COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2003

Cornelia G. Clark
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. 02-2859 Cir. Ct. No. 01-CV-546

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

FUN-WORLD 2, L.L.C.,

PLAINTIFF-APPELLANT,

ACUITY, A MUTUAL INSURANCE COMPANY,

INTERVENING PLAINTIFF-RESPONDENT,

V.

JOSEPH KONOPKA,

DEFENDANT,

CHAD REIMER, DENNIS CHALLE AND INFINITY TECHNOLOGY, INC.,

DEFENDANTS-RESPONDENTS,

ST. PAUL FIRE & CASUALTY INSURANCE COMPANY,

INTERVENING DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County: RICHARD J. DIETZ, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Fun-World 2, L.L.C., appeals a summary judgment dismissing its complaint against Infinity Technology, Inc., Dennis Challe and Chad Reimer for damages resulting from alleged unlawful access to its computer system.[1] Fun-World argues that (1) the court erroneously disregarded the affidavit of Fun-World's owner, Samuel Graham, as a "sham" affidavit; (2) genuine issues of material fact preclude summary judgment; and (3) public policy considerations do not eliminate liability. With regard to the first issue, while we are not satisfied Graham's affidavit is a "sham," the court was entitled to disregard it to the extent the affidavit was unsubstantiated opinion. Second, even without Graham's affidavit, we conclude that the record permits conflicting issues of material facts thereby precluding summary judgment against Infinity and Challe. The record does not, however, disclose disputed facts concerning Fun-World's claim against Reimer. Third, we are satisfied that public policy considerations do not require dismissal of the action against Infinity and Challe at this stage of the proceedings. Therefore, the judgment is affirmed with respect to the dismissal of Fun-World's claim against Reimer. It is reversed with respect to the dismissal of Fun-World's claims against Infinity and Challe, and remanded for further proceedings.

[1] Also parties on appeal are insurers Acuity and St. Paul Fire & Casualty Insurance Company. Because they do not raise issues separate from the parties they insure, we do not refer to them separately in this opinion.

¶2 Because the first three issues are dispositive, it is unnecessary to reach Fun-World's additional argument that the circuit court erroneously concluded the tort of negligent supervision requires proof that the employee acted within the scope of employment. Nonetheless, in the event this issue would be raised again, we conclude that when the court used the term "course of employment," it inaccurately described the element of causation.[2]

I. BACKGROUND

A. Facts[3]

¶3 Challe is an owner of Infinity, a local Internet service provider (ISP) that provides Internet access to businesses and individuals in northeast Wisconsin.[4] Infinity employed Samuel Graham from December 1996 to August 1998 as a computer technology salesman. Infinity also employed Joseph Konopka as the systems administrator from November 1996 to February 2001.

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[2] Fun-World also argued that summary judgment proceedings should have been stayed pending resolution of criminal proceeding against Konopka. Because our reversal of summary judgment against Infinity and Challe is dispositive, and on remand Konopka's prosecution may be in a different posture, we do not address the issue of a stay with respect to Fun-World's claims against them. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983). With respect to Fun-World's claim against Reimer, we are unpersuaded that Fun-World made a sufficient showing to justify a stay.

[3] Because of the lengthy record, we do not attempt an extensive factual recitation. Instead, we refer to portions of the record necessary for an adequate understanding of our discussion. To the extent it may be argued that our factual recitation emphasizes Fun-World's viewpoint, we note that this argument supports our conclusion that material facts are in dispute and that our factual recitation complies with our standard of review discussed in Part II.

[4] No argument is raised regarding a distinction between corporate and personal liability and, consequently, we do not discuss the issue.

¶4 Graham testified that Mike Kinnard, a co-owner of Infinity, told him that "if I [Graham] started a business, then basically I was going to be sorry I did that" and that Challe was "waiting to pounce …." Nonetheless, Graham left his employment with Infinity to start Fun-World,[5] originally an on-line computer game service for children that later evolved into an ISP. Graham initially hired Infinity to design and develop the website and host two gaming servers, NS1 and NS2. Konopka assisted in the work on Fun-World's servers.

