COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2473 **Cir. Ct. No. 98-CV-1103**

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

JOSEPH RAY HALSTED,

PLAINTIFF-APPELLANT,

BLUE CROSS BLUE SHIELD UNITED OF WISCONSIN,

SUBROGATED-PLAINTIFF,

V.

SOCIETY INSURANCE COMPANY, DALE LILLY, TAMMY LILLY, AND ELINOR R. PFAFF,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

Before Vergeront, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Joseph Ray Halsted appeals from an order dismissing his personal injury action against Dale and Tammy Lilly, and Elinor Pfaff. Halsted fell and severely injured himself on the premises owned by the Lillys and formerly owned by Pfaff. The issue is whether he presented sufficient evidence on summary judgment to create a dispute of material fact concerning the cause of his fall. We conclude he did not, and therefore affirm.

¶2 Halsted rented the upstairs half of a duplex from the Lillys and accessed his apartment using an outside stairway. On a night when he was admittedly intoxicated, he was found lying near the stairs, severely injured. From the physical evidence at the scene, one could reasonably infer that his injury occurred when he fell over the handrail while on or at the top of the stairway. Halsted could not confirm this, however, because he cannot remember anything about his accident. At the time he was injured his blood alcohol level was .40 percent, a near fatal level according to a defense expert. With a blood alcohol content that high, the expert stated that:

> [A] person's double vision results in a complete loss of depth perception. Individuals at this level of alcohol intoxication also lose all peripheral vision which results in a complete inability to see anything to either side.… [A] person's judgment about safe behavior is severely impaired to the extent that he is not safe out in the general environment because of increased risk taking and impaired perceptions of his environment and of his own impairment. Coordination is likewise severely impaired. Finally, information processing and reaction time are severely impaired because of the alcohol's effect on the individual's central nervous system.

The expert estimated that in the hours prior to the accident Halsted must have drunk the equivalent of thirty cans of regular beer.

¶3 There is no dispute that a reasonable fact finder could determine that Halsted's intoxication was a cause of the accident. The basis of this lawsuit is Halsted's allegation that the unsafe nature of the stairway was also a substantial factor in his fall. In an affidavit opposing summary judgment, Halsted's expert engineering witness, David Rudig, noted that the stairway violated several local building code provisions, including a stairway handrail three to five inches below the minimum thirty inch height requirement, a top step six and one-half inches too narrow, varying riser heights, and an unsafe slope to the stair treads. Rudig concluded that:

> [I]t is my professional opinion that, if Mr. Halsted fell over the handrail, the extremely low height of the handrail was a cause of Mr. Halsted's continued fall to the pavement below and his resulting injury.
>
> 7. Based on the information that I have received and reviewed to date it is my professional opinion Mr. Halsted did, in fact, fall over the portion of the handrail adjacent to the upper four steps.

¶4 In a prior deposition Rudig was asked if he had a professional opinion as to the cause of the fall, and Rudig answered "no." "The only opinion that I can render is what the condition of the premises were and whose responsibility it was to have it code compliant."

¶5 In the decision granting summary judgment, the trial court declined to consider Rudig's opinion on causation, as stated in his affidavit, because it directly conflicted with his deposition testimony that he had no opinion on the matter. The trial court therefore dismissed the complaint because Halsted had nothing to rebut the evidence that his extreme intoxication was the only substantial cause of his injury.

¶6 We review summary judgment decisions de novo, applying the same standards as the trial court. ***Guenther v. City of Onalaska***, 223 Wis. 2d 206, 210, 588 N.W.2d 375 (Ct. App. 1998). If, as here, the pleadings join issues of material fact and the moving party's affidavits establish a *prima facie* case for summary judgment, we then look to the opposing party's affidavits to determine whether there are any material facts in dispute such that the matter should proceed to trial. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232-33, 568 N.W.2d 31 (Ct. App. 1997). Upon review of the party's submissions on summary judgment, the reviewing court should not consider affidavits that directly contradict prior deposition testimony, unless the contradiction is adequately explained. ***Yahnke v. Carson***, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102.

¶7 Rudig's opinion on causation should not be considered on summary judgment. In his prior deposition testimony, Rudig said he could not offer an opinion on cause. In his affidavit, he did offer an opinion. That is a direct contradiction. Halsted explains that in his deposition Rudig was addressing what might have precipitated Halsted's fall, whereas in the affidavit he opined on the cause of the injury, that being the handrail's failure to stop Halsted's fall after he lost his balance. However, we do not draw that distinction from our examination of Rudig's deposition testimony. At the deposition, counsel repeatedly asked Rudig, in an open-ended way, if he had any opinion on the causation issue. Rudig had multiple opportunities to make the distinction counsel now offers, but he did not. Consequently, we decline to consider Rudig's opinion in our de novo review and, without it, the defendants' evidence on causation stands unrebutted.

¶8 Even if we considered Rudig's affidavit, Halsted has failed to adequately present a material factual dispute on causation. A mere possibility of causation is not enough; if the matter remains one of speculation or conjecture, or

the probabilities are at best evenly balanced, the plaintiff cannot prevail. *See* ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 460, 267 N.W.2d 652 (1978). Rudig's affidavit, at best, establishes only the possibility that a code compliant handrail would have prevented the fall.[1] Beyond that, it is only conjecture.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

[1] Halsted was 6 feet 4 inches tall, and presumably more at risk of falling over the handrail than a person of average height, even if it had been at or above the code required thirty inches.