COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP2983 Cir. Ct. No. 2003CV313

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

AMY L. THUSIUS AND RICHARD THUSIUS,

PLAINTIFFS-APPELLANTS,

EMPLOYERS MUTUAL CASUALTY COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

E.G. HINTZ AND SONS, INC. AND SELECTIVE INSURANCE COMPANY,

DEFENDANTS,

LEXINGTON INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

CNA INSURANCE COMPANY AND NORDIN-PEDERSEN ASSOCIATES, LTD.,

DEFENDANTS-THIRD-PARTY
PLAINTIFFS-RESPONDENTS,

V.

SHAWANO AREA AGRICULTURAL SOCIETY, INC. AND T.H.E.

INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS.

APPEAL from judgments of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Amy Thusius and her husband, Richard, appeal summary judgments dismissing their claims against Nordin-Pedersen Associates, Ltd., and its insurer, CNA Insurance Company (collectively, "Nordin") and Lexington Insurance Company.[1] The Thusiuses assert factual issues preclude summary judgment. We affirm the judgments because Amy Thusius failed to establish the existence of a duty.

Background

¶2 Amy Thusius was employed by Results Broadcasting, Inc. On April 12, 2003, during the company's home show at the Shawano County Exposition Center, she was pulling a cart stacked with chairs, contrary to a warning label on the cart. The cart's wheel stuck in a "groove" caused by the presence of an expansion joint. The cart tipped and the chairs fell, severely fracturing Thusius's leg.

[1] Lexington Insurance Company insured Burley's Rink Supply. Lexington was substituted for Burley's because Burley's filed a ch. 11 bankruptcy petition in July 2004.

¶3 The Expo Center was completed in 2000. Shawano County owns the Center and leases it to the Shawano Area Agriculture Society. The Shawano Hockey League uses the Center in the winter, and the Agriculture Society uses it the rest of the year. When it was initially constructed, the Center had a dirt floor. This proved impractical because ice laid for the hockey league would penetrate deep into the soil and then took too long to thaw in the spring. Thus, fundraising efforts began to finance installation of a concrete floor and a hockey rink. Nordin volunteered its engineering expertise to prepare the floor and rink design.

¶4 Nordin, however, had never designed a concrete floor and ice rink system. Thus, Nordin incorporated into its design specifications provided by Burley's Rink Supply, Inc., the company that provided some of the rink components. One of the specifications was for an expansion joint, the "groove" in which Thusius's cart wheel caught. Essentially, the expansion joint serves as a buffer between the cold segment of the floor under the ice and the warmer adjacent sections, accommodating movement in the floor and preventing the concrete from otherwise cracking. The floor and rink were constructed in 2001.

¶5 Thusius's complaint alleged negligence based on a failure to properly design the floor in such a manner that there would be no groove, and a violation of the Safe Place Act.[2] Lexington and Nordin each moved for summary judgment. Lexington asserted a policy exclusion for professional services applied. Nordin challenged the sufficiency of Thusius's complaint, asserting that she failed to identify the necessary standard of care.

[2] There is no issue regarding the Safe Place Act raised on appeal. The complaint also included a derivative claim by Richard for loss of society and companionship.

¶6 Thusius retained an expert, Francis Biehl, and offered his affidavit in response to Nordin's summary judgment motion. In relevant part, Biehl averred:

> 5. Based upon my observations, and review of the foregoing, it is my professional opinion that the design of the flooring and expansion joint in question, where the accident causing Mrs. Thusius's injuries occurred, was the result of negligent and inadequate design by Nordin-Pedersen Associates, Ltd.[] This negligent design resulted in several safety code violations, including Wis. Admin. Code, Department of Industry, Labor and Human Relations 69 Appendix B, 4.5.1, 4.5.2 and 4.5.4.…
>
> 6. Further, based upon my professional opinion, in order to comply with preferred safety design specifications, the expansion joint in the flooring should have been covered to avoid this dangerous condition from existing. A simple cover plate system … could have avoided this accident from occurring.

Nordin argued that the affidavit was too conclusory and in any event was legally insufficient because it still failed to establish any duty. Thus, Nordin asserted, there was no genuine issue of material fact on which to have a trial.

