of knowledge" regarding the icing-up of overpasses. Again, that knowledge would not have affected Zhurbas's ability to see the ice on the overpass.

¶7 Finally, the court stated that there were "questions regarding whether road conditions alone or in combination with his negligent management and control could have caused him to lose control of his truck." These facts, however, are rendered immaterial by Fisher's own testimony and all of the undisputed evidence that the icy patch simply was not foreseeable. As noted, irrelevant facts that are disputed cannot be relied upon to defeat an otherwise properly supported motion for summary judgment. *See* ***Hilkert***, 90 Wis. 2d at 342, 280 N.W.2d at 117. Thus, there is no basis upon which to find that any alleged breach of Zhurbas's duty to maintain a proper lookout played a role in either causing his accident or the Fischers' injuries. Accordingly, the Fischers failed to show the existence of an element essential to their negligence claim, *see* ***Hunzinger***, 179 Wis. 2d at 292, 507 N.W.2d at 140, and Zhurbas is entitled to summary judgment. We remand this matter to the trial court with directions that it dismiss the Fischers' complaint.

By the Court.—Order reversed and cause remanded with directions.

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