¶5 Fun-World brought this action against Infinity and Challe, as well as Konopka and Konopka's friend Reimer, alleging that it was damaged when Konopka and Reimer hacked and otherwise attacked its computer systems.[6] Fun-World sought damages against Infinity and Challe for negligent supervision of its employees. It claimed that Infinity and Challe's negligent supervision of Konopka was a significant factor in causing damages.[7] As against Reimer and Konopka, Fun-World sought damages for conversion and unlawful access to stored communications.

¶6 Konopka has an extensive misdemeanor and felony record dating back to 1994, including felony negligent handling of burning materials and

[5] Graham's wife and friend were also part owners.

[6] Fun-World claimed three forms of attacks: (1) hacking, which involved illegal intrusion into Fun-World's servers; (2) spoofing; i.e., changing the domain name server so that the customer would log on and be redirected to another site; and (3) flooding; that is, sending huge volumes of messages that interrupted service for Fun-World's customers. Also, obscene and derogatory messages were posted on Fun-World's message board.

[7] Although the complaint stated other theories of liability, negligent supervision is the only theory of liability argued on appeal against Challe and Infinity.

burglary.[8] In 1998, Challe was aware that Konopka had been arrested for burglary. Nonetheless, as Infinity's sole systems administrator, Konopka had virtually exclusive control over the security and operation of Infinity's entire computer system. Some of Infinity's employees knew Konopka to be an accomplished computer hacker. He stated to at least one Infinity employee that he "had hacked into Fun-World." When Konopka was arrested in January 2001, the FBI seized computer equipment Konopka used at his residence and at Infinity. The equipment remains in FBI's custody.[9]

¶7 During 1998 and 1999, Graham contacted Infinity numerous times to complain about attacks on Fun-World's computer system and to inform Infinity that hacking was tracked "back to responsible parties which come from your ISP." In December 1999, Konopka emaileded Graham: "FYI, 'admin.itol.com' is our public shell server. That means WE are not necessarily doing anything. One of our 5000+ dialup customers might be." Graham also notified Konopka that attacks were coming from Chad Reimer. In August 1999, Konopka emaileded Challe that "we hacked [Graham's] message broad [sic]."

¶8 Infinity performed no background checks on employees, permitted non-employees to access the building and its computers, had no security personnel and did not monitor what people were doing on its premises after business hours.

[8] The trial court stated, and it is not disputed, "the entire record in this case leads to the inevitable conclusion that Joseph Konopka is a deranged criminal who commits any number of different kinds of criminal activity for his own purpose and amusement."

[9] On May 7, 2002, a federal grand jury indicted Konopka on thirteen counts, including intentionally causing damage to Fun-World's computers and intentionally intercepting email communication between Fun-World and Infinity's customers, to which Konopka entered a no contest plea. *See* ***United States of Am. v. Konopka***, No. 02-CR-87 (E.D. Wis. May 7, 2002).

One witness testified that he met Konopka through his "Teens 4 Satan" chat room,[10] and that Konopka often hosted LAN[11] parties at Infinity's building in the evenings, where he permitted his guests to use Infinity's equipment. Infinity did not monitor its employees' use of the Internet. Employees were allowed to bring their own personal computer equipment to work and to use it at work and during off-hours.

B. Summary Judgment Motions

1. Infinity's Summary Judgment Motion

¶9 Infinity moved for summary judgment, asserting that Infinity and Challe could not be found negligent in supervising Konopka because Fun-World had not established that the hacking occurred while Konopka was under Infinity's or Challe's supervision. In support of its motion, Infinity included Challe's affidavit and Graham's entire 254-page deposition.

a. Challe's affidavit

¶10 Challe's affidavit stated that to his knowledge, neither he nor any other Infinity employee had ever hacked or otherwise improperly accessed Fun-World's computer system. Also, when Graham first complained to him, he asked Graham for information to track down the perpetrators of the alleged computer attacks, but Graham never provided the requested information.