¶7 Ultimately, the circuit court granted Lexington's and Nordin's summary judgment motions. It concluded that while Biehl was qualified to give his opinion, that opinion was based on inapplicable portions of the administrative code and only general engineering preferences; nothing in his affidavit established a legal duty.[3] Thusius appeals.

[3] Contrary to Thusius's representations in her brief, the court did not disregard the affidavit as too conclusory. The court specifically noted, "I would agree he has some generalities there and I would agree that sometimes in the law, as far as summary judgment goes, generalities are acceptable at times."

Discussion

1. Applicable Summary Judgment Standard

¶8 We review summary judgments de novo, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 316-17, 401 N.W.2d 816 (1987). Summary judgment is appropriately granted when "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 judgment as a matter of law." WIS. STAT. § 802.08(2).[4]

¶9 If the moving party demonstrates there is no genuine issue of material fact and it is entitled to judgment as a matter of law, the opposing party must set forth specific facts to counter, showing there is a genuine factual issue for trial. *See* WIS. STAT. § 802.08(3). Thusius asserts the trial court ignored this standard by failing to hold Nordin to a burden to supply evidence that it met a standard of care in designing the floor. But given this case's procedural history, Nordin had no such burden.

¶10 Sometimes, "a party moving for summary judgment can only demonstrate that there are no facts of record that support an element on which the opposing party has the burden of proof, but [the moving party] cannot submit specific evidentiary material proving the negative." ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291, 507 N.W.2d 136 (Ct. App. 1993).

[4] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

In that case, the party asserting a claim on which it has the burden of proof at trial has the burden "to make a showing sufficient to establish the existence of an element essential to that party's case." ***Moulas v. PBC Prods., Inc.***, 213 Wis. 2d 406, 410, 570 N.W.2d 739 (Ct. App. 1997), *aff'd*, 217 Wis. 2d 449, 576 N.W.2d 929 (1998) (citations omitted). In other words, once the movant supports the motion with the appropriate evidence required by statute, the opponent "does not have the luxury of resting upon its mere allegation[s] or denials …." ***Id.*** at 410-11.

¶11 Here, Nordin's basis for its summary judgment motion was that Thusius failed to identify the standard of care Nordin allegedly violated—a negative that Nordin cannot prove through evidentiary facts. Thusius responded with Biehl's affidavit in an attempt to sufficiently establish the existence of that essential element and avoid dismissal. The burden does not, however, shift back to Nordin upon Thusius's response. If she could successfully identify the duty, then Nordin would simply not be entitled to summary judgment on the basis it alleged.

2. Existence of a Duty

¶12 Negligence is a four-pronged test, requiring a duty, a breach of the duty, a causal connection, and actual loss. *See* ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶13 n.5, 277 Wis. 2d 21, 690 N.W.2d 1. Whether negligence exists is a mixed question of fact and law. ***Hatleberg v. Norwest Bank Wisconsin***, 2005 WI 109, ¶15, 283 Wis. 2d 234, 700 N.W.2d 15. Questions of historical fact are left to the fact finder, but the existence and scope of a duty present questions of law. ***Id.*** The circuit court concluded Thusius failed to establish the existence of a duty. Thusius asserts the court failed to adequately consider Biehl's affidavit.

¶13 "An architect has the duty of using the standard of care ordinarily exercised by the members of that profession." ***A.E. Invest. Corp. v. Link Bldrs., Inc.***, 62 Wis. 2d 479, 489, 214 N.W.2d 764 (1974). Because an engineer is similar to an architect, it stands to reason that an engineer has a similar duty. It is unlikely, however, that a jury or trial court would be familiar with a professional engineer's ordinary standard of care. Thus, expert testimony explaining that standard is essential to a negligence case. *See* ***Baumeister***, 277 Wis. 2d 21, ¶¶18-19.

¶14 It is, as Thusius argues, appropriate for an expert's affidavit to contain only opinions, so long as the expert is qualified and has a foundation for the opinion. *See* ***Mettler v. Nellis***, 2005 WI App 73, ¶¶10-11, 280 Wis. 2d 753, 695 N.W.2d 861. However, neither Biehl's affidavit nor any other of Thusius's pleadings ever explicitly identifies a standard of care of engineers under the circumstances presented.

