COURT OF APPEALS
DECISION
DATED AND FILED

May 2, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3302-FT **Cir. Ct. No. 00-CV-244**

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

EMILY DEE,

PLAINTIFF-APPELLANT,

V.

MARKET SQUARE HOUSING LLC AND MIDWEST FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Reversed and cause remanded.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 PER CURIAM.[1] Emily Dee appeals from a judgment dismissing her personal injury claim against Market Square Housing, LLC, and its insurer. She sued after being injured in a parking ramp under construction. On summary judgment the trial court held Dee more negligent than Market Square, the ramp's owner, as a matter of law. The issue on appeal is whether the evidence submitted on summary judgment allowed competing reasonable inferences concerning the apportionment of negligence. We conclude that it does, and therefore reverse.

¶2 The material facts are not in dispute. After an evening of drinking, Dee and a friend, Rose Dubey, were walking in downtown La Crosse toward Dee's home. A police report describes what happened next:

> [Dee and Dubey] thought they were being followed by two unknown male subjects.
>
> To get away from the two unknown male subjects Ms Dee and Ms Dubey walk south on 4th St., then East on Jay St., and then entered the ground level hallway of the Market Square parking ramp from the north side of the building. Ms Dee and Ms Dubey walked south through the ramp (Ms Dubey was ahead of Ms Dee). Ms Dee goes on to explain that as they reached the south end of the hallway just before exiting on to King St., there were some 4ftx8ft (possibly 4x10) sheets of sheetrock propped up against the left wall. Ms Dee does not know how, but the three sheets of sheetrock fell hitting her in the left knee.…
>
> It should be noted that the ramp is not open for business yet however, there are no signs on either end of the hallway advising people they can not at least walk through nor are the entrances of the hallways blocked. The [vehicular] entrances and exits are blocked off for vehicles. The ramp area is very well lighted, and there was no security personnel seen this date.…

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Dee was aware that the ramp was not open for parking. She conceded that either she or Dubey must have hit the building material and caused it to fall while walking briskly or jogging through the hallway. When Dee went to the hospital after the accident her blood alcohol content registered at .144 percent.

¶3 On these undisputed facts Market Square contended that it was entitled to judgment because no reasonable trier of fact could find its causal negligence greater than Dee's. Dee contends, however, that a trier or fact could find Market Square more casually negligent for leaving the construction materials in a hallway open to public passage and without barricades or warning signs.

¶4 Our review of a summary judgment motion is a question of law that we consider de novo. ***Hofflander v. St. Catherine's Hosp. Inc.***, 2001 WI App 204, ¶11, 247 Wis. 2d 636, 635 N.W.2d 13. Summary judgment shall be rendered when no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We will reverse a summary judgment if a party's submissions reveal disputed material facts or undisputed material facts from which reasonable competing inferences may be drawn. *See* ***Hofflander***, 2001 WI App 204, at ¶11.

¶5 Market Square's alleged negligence is subject to evaluation under the Wisconsin safe place statute, WIS. STAT. § 101.11(1). That section requires owners of public buildings, such as Market Square's parking ramp, to maintain them as safely as their nature reasonably permits, for the protection of their frequenters. ***McGuire v. Stein's Gift and Garden Center, Inc.***, 178 Wis. 2d 379, 398, 504 N.W.2d 385 (Ct. App. 1993). This standard imposes a more stringent duty than does the ordinary care standard. ***Topp v. Continental Ins. Co.***, 83 Wis. 2d 780, 788, 266 N.W.2d 397 (1978). However, comparative negligence

remains applicable to cases involving the defendant's alleged safe-place violation. ***D.L. v. Huebner***, 110 Wis. 2d 581, 645, 329 N.W.2d 890 (1983). Consequently, a plaintiff's failure to exercise ordinary care for his or her own safety remains a defense to liability. ***Jankee v. Clark County***, 2000 WI 64, ¶53, 235 Wis. 2d 700, 612 N.W.2d 297.

¶6 We conclude that summary judgment is not available to resolve the issue of comparative negligence in this case. "[T]he issue of comparative negligence peculiarly lies within the province of the jury to determine." ***Rossow v. Lathrop***, 20 Wis. 2d 658, 664, 123 N.W.2d 523 (1963). Consequently, summary judgment should be used only in the rare case where it is clear and uncontroverted that one party is more negligent than another and that no jury could reach a conclusion to the contrary. ***Huss v. Yale Materials Handling Corp.***, 196 Wis. 2d 515, 535, 538 N.W.2d 630 (Ct. App. 1995). Here, a jury could reasonably find that Market Square neglected its safe-place duty by not warning frequenters that the hallway was a construction area containing construction materials, and by not barring pedestrian passage. We cannot say that a jury could not, under any circumstances, find that negligence greater than Dee's neglect in caring for her own safety. As the supreme court noted:

> Summary judgment is a poor device for deciding questions of comparative negligence.… A comparison, of course, assumes the things to be compared are known, and can be placed on the scales. If a defendant, on summary judgment, is to be permitted to set forth in his affidavits the conduct of the plaintiff, and seek summary judgment on the ground that plaintiff's negligence outweighs his own as a matter of law, the only recourse to the plaintiff is to set forth in his counteraffidavits all of the conduct of the defendant. The upshot is a trial on affidavits, with the trial court ultimately deciding what is peculiarly a jury question. Our summary-judgment statute does not authorize a trial by affidavits.

Cirillo v. City of Milwaukee, 34 Wis. 2d 705, 716-17, 150 N.W.2d 460 (1967).

By the Court.—Judgment reversed and cause remanded.

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