[10] Joseph Lemieux, an acquaintance of Konopka, testified that "Teens 4 Satan" is an Internet relay channel (IRC) like a chat room.

[11] The parties explain that a LAN party is where multi-player computer games are played over a local area network.

b. Graham's deposition

¶11 At his deposition, Graham testified that he had little formal education[12] and, when employed at Infinity, he was "very, very low" in informational technology skills. He testified that he had not attended any information technology courses. He also testified that he did not know whether Internet protocol (IP) addresses could be mimicked. When asked if there are ways someone could mimic the IP address of another entity, Graham responded that he was not that "knowledgeable on that kind of stuff." When asked: "Isn't it possible, sir, that there are other explanations for every reference to admin.itol.com that appear in any of these documents other than Infinity's actual use of that number," Graham answered, "I don't know." He was unable to explain how Fun-World was hacked after it installed a "firewall," deferring that question to a "better technician than me."[13] Although claiming that a program showed that Infinity was the origin of the attacks, Graham acknowledged that he did not understand what the program document stated.

¶12 When asked to define hacking, Graham explained: "Well, now that I'm well versed in hacking I really understand hacking to be an intrusion either per

[12] Infinity argues that the highest grade Graham attained in school was eighth. The record indicates that Graham obtained a GED and an associate degree in accounting from a technical college.

[13] A firewall

> is a set of interrelated programs, located at network gateway server (e.g., the entrance to the www.itol.com server) that protects the resources of a private network from users of other networks. Basically, a firewall, working closely with a router program, examines each packet of information sent through the internet to determine whether to forward it to its destination.

UDP port, TCP port, or PCMCI port, or whatever port they might want to hack in …." At one point, Graham acknowledged that he believed Konopka and Reimer changed tables on his DNS,[14] but he did not understand how they changed his tables, and stated, "I don't understand that part of it." However, he would "reboot the machine and reset the DNS table. … Actually go in and clear out the server and let it update correctly to the worldwide Web."

¶13 Graham testified that he "kept a copy of every incident within the logs." He stated that there were reports from "eSoft … from the firewall, that show hacking coming directly from Infinity Technology with the IP addresses there up until this date …." Graham stated that his logs showed that "basically some parties were trying to actually hack into other providers and use their servers to attack us." When asked to interpret documentary evidence, Graham answered,

> I'm not a hacker. I really don't know how they think or how they do things, so basically I can't answer that. I mean that would be more of like a professional to answer that type of question.

Later, Graham explained:

> Mr. Konopka trained these kids to do whatever they wanted on the Internet. You have to understand, these guys went out and hacked unmercifully other providers and then hacked you using their service. It wasn't only Infinity that they were using. They were using other – Golden.net, California servers, all over the world. I could hack into a

[14] Challe's affidavit explains:

> Domain Name Server (DNS) is the way that internet domain names (e.g., www.microsoft.com) are located and translated into internet protocol (IP) addresses. A domain name is a "handle" for an internet protocol address. An IP number is an address that identifies each sender or receiver of information that is sent in packets across the internet.

> server somewhere in China and flood your server. Does that mean it came from China? No.

¶14 On the other hand, Graham testified that he had been working with computers for many years and believed he was competent to trace the source of the computer attacks.

> [W]e did on-site work and NT installation and hubs and routers and configuration, which I handled mostly all of was the configuration of NT and networking and the interfaces and different IP routings for external IPs, internal IPs, Class C licenses, you know, stuff like that. … I was trained by, I felt, some of the best in the world, which was Cisco. … [T]hey worked with me directly over the phone because I had [bought] services, service packs for that.

When asked whether he held himself out to be a network installation and configuration expert, Graham replied that he personally felt that he was. He added that although he had no certifications, he "Just learned mostly from technicians and people like Mr. Konopka, who was the administrator from Infinity …." Later during his deposition, Graham stated: "I am a quite thorough technician now. I think I know my stuff." He testified that while at Infinity, he was very well trained and felt knowledgeable when he left there.

