COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2351 **Cir. Ct. No. 00 CV 4428**

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

RUTH GENKE AND RICHARD GENKE,

PLAINTIFFS-APPELLANTS,

KVI, A DIVISION OF SEABURY & SMITH, INC., AND UNITED STATES OF AMERICA,

SUBROGATED-PLAINTIFFS,

V.

NDC, INC., A/K/A PICK-N-SAVE, AND FIREMAN'S FUND INSURANCE COMPANY OF WISCONSIN,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

HONDO, INC.,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order and a judgment of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Appeal from order dismissed; judgment affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Ruth Genke and Richard Genke appeal from an order denying their motion seeking reconsideration after the trial court granted summary judgment in favor of NDC, Inc., a/k/a Pick-N-Save, Fireman's Fund Insurance Company of Wisconsin (collectively NDC) and Hondo, Inc. They also appeal from the judgment entered in favor of Hondo.

¶2 The Genkes claim that the trial court erred in denying their motion for reconsideration. Because no new issues were raised in the reconsideration motion, this court has no jurisdiction over the appeal with respect to the NDC order and, therefore, this part of the appeal is dismissed. Because the Genkes have failed to make a sufficient showing as to the existence of a genuine issue of material fact as to the Hondo judgment, we affirm the judgment.

I. BACKGROUND

¶3 On Saturday, March 20, 1999, Ruth Genke was shopping at the Tri-City NDC food store, located at 6462 South 27th Street in Oak Creek, Wisconsin. While she was looking at a cake display located on an upper shelf in aisle 17, she tripped over a wooden pallet, which had been left on the floor. The pallet was located partially in front of the cake display case and partially in front of a Coca-Cola product display. Hondo is the Coca-Cola distributor that supplies its product to NDC.

¶4 Ruth sustained injuries as a result of the fall. The Genkes filed a safe place and negligence action against NDC and a negligence action against Hondo. After filing answers and conducting discovery, NDC moved for summary judgment, and Hondo subsequently joined in the motion. The trial court granted the motion on October 8, 2001, and entered an order for judgment on October 22, 2001.

¶5 On October 31, 2001, the Genkes filed a motion seeking reconsideration of the order for summary judgment. On December 6, 2001, the trial court entered judgment in favor of NDC. On December 11, 2001, the trial court held a hearing on the reconsideration motion. Without waiting for the trial court's reconsideration order, NDC served and filed notice of entry of the December 6th judgment in a timely fashion. Therefore, the Genkes' deadline to appeal from the December 6th judgment was January 22, 2002. *See* WIS. STAT. § 808.04(1) (2001-02).[1] On June 10, 2002, the trial court issued a written decision and order denying the motion for reconsideration. The Genkes then filed this appeal on September 3, 2002. On September 19, 2002, the trial court entered judgment in favor of Hondo. The Genkes then filed an additional notice of appeal as to that judgment.

II. ANALYSIS

¶6 Because of the dual procedural background of this dispute, we are asked to examine the propriety of two separate and distinct judgments entered after orders for summary judgment were granted and entered: one granted in favor of NDC, and one granted in favor of Hondo. In the former, we consider a

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

jurisdictional challenge; in the latter, a procedural challenge. We shall now address the appeals affecting each judgment separately.

A. Appeal of the NDC Summary Judgment.

¶7 On October 10, 2002, this court considered a motion filed by NDC and Hondo to dismiss the Genkes' appeal. Among other matters, we ordered NDC and the Genkes to address whether this court had jurisdiction over the appeal from the denial of the Genkes' motion for reconsideration of the judgment in favor of NDC. Although not expressed in the order, we based our request upon the rationale expressed in ***Yaeger v. Fenske***, 15 Wis. 2d 572, 573, 113 N.W.2d 411 (1962), which requires the court to determine the appealability of an order, even though the issue has not been raised by counsel. In ***Silverton Enterprises, Inc. v. General Casualty Co. of Wisconsin***, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988) (citing ***Ver Hagen v. Gibbons***, 55 Wis. 2d 21, 197 N.W.2d 752 (1972)), we concluded that: "No right of appeal exists from an order denying a motion to reconsider which presents the same issues as those determined in the order or judgment sought to be reconsidered." This rule has been denominated the ***Ver Hagen*** "new issues" test; we shall now apply it.

