COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1110 **Cir. Ct. No. 2007CV4754**

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

SHALONDA EZELL AND OMARION EZELL,
BY HIS GUARDIAN AD LITEM, JOSEPH J. WELCENBACH,

PLAINTIFFS-APPELLANTS,

V.

WEST BEND MUTUAL INSURANCE COMPANY
AND BOOMLAND LEARNING CENTER, LLC,

DEFENDANTS-RESPONDENTS,

MANAGED HEALTH SERVICES INSURANCE CORPORATION,

SUBROGATED-DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed*.

Before Dykman, Lundsten and Bridge, JJ.

¶1 PER CURIAM. Shalonda Ezell and Omarion Ezell, by his guardian (collectively, Shalonda), appeal a judgment dismissing their personal injury claims against the Boomland Learning Center, LLC, and its insurer. The issue is whether the trial court properly granted summary judgment to Boomland. We affirm.

¶2 Boomland is a licensed child care center. On August 30, 2006, it provided day care to Omarion, who was then approximately twenty months old. Shalonda, his mother, commenced this action alleging that Omarion suffered a broken finger while in Boomland's care, and that it was attributable to Boomland's negligence, and to its failure to comply with its legal duty to protect Omarion's health and safety.

¶3 Boomland moved for summary judgment. Shalonda introduced evidence that when Omarion came to Boomland on the morning of August 30 he had no physical injuries. When she picked him up in the evening she discovered that he had an injury to his little finger that a physician subsequently diagnosed as a fracture. As is pertinent here, that was the extent of the evidence, as neither side could offer evidence to show how Omarion broke his finger. In the absence of any such evidence, the trial court concluded that Boomland was entitled to dismissal. On appeal, Shalonda contends that the very fact that the injury occurred while Omarion was at Boomland is sufficient to attribute liability to Boomland under theories of negligence per se, res ipsa loquitur, and negligent supervision.

¶4 Whether to grant summary judgment is a question of law that we review using the same methodology as the circuit court and without deference to its decision. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a

matter of law. WIS. STAT. § 802.08(2) (2007-08)[1]; ***Green Spring Farms***, 136 Wis. 2d at 315. In deciding whether there are factual disputes, the circuit court and the reviewing court consider whether more than one reasonable inference may be drawn from undisputed facts; if so, the competing reasonable inferences may constitute genuine issues of material fact. ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991). We draw all reasonable inferences from the evidence in favor of the nonmoving party. ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980), *abrogated on other grounds by* ***Olstad v. Microsoft Corp.***, 2005 WI 121, 284 Wis. 2d 224, 700 N.W.2d 139. We therefore treat as fact for the purpose of this decision that Omarion hurt his finger while in Boomland's care.

¶5 There are no reasonable inferences available that would support a claim based on Boomland's negligence per se. Violation of a safety statute is negligence per se where the statutory purpose is to avoid or diminish the likelihood of harm that resulted. ***Miller v. Thomack***, 204 Wis. 2d 242, 252-53, 555 N.W.2d 130 (Ct. App. 1996), *abrogated on other grounds by* ***Meier v. Champ's Sport Bar & Grill, Inc.***, 2001 WI 20, 241 Wis. 2d 605, 623 N.W.2d 94. Here, the safety provision that Shalonda relies on to claim negligence per se is the administrative rule for day care facilities that requires a facility to keep children closely supervised. *See* WIS. ADMIN. CODE § HFS 46.05(3).[2] In Shalonda's view, the undisputed fact that no one employed by Boomland knew what happened to Omarion mandates, or at least allows, an inference that Boomland violated its duty

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] HFS 46 has been renumbered to WIS. ADMIN. CODE § DCF 251.

to closely supervise. However, we conclude that no reasonable fact finder could infer from the mere fact of the injury, and nothing more, that Boomland failed to closely supervise Omarion. Even under close supervision, Omarion could have suffered his injury. Furthermore, he could have suffered it under close supervision without the care worker's knowledge. Omarion did not talk, and showed no obvious discomfort such as crying or complaining when Shalonda picked him up. He only showed some sign of injury when she tried to take him by his injured hand, and even then his reaction was not particularly substantial. Only upon close examination did Shalonda notice the swelling in his finger. Consequently, a fact finder could only speculate that Omarion was left unattended and unsupervised at the time of his injury.

¶6 The mere fact of the injury also fails to allow a reasonable inference of negligence in fact. Shalonda argues otherwise, based on the doctrine of res ipsa loquitur. That doctrine is a rule of circumstantial evidence that permits a fact finder to infer a defendant's negligence from the mere occurrence of the event. *See* ***Lambrecht v. Estate of Kacmarczyk***, 2001 WI 25, ¶33, 241 Wis. 2d 804, 623 N.W.2d 751. The event in question must be of a kind which does not ordinarily occur in the absence of negligence and the defendant must have exclusively controlled the agent or instrument of the harm. ***Id.***, ¶34. We conclude that a small child's hand injury, even a broken finger, can ordinarily occur without negligence. We also conclude that it would be pure conjecture to infer that Boomland exclusively controlled all possible agents or instruments that could have caused Omarion's injury. For all anyone knows, the child might simply have fallen and landed on his hand. To invoke res ipsa loquitur, a plaintiff must present sufficient evidence to remove the causation question from the realm of conjecture.

McGuire v. Stein's Gift & Garden Ctr., 178 Wis. 2d 379, 393, 504 N.W.2d 385 (Ct. App. 1993). Here, the evidence is not sufficient to do that.

¶7 Shalonda's theory of negligent supervision fails to support their claims for the same reason her other two theories fail. Without evidence of how Omarion injured his little finger, a fact finder could not reasonably infer that Boomland's child care workers were negligent, or that their negligence caused the injury.

¶8 In summary, the facts were undisputed and created no reasonable inferences under which Shalonda could hold Boomland liable for Omarion's injury. Boomland was therefore entitled to summary judgment.

By the Court.—Judgment affirmed.

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