¶15 The first relevant paragraph of Biehl's affidavit states:

> 5. … the design of the flooring and expansion joint in question … was the result of negligent and inadequate design by Nordin-Pedersen Associates, Ltd.[] This negligent design resulted in several safety code violations, including Wis. Admin. Code, Department of Industry, Labor and Human Relations 69 Appendix B, 4.5.1, 4.5.2 and 4.5.4.…

It is evident that Biehl referenced the administrative code in an attempt to establish a duty. Like statutes, the code can create a duty and when it does, violation of the code will be negligence per se. *See* ***Bennett v. Larsen Co.***, 118 Wis. 2d 681, 693-94, 348 N.W.2d 540 (1984).

¶16 However, the portions of the code cited, in addition to being outdated, were simply inapplicable.[5] Those sections were guidelines under the Americans with Disabilities Act, enacted "to insure that any building or facility is designed, constructed, and altered to be accessible and usable by people with disabilities." *See* WIS. ADMIN. CODE § Comm 69.01 (2001) (repealed). Safety statutes and administrative provisions that are designed to protect a class apply only to the class. *See* ***Bennett***, 118 Wis. 2d at 694. These rules "are not to be extended so as to impose any duty beyond that imposed by the common law unless such [rule] clearly and beyond any reasonable doubt expresses such purpose …." ***Id.*** (citation omitted). Therefore, even if the code portions Biehl cited were meant as safety rules, Thusius has never shown or even argued that she belonged to the protected class of disabled individuals. Therefore, violations of the code are not a basis for her negligence action.

¶17 Thusius also claims Biehl identified a standard requiring the expansion joint be covered. Biehl averred, "in order to comply with preferred safety design specifications, the expansion joint in the flooring should have been covered to avoid this dangerous condition from existing. A simple cover plate system … could have avoided this accident from occurring." Thusius cites no authority to indicate an expert's mere preference establishes a standard of care. It may be the preferred safety design because it is least labor intensive, most visually appealing, or least expensive, not necessarily because it is safest or the industry's standard of care.

[5] Biehl swore his affidavit in 2005. The sections Biehl cited from WIS. ADMIN. CODE ch. ILHR 69, App. B, had been reassigned as an appendix to WIS. ADMIN. CODE ch. Comm 69 in 1997. Chapter Comm 69 was repealed effective July 1, 2002, its details incorporated into chs. Comm 61-65.

¶18 Because Thusius has not identified a standard of care, she is missing a key element of her negligence case.[6] Accordingly, Nordin moved for summary judgment based on that omission. *See* ***Transportation, Inc.***, 179 Wis. 2d at 291. Thusius then had to "establish the existence" of that element. *See* ***Moulas***, 213 Wis. 2d at 410. She did not identify the standard of care and the court appropriately granted summary judgment.

¶19 As to Lexington's professional exclusion defense, we decline to reach that issue. Thusius's failure to identify Nordin's standard of care here also means she failed to identify a standard of care applicable to any of the defendants, making the negligence claim against Burley's unsustainable as a matter of law. Insurance coverage is therefore irrelevant, and only dispositive issues need be addressed. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938).[7]

By the Court.—Judgments affirmed.

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

[6] This case is not like ***Mettler v. Nellis***, 2005 WI App 73, 280 Wis. 2d 753, 695 N.W.2d 861. That case dealt with the equine immunity statute, which precludes immunity when one provides an equine and fails to safely manage the particular horse based on the rider's abilities. *See* WIS. STAT. § 895.481(3)(b). There, the statute had already been identified as the standard of care when the expert averred the provider failed to safely manage the horse based on the rider's abilities. Here, there is no standard of care identified. This makes Biehl's affidavit not one of evidentiary fact, but one asserting an ultimate fact or legal conclusion, and that sort of affidavit is to be avoided. *See* ***Maynard v. Port Pub'ns, Inc.***, 98 Wis. 2d 555, 562, 297 N.W.2d 500 (1980).

[7] Our opinion addresses the issues necessary for resolution of the appeal. We will not, however, address each and every piece of minutiae thrown into Thuisus's brief, particularly when we would simply reject outright many of those arguments.