¶8 In other words, it is undisputed that the Genkes did not file a timely notice of appeal from the NDC judgment. Thus, we have no jurisdiction to review the issues arising from the NDC judgment. However, the appeal from the order denying the reconsideration motion was filed timely. Thus, our review is limited to that order. In addition, according to the ***Ver Hagen*** test, if the Genkes failed to raise any *new* issues in their reconsideration motion, then this court does not have jurisdiction over the appeal as to NDC.

¶9 The Genkes contend that a comparison of the initial decision of the trial court, with its second decision on reconsideration, clearly indicates that new issues were considered in the motion for reconsideration and in the decision resulting therefrom, which were not considered in the original summary judgment decision. For reasons to be stated, we are not convinced.

¶10 When NDC moved for summary judgment, it based its motion on the absence of evidence demonstrating "actual or constructive notice of the claimed defect." In opposing the summary judgment motion, the Genkes proffered three written arguments: (1) the safe place statute creates a non-delegable duty; (2) when the defendant creates the hazard, no notice is required; and (3) even if notice is required, constructive notice is a disputed issue of material fact in this case.

¶11 In moving for reconsideration, the Genkes advanced the following three arguments: (1) it is clear that NDC had a non-delegable duty under the safe place law; (2) notice of a hazardous condition is not necessary when the person charged with the duty creates the condition; and (3) the person stocking the shelves who may have left the pallet in the aisle was NDC's agent.

¶12 A review of the summary judgment transcript reveals that the Genkes, in their opposition brief, highlighted the second argument as "[t]he safe place statute creates a non-delegable duty." They then went on to assert:

> An employer has a non-delegable duty to provide a safe place of employment. This is a place of employment and the plaintiff is a frequenter. NDC can not claim that someone other than itself is responsible for the injury since the employer is in charge of the place of employment.

¶13 In addition, the Genkes, in their appellate brief, admit that in their summary judgment opposition brief they argued "that the safe place statute created a non-delegable duty." From this recital, no other conclusion can be reached but that the Genkes addressed the first argument of their motion for reconsideration during the summary judgment proceeding.

¶14 Next, in their opposition brief to summary judgment, the Genkes highlighted an argument: "When the defendant creates the hazard, no notice is required." Citing ***Kosnar v. J.C. Penney Co.***, 6 Wis. 2d 238, 242, 94 N.W.2d 642 (1959) and WIS JI—CIVIL 1900.4 they argued:

> A store proprietor may be held negligent for a hazardous condition if it created the condition…. This is well established law and can be found in WCJI 1900.4 where the court instructs the jury that the notice requirement does not apply where the defendant's affirmative act created the defect.

¶15 The trial court ruled that actual or constructive notice was required in order to trigger NDC's duty.

¶16 The Genkes' reconsideration brief sets forth, as its second argument, "[n]otice of a hazardous condition is not necessary when the person charged with the duty creates the condition," citing the same law as set forth above. Further, the Genkes acknowledge the use of the same argument in their earlier summary judgment opposition brief where they assert "that the defendant, NDC, created the hazard and no notice was required." Clearly then, this second argument was examined and resolved during the summary judgment proceeding.

¶17 As to the third argument for reconsideration, the Genkes contend that: "The stocker was NDC's agent." Expanding on this argument, they claim:

> This is not a case where a customer creates a condition such as leaving a grape in the aisle, but rather the condition is created through the methodology adopted by NDC. In this case NDC clearly utilized the method of stocking its shelves whereby Coca Cola, or whoever, did the stocking. Whoever was stocking the NDC shelves was acting as NDC's agent, since this was the method utilized by NDC. As stated in the initial brief which was supported by discovery material, NDC's method for stocking its shelves (at least the soda shelves) was to have representatives of various soda companies stock their products and have access to the area where their product is delivered without a requirement that they check in, or otherwise notify the store of their presence. Coca Cola's stock is in the back room of the warehouse. Coca Cola merchandises the store which means that Coca Cola takes the stock out of the back room and puts it on the shelves. Coca Cola stocks the shelves throughout the day. Clearly, the supplier is thus acting as a stocker and agent for NDC because it is stocking the NDC shelves.

