COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2469 **Cir. Ct. No. 02-SC-123**

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

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

PLAINTIFF-RESPONDENT,

V.

BRIAN PARROTT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Brian Parrott appeals a grant of summary judgment by the circuit court in favor of the Department of Natural Resources

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All subsequent references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

(DNR). The DNR sued Parrott to recover costs incurred while suppressing a fire set by Parrott that burned out of control. Parrott argues that he is not liable because he was acting as an agent for the DNR at the time he set the fire. We reject Parrott's argument and affirm.

Background

¶2 Parrott owned a parcel of land in Marquette County. On May 3, 2000, Parrott applied for and received a burning permit. The application states: "YOU ARE RESPONSIBLE IF YOUR FIRE GETS AWAY. YOU BECOME LIABLE FOR ALL EXPENSES INCURRED IN SUPPRESSING A FIRE AND WILL BE RESPONSIBLE FOR ALL DAMAGE CAUSED BY THIS FIRE." On May 6, 2000, Parrott set a fire on his property, and the fire spread out of control. Personnel from a local fire department and the DNR put out the fire, at a cost of $1,702.99. The DNR sued under WIS. STAT. § 26.14 to recover the fire suppression costs.

¶3 In his brief to the circuit court, Parrott alleged that "[t]he timing of the fire and the specific conditions for conducting the fire were set by the DNR Fire Ranger" and that "[t]he fire became a wild fire because it was conducted at a time in the spring before all danger of a wild fire was past, and because it was conducted with the wind at [its] back rather than into the wind."

¶4 The circuit court granted summary judgment in favor of the DNR.

Argument

¶5 Parrott argues that summary judgment was inappropriate because a factual issue remains as to who was responsible for the fire under WIS. STAT. § 26.14(9). We review summary judgment decisions *de novo*, applying the same

methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A motion for summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, ... 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).

> [O]nce the motion is made and demonstrates the support required by the statute, the opponent does not have the luxury of resting upon its mere allegation or denials of the pleadings, but must advance specific facts showing the presence of a genuine issue for trial. In examining the affidavits for the ascertainment of evidentiary facts only that evidence may be considered "as would be admissible" at trial.

Moulas v. PBC Prods. Inc., 213 Wis. 2d 406, 410-11, 570 N.W.2d 739 (Ct. App. 1997) (quoting ***Leszczynski v. Surges***, 30 Wis. 2d 534, 539, 141 N.W.2d 261 (1966)), *aff'd*, 217 Wis. 2d 449, 576 N.W.2d 929 (1998). With these principles in mind, we now examine the submissions of the parties.

¶6 WISCONSIN STAT. § 26.14(9)(b) provides: "Any person who sets a fire on any land and allows such fire to escape and become a forest fire shall be liable for all expenses incurred in the suppression of the fire by the state or town in which the fire occurred." Parrott argues that he is not liable for the suppression costs because he is not the person responsible for setting the fire. Parrott contends that a DNR fire ranger prescribed the conditions under which he should set the fire and, therefore, Parrott was acting as an agent of the State of Wisconsin and is not liable under the theory of respondeat superior. However, Parrott has not submitted any affidavits supporting the factual allegation that he acted at the direction of a DNR fire ranger. Without any supporting evidence, Parrott's argument is meritless. *See* ***Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.***, 2001 WI

App 148, ¶48, 246 Wis. 2d 933, 632 N.W.2d 59 (summary judgment opponent may not rely on conjecture; rather, "The opponent's obligation is to counter with evidentiary materials demonstrating there is a dispute ...."), *aff'd*, 2002 WI 80, 254 Wis. 2d 77, 646 N.W.2d 777.

¶7 Based on the evidence in the record, Parrott applied for and received a permit under which he assumed liability if he was unable to control his fire. Parrott does not dispute that he set the fire, or that he allowed the fire to escape and become a wild fire. We agree with the circuit court that this case is appropriately disposed of by summary judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4 (2001-02).