COURT OF APPEALS
DECISION
DATED AND FILED

June 9, 2010

David R. Schanker
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. 2009AP1305 **Cir. Ct. No. 2007CV2704**

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

VILLAGE OF STURTEVANT,

PLAINTIFF,

CINCINNATI INSURANCE CO.,

INVOLUNTARY-PLAINTIFF,

V.

STS CONSULTANTS, LTD. AND PARTNERS IN DESIGN ARCHITECTS, INC.,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

SCHINDLER ELEVATOR CORPORATION,

THIRD-PARTY DEFENDANT-RESPONDENT,

RILEY CONSTRUCTION COMPANY, INC., PSJ ENGINEERING AND ELECTRICAL SYSTEMS & SERVICES, INC.,

THIRD-PARTY DEFENDANTS.

APPEAL from an order of the circuit court for Racine County: EMILY S. MUELLER, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. STS Consultants, Ltd. and Partners in Design Architects, Inc., third-party plaintiffs, appeal from a circuit court order granting summary judgment to and dismissing Schindler Elevator Corporation as a third-party defendant. We affirm.

¶2 The Village of Sturtevant contracted with STS Consultants to provide engineering design services for the construction of a passenger rail station (the depot). STS subcontracted with Partners in Design to provide architectural design services for the project. Sturtevant sued STS and Partners (the design team) for breach of contract and negligence because the depot's bridge towers and elevators were defectively designed and constructed, and the elevators malfunctioned during rain and snow. The design team brought a third-party complaint seeking contribution from Schindler, the elevator subcontractor, among others, for the costs Sturtevant expected to incur to remodel the structure to remediate weather-related problems. Schindler denied liability.

¶3 Schindler sought summary judgment on the design team's contribution claim because it undertook no responsibility for the design or construction of the allegedly defective depot towers and it manufactured the two passenger elevators in accordance with the specifications provided by the design team. Schindler further alleged that Partners in Design, the architect, consulted with Otis Elevator Corporation regarding the planned open design of the structure

and the specific requirements for the elevators.[1] Schindler was not consulted regarding the elevators' specifications. Before Schindler installed the elevators, the architect approved Schindler's shop drawings for the elevators. The elevators were installed by July 2006, and they were accepted and approved as being within contract specifications. Schindler gave a limited warranty to the general contractor that the elevators complied with the contract specifications. Schindler serviced and maintained the elevators thereafter. Among the service reports were numerous weather-related service calls due to snow, rain and moisture. Schindler argued that the design team's contribution claim should be dismissed.

¶4 In opposition to Schindler's summary judgment motion, the design team argued that Sturtevant's postconstruction elevator consultant opined that the elevators were not designed for exposure to Wisconsin weather conditions. The consultant, Architectural Associates, suggested that if there was a foreseeable problem with the elevator, it was reasonable for an elevator vendor to question installing the elevator. Wesley Grover, a licensed professional engineer retained by the design team, opined that Schindler had an obligation to express an opinion that the elevators were not suitable for the depot application. The design team argued that a jury was entitled to weigh the experts' opinions that Schindler had a duty to advise the parties regarding the suitability of its elevators for the depot application and that Schindler shared liability for incorporating its elevators into

[1] In his deposition, the design team's architect stated that discussions with Otis focused on the effect of cold weather on the hydraulic fluid, not upon the operational impact of snow and rain given the less than fully sheltered elevator design. In consulting with Otis, the architects were "looking for guidance on the specifications and anything else that they felt we should incorporate in this type of installation." The design team selected an elevator of standard specifications.

the project design. The design team argued that the elements of contribution were met.

¶5 In its reply to the design team, Schindler reiterated that the design team agreed that Schindler played no role in the design of the depot or in the creation of the elevator specifications. Schindler argued that there were no facts to support its alleged duty to advise because Schindler did not participate in or consult regarding the creation of the specifications, the design team had its own elevator consultant, Otis, who did not raise the possibility of weather-related problems, and Schindler only warranted that the elevators would comply with contractual specifications.

¶6 On summary judgment, the circuit court concluded that the following facts were undisputed: the design team consulted with Otis Elevator regarding the elevators' specifications, those consultations included the drawings and conversations about what should be specified, and Schindler supplied the specified elevators without consulting about the specifications. The court rejected the design team's contention that Schindler had a duty to alert the design team to potential problems with the elevators in the weather-exposed depot application. Sturtevant sued the design team for negligent design and construction, but there was no allegation that Schindler was involved in design and construction. Because Sturtevant did not have a negligence claim against Schindler, Schindler was not a joint tortfeasor and did not owe contribution. In the absence of disputed material factual issues, summary judgment in favor of Schindler was appropriate.

¶7 We review decisions on summary judgment by applying the same methodology as the circuit court. ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That

methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** at 496-97.

¶8 We agree with the circuit court that there are no genuine issues of material fact that would have precluded summary judgment. It is undisputed that Schindler had no hand in creating the elevator specifications and was not asked to advise or comment upon the specifications, the design team consulted with another elevator company, Otis, regarding elevator specifications, and the design team assumed that the depot structure and a nine-foot elevator set-back would be sufficient to shield the elevators from the weather under most circumstances. It is further undisputed that Schindler supplied the specified elevators, installed and maintained them as required by Schindler's contract. It is further undisputed that the weather caused numerous problems with the elevators, contrary to the design team's belief that the structure itself would shield the elevators. On the undisputed facts, summary judgment was appropriate.

¶9 On appeal, the design team argues that whether a party has a duty of ordinary care is a jury question. *See* ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶22, 318 Wis. 2d 622, 768 N.W.2d 568. The design team further argues that weather-related problems with the elevators were foreseeable, and Schindler had a duty to exercise reasonable care by reviewing the depot plans and advising regarding the suitability of the specified elevators for the intended purpose.

¶10 We disagree with the design team's analysis of Schindler's alleged duty. Where the facts are undisputed, the existence of a duty is a question of law. ***Id.***; ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶10, 283 Wis. 2d 555,

699 N.W.2d 205. On the undisputed facts, Schindler had no role other than to supply what others had specified. Performing this function did not create a duty of care to advise regarding the specifications.

> [W]hat is within the duty of ordinary care depends on the circumstances under which the claimed duty arises. For example, what is comprised within ordinary care may depend on the relationship between the parties or on whether the alleged tortfeasor assumed a special role in regard to the injured party.

Behrendt, 318 Wis. 2d 622, ¶18. The duty of ordinary care is circumscribed by "what would be reasonable given the facts and circumstances of the particular claim at hand." ***Id.*** Given Schindler's limited role as a supplier and installer, Schindler had no duty to opine on the specifications created by the design team and their own elevator consultant.

¶11 The design team claims that Schindler can be liable for contribution. The elements of contribution are: "(1) both parties must be joint tortfeasors, (2) both parties must have common liability to the same person because of their status as tortfeasors, and (3) one party must have born an unequal portion of the common burden." ***Fire Ins. Exch. v. Cincinnati Ins. Co.***, 2000 WI App 82, ¶8, 234 Wis. 2d 314, 610 N.W.2d 98.

¶12 We disagree with the design team that Schindler is a joint tortfeasor because its elevators were not suitable for the intended purpose. This argument ignores the undisputed fact that Schindler played no role in preparing the specifications for the elevators and merely supplied and installed the specified elevators. This argument further ignores that the design team had its own elevator consultant, Otis, to whom it turned for guidance and expertise. Schindler implemented the specifications that arose out of that consultation. The design

team's third-party contribution claim is premised upon Sturtevant's first-party claim for the cost of remediating the depot negligently designed by the design team. Schindler played no role in that design.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).