¶18 From this statement, it is clear that this reconsideration argument contains the same issues of "agency" and "method of operation" argued during the summary judgment motion. A final review of the summary judgment record discloses the claim that:

> The pallet was put there by a person acting as [an] agent for NDC and Coca-Cola. He should have seen it. As Boyle notes in Wisconsin Safe Place Law Revised, 1980, at p. 166, citing Rudzinski:
>
> "Time of a defect's existence is of no materiality where it was readily observable to an agent or an employee who was in the area."

¶19 In their summary judgment opposition brief, the Genkes argued:

> "Thus when an unsafe condition, although temporary or transitory, arises out of the course of conduct of the owner or operator of a premises or may reasonably be expected from his *method of operation*, a much shorter period of time, and possibly no appreciable period of time under some circumstances, need exist to constitute constructive notice." Strack v. Great Atlantic and Pacific Tea Co., 35 Wis. 2d 51, 55, [150 N.W.2d 361] (1967).

(Emphasis added.) Additionally, at oral argument on the summary judgment motion, the trial court and counsel for the Genkes engaged in the following exchange:

> MR. WELCENBACH: But by their very method of operation, this is their method of operation, to have someone put the soda there. And the pallet was left there during that performance of that duty, about that job. And to say NDC has no notice when that is the way they do things totally emasculates the concept of when you create a condition you don't need notice. Why would they need notice of when they themselves are doing this methodology of stocking the shelves and leaving the pallets?
>
> THE COURT: You need actual or constructive notice. I think that is just the case law.
>
> MR. WELCENBACH: Well, I see. I don't think we need actual or constructive notice if we ourselves are creating the condition. This is not a customer who created a condition or some outside third party; this is their own person who they have selected to stock the shelves.

¶20 In this appeal, the Genkes set forth four issues which they contend are new, thereby providing the basis for this court's jurisdiction over this appeal. The first three of the proffered new issues relate to NDC and the fourth relates to Hondo. From our comparison of the records from both the motion for reconsideration and the motion for summary judgment, there is no doubt that the essence of the three arguments proffered to support reconsideration as they relate to NDC, were given a thorough examination during the summary judgment process. Because new issues were not presented for the motion for reconsideration, there is no basis to sustain jurisdiction for this appeal affecting NDC. Thus, this court does not have jurisdiction to review the Genkes' appeal from the reconsideration order with respect to NDC; as a result, this portion of the appeal is dismissed.

B. Hondo Appeal.

¶21 When the Genkes filed this action against NDC, Hondo, the Coca-Cola distributor, was impleaded by a third-party summons and complaint filed by NDC. Subsequently, the Genkes amended their action to include a claim for negligence against Hondo. Subsequently, Hondo joined in the summary judgment motion filed by NDC. The trial court granted the motion as to both parties. The judgment in favor of Hondo was entered on September 19, 2002. This appeal is directly from the entry of that judgment.

¶22 We review orders for summary judgments independently, employing the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We do value any analysis that the trial court has placed in the record. We shall affirm the trial court's decision granting summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶23 Summary judgment is appropriate 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 a judgment as a matter of law." ***Id.*** A court examines summary judgment motions in a three-step process. ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

¶24 First, it must determine whether the pleadings set forth a claim for relief as well as a material issue of fact. ***Id.*** Second, the court must determine whether the moving party's affidavit and other proofs present a prima facie case for summary judgment. ***Id.*** A defendant states a prima facie case for summary

judgment by showing a defense that would defeat the claim. ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). Finally, the court examines the affidavits and proofs of the opposing party to determine whether any disputed material fact exists, or whether any undisputed material facts are sufficient to allow for reasonable alternative inferences. ***Grams***, 97 Wis. 2d at 338. The court proceeds to each succeeding step only if it determines that the appropriate party has satisfied the preceding one. *See* ***id.***

¶25 The mere allegation of a factual dispute will not defeat an otherwise properly supported motion for summary judgment. ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994). One purpose of summary judgment is to avoid a trial where no genuine issues of material fact exist—leaving nothing to try. ***Rollins Burdick Hunter, Inc. v. Hamilton***, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981).