¶15 Graham further testified: "We were able to see where [spoofing] was coming from" and "I mean we were able to track it, you know, as much as our knowledge allowed us to at that time, yes. I mean, you know, we were able to track it back to what we felt was the initiating party …."

2. Reimer's Summary Judgment Motion

¶16 Reimer moved for summary judgment, claiming that he never engaged in hacking or any other unlawful access to Fun-World's computer system. He asserted that there was no evidence tying him to any computer attacks. He

claimed that the only evidence of record indicated that Konopka admitted to a number of individuals that Konopka himself engaged in hacking Fun-World's computer systems.

3. Fun-World's Opposition to Summary Judgment

¶17 To rebut motions for summary judgment, Fun-World sought to show a nexus between Infinity's negligent supervision of its employees, Konopka's and his cohorts' hacking activities, and Fun-World's losses, through affidavits of Graham and computer consultant Mark Hunter. Fun-World also offered other depositions, including that of James Bailey, a former Infinity employee.

a. Graham's affidavit

¶18 Graham's affidavit stated that he was very familiar with how computer systems operate and had worked with computers for over twenty years, "mostly self-taught." He also claimed to have professional experience as a computer technology salesman from 1995 to 1998. He claimed additional professional experience as owner and operator of Fun-World. From 2001 to the present, he owned and operated Comp Tech, a retail computer store. He stated: "From this experience, I knew how to trace the origin of the attacks which were coming to Fun-World's computer systems."

¶19 Graham's affidavit stated: "Initially, I traced the attacks to Chad Reimer's computer based on the origin of the Internet protocol (IP) address, which was 207.67.48.41. … Konopka advised me that this particular number belonged to Infinity." Graham further stated: "Later, I traced the attacks directly to Infinity. I know that these attacks came from Infinity because the originating IP number or address was admin.itol.com, which meant that the hacker was physically on

Infinity's premises using its servers to launch the attacks against Fun-World." Graham attached a copy of a log printed from Fun-World's NS1 server dated December 3, 2000, "showing that admin.itol.com was denied access, which meant that a person physically using the servers at Infinity was trying to gain unauthorized access to Fun-World's server."

¶20 Graham's affidavit repeated portions of his deposition testimony. Graham attached as another exhibit copies of logs from July 1999 showing messages on Fun-World's message board from "pigkillor," Reimer's on-line moniker, received from Infinity's server, admin.itol.com, "which meant that Chad Reimer was physically present using the servers at Infinity when he posted this message." Graham stated that Infinity designed the original website for the on-line gaming aspect of Fun-World and that Konopka was involved in designing an on-line ordering program. Infinity also hosted Fun-World's two servers, NS1 and NS2. Graham soon noticed that Konopka "was defacing the website and message board by putting messages on the message board such as 'Sam is a bonehead.'" At that point, Graham took back his servers and ceased doing business with Infinity.

¶21 On his second day of on-line internet server operation, Fun-World's servers were attacked. The attack took various forms, including posting pornographic messages and pictures on Fun-World's message board, such as a naked woman on a horse, a man dressed in women's clothing, or a message saying that Graham molested children.

¶22 Another form of attack involved changing the DNS tables of Fun-World's DNS servers so that when a customer attempted to dial up to Fun-World's Internet service to go to a website, the customer would end up at a

pornographic website. Another form of attack flooded the computer system with large numbers of messages so the servers would "go down."