¶26 Summary judgment is appropriate when sufficient time for discovery has passed and the party asserting a claim on which it bears the burden of proof at trial has failed to demonstrate the existence of an element essential to that party's case. ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291, 507 N.W.2d 136 (Ct. App. 1993). The party moving for summary judgment must explain the basis for its motion and identify those submissions and pleadings demonstrating the absence of a genuine issue of material fact. ***Id.*** at 292. Once the moving party demonstrates that 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 a judgment as a matter of law, WIS. STAT. § 802.08(2), the opposing party may avoid summary judgment only by setting forth specific facts showing that there is a genuine issue for trial. If the non-moving party has failed to

produce any evidence of an essential fact, it is not necessary for the moving party to produce affidavits or other submissions that specifically negate the opponent's claim. ***Id.*** A non-moving party may not rest upon the mere allegations of its pleadings—it must come forward with evidence supporting those allegations. WIS. STAT. § 802.08(3).

¶27 We conclude the Genkes failed to make a sufficient evidentiary showing in their submissions opposing summary judgment to create a genuine material issue of fact as to Hondo. The elements in a cause of action for negligence are: (1) a duty of care on the part of the defendant; (2) a breach of that duty by the defendant; (3) a casual connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury.

¶28 We now review the documents submitted for the summary judgment motion. A reading of the Genkes' pleadings related to Hondo discloses that the cause of action stated is based upon common law negligence. When Hondo joined in NDC's motion for summary judgment, it relied on affidavit portions of the depositions of: the plaintiff, Ruth Genke; NDC employees Nicole Bennett and Ann Reichart; Steven Immel, the manager of the NDC store; and affidavits of Hondo's regional manager, Ron Braun, and its director of claims, Kathy Dalton.

¶29 Ruth's testimony indicates that she did not see the pallet until after she tripped over it. She was looking up at the cake display when the accident occurred. She did not know how long the pallet had been on the floor. The pallet had no identifying markings. She did not see any Cola-Cola stockers or any other stockers in the store when she was there.

¶30 Reichart provided the following information. She was on a half-hour lunch break in the front break room. From where she was located in the

break room, she could look down aisle 17, the site of the accident. She observed a stocker dressed in a Coke jacket, brownish-black in color, with a Coca-Cola emblem on it. He was stocking two-liter coke bottles from a pallet laying flat on the floor. The stocker had sandy brown hair and did not wear a hat. Reichart finished her break and left the room before the stocker finished his job. She returned to her work area and, within two to three minutes, her assistant, Bennett, reported the accident. She spoke briefly with Genke who told her how the accident happened, but did not show her how it happened. Reichart then returned to aisle 17 and found a pallet located a little bit towards the cake case, but mainly in front of the Coke bottles. She testified that there are several sizes of pallets used in the store. The pallet involved here was bigger than a normal-sized pallet. After the accident when she observed the pallet, she was not sure whether the pallet was laying flat or on its side. She had no idea whether or not the pallet had been moved between the time of the accident and when she observed the pallet. She took the pallet back to the storage room. She did not see any Coca-Cola personnel in the storage room or any other merchandisers that day. She never again saw the same person who had been doing the stocking.

¶31 The deposition of Immel, who was the store manager at the time of the accident, reveals that Coca-Cola uses a smaller than normal pallet, 36" by 36," whereas the NDC warehouse, Pepsi, and Roundy's other merchandisers use a larger pallet, measuring 40" by 48." The suppliers of water in gallon containers located in the same aisle also use pallets. The size of the Coca-Cola pallets was confirmed by the affidavit of Dalton, who is the director of claims for Hondo. Immel had no idea whose pallet was involved in this accident. He did not talk to any Hondo personnel about this incident. He testified that on a typical Saturday, eight to sixteen suppliers make deliveries. There are records to verify deliveries.

From these records, it can be ascertained what deliveries would require the use of pallets and where in the store this would occur.

¶32 Hondo admitted that the only merchandiser who stocked in the store on the date of the accident was John Marlow, an African-American, who did not have sandy-brown hair. This is confirmed by the affidavit of Braun, who is a regional manger of Hondo, and who formerly supervised Marlow's work at the time of the accident. No one reported seeing Marlow in the store on March 20. Dalton averred in his affidavit that Coca-Cola merchandisers are not required to wear uniforms when working on weekends.

¶33 The essence of the Genkes' claim for negligence against Hondo is that a Hondo employee stocking Coca-Cola on Saturday morning, March 20, left a pallet in the aisle over which Ruth Genke tripped. In response to Hondo's affidavits and deposition excerpts, the Genkes submitted the entire deposition of Immel, an excerpt of Reichart's deposition, and an admission given in response to a discovery request to admit.

¶34 As recited earlier in this opinion, the second element in a negligence claim that must be fulfilled in order to successfully prosecute the claim is to demonstrate a breach of a known duty by a putative defendant. Hondo challenges the fulfillment of this requirement.

¶35 The record, as established by the affidavits, deposition testimony, admissions and pleadings unquestionably demonstrate that the only eyewitness described seeing a man attending a pallet stocking two-liter bottles, in the late morning of March 20, 1999. The man was wearing a brownish-black jacket with a Coca-Cola label on it, and he had sandy-brown hair.

¶36 This description, however, is completely at odds with the description of the Hondo employee who was assigned to the store on that day. The assigned Hondo employee was John Marlow, an African-American, who did not have sandy-brown hair. Other than by the admission, no evidence was presented that Marlow was seen anywhere in the store, much less in aisle 17. Nor was any evidence proffered to show that Hondo was mistaken as to who was assigned to the store on that date. Further, although there was evidence submitted describing the regular uniforms of the Pepsi and Seven-Up stockers, there was no additional evidence offered about the uniforms of Hondo stockers.

¶37 The ownership of the pallet also plays a role in identifying the tortfeasor. The pallet involved was a normal 40" by 48" size. There was no identifying information on the pallet. It was the size used by the NDC warehouse, Pepsi, and Roundy's. Yet, it is uncontroverted that Hondo uses a smaller 36" by 36" pallet for the purposes of stocking. Additional deposition testimony also revealed that purveyors of water in one-gallon containers also use pallets to stock in the same aisle.

¶38 Based on the foregoing, the Genkes argue that there was a factual conflict between the witnesses and the actual physical facts. The Genkes suggest that, as a result, the case should be submitted to the jury for resolution of the disputed issue. We cannot agree. Rather, we concur with the trial court that given these circumstances, it was incumbent upon the Genkes to step forward by affidavit or other approved means to show the existence of a material fact; i.e., connecting the ownership or the control of the pallet to a Hondo employee, which demonstrated unreasonable activity.

¶39 There is no dispute that Coca-Cola does not use the size pallet that was found in aisle 17 following the accident. There is no dispute that the only Hondo employee assigned to that NDC store on that day does not fit the description of the eyewitness. Based on these facts, the Genkes have failed to produce any evidence to create a material issue of fact as to whether Hondo breached a duty to Ruth Genke by leaving a pallet on the floor. Failure to satisfy this requirement is fatal to their case because a finding of negligence cannot be based upon surmise, sheer speculation, or conjecture. *See* ***1st Bank Southeast of Kenosha v. M/V Kalidas***, 670 F. Supp. 1421, 1431 (E.D. Wis. 1987). As we ruled in ***Hunzinger***, 179 Wis. 2d at 291 (citing ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986)), once the motion is made and support for it has been shown, the Genkes cannot rest upon their claim that issues for the jury exist. Rather, they must positively set forth specific facts showing that there is a genuine issue of material fact for trial. Because the Genkes have not satisfied this requirement, their appeal against Hondo fails.

By the Court.—Appeal from order dismissed; judgment affirmed.

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