¶23 Graham's affidavit also recounted an incident in February 1999 at a business exposition where "Konopka tried to hack into Fun-World's computer servers in order to change the DNS tables so that people using our computers at the exposition and our dial-up customers using Fun-World's website would access pornographic websites when they tried to access non-pornographic websites." Graham saw Konopka "working furiously on his laptop" and when he noticed Graham watching him, Konopka immediately closed the computer screen. When Graham checked the NS1 and NS2 servers after the exposition, he "found that the DNS tables had indeed been changed [and] I was able to trace the IP address to Infinity Technology." Graham "sustained significant business losses both from having to spend time to correcting the problems which the hacking created and from losing customers who were turned off by the pornography on Fun-World's website, which we promoted as a website for children."

b. Mark Hunter's affidavit

¶24 Fun-World retained Mark Hunter, a certified information systems security professional employed as a senior consultant with Pinkerton's Information Risk Group. He stated:

> To get a complete picture of the attacks against Fun-World's computer systems, it would be useful to analyze the hard drives of the computer systems from which the attacks originated. However, assuming that Mr. Graham was able to trace other attacks (be it hacking, spoofing, spamming or flooding) to Infinity's DNS server (ADMIN.itol.com), this would indicate that the person who was instigating these attacks was physically using Infinity's DNS server (ADMIN.itol.com). On the other hand, the person who was instigating the attacks against Fun-World's

> computer systems would not need physical access to Fun-World's computer systems.

c. James Bailey's deposition

¶25 Fun-World also offered the deposition of James Bailey, who worked at Infinity's technical service department from December 1997 to the summer of 2000. In 1998 or 1999, Konopka told him that Fun-World "would have troubles going to different sites because he did a DNS spoof on them so it would be redirected to porn sites, which I know he thought was funny and did a lot."[15] Bailey testified further: "There is [sic] other times saying that he knocked over Sam's box again …." Konopka also told Bailey that "before the [business] expo starts he's going to do something to Fun-World's computers …." Konopka made similar statements when Mike D'Amico, another Infinity employee, was present.

¶26 Bailey testified that Challe told him that "he understood what Joe [Konopka] did do outside of work and that he was a hacker and it did make him uneasy because he definitely was a valuable part of the organization." Bailey explained, "Like he wanted to keep him, but he knew of the liabilities basically around that. … [O]ne time there was an issue of Joe bringing in friends of his after work hours and sitting there at night …." He added: "Gene Gliniecki being my supervisor, he would discuss it because Joe was part of it. We were a pretty tight-knit organization, almost family there."

[15] Konopka's acquaintance, Lemieux, also testified that Konopka sent him an email that "anybody using Ultimate Fun-World, if they went to Yahoo they would be brought to beastiality.com." Lemieux also stated that on another occasion Konopka claimed responsibility for changing Fun-World's DNS tables.

¶27 In addition to D'Amico and Glinecki, Aaron Rickert and "most of the tech support guys" knew that [Konopka] was a hacker. Bailey stated that it was "just common knowledge" throughout that "subcommunity" that Konopka, known as "Dr. Chaos" was one of the elite hackers in town. Although Bailey had no direct knowledge of Konopka hacking at Infinity, Konopka did other illegal activities at Infinity, such as copying software on his own computer.

C. Court's Ruling on Summary Judgment Motions

¶28 In addressing Infinity and Reimer's summary judgment motion, the circuit court agreed with Infinity, Challe and Reimer that Graham's affidavit should be disregarded because it contradicted his deposition testimony. The court also disregarded Hunter's affidavit "because it is based on a false assumption." The court apparently was referring to Hunter's statement, "assuming Mr. Graham was able to trace other attacks (be it hacking, spoofing, spamming or flooding) to Infinity's DNS server."

¶29 The court further ruled that the "reams of documents that were submitted by the parties" fail to show that Konopka "was acting in the course of his employment." It further stated: "It is clear from the record that, at this stage of the proceedings, and with the evidence gathered so far, that the hacking could have occurred from a distant location and not from the premises of the defendant, Infinity Technology." The court concluded that the record was devoid of evidence from which any reasonable inference could be drawn that "Konopka, while in the employ of Infinity Technology, and in the course of his employment, committed a wrongful act for which Infinity should be held liable" based upon their negligence in hiring, training or supervising. It determined that absent this critical element, Fun-World's negligence claims against Infinity could not stand.

¶30 The court further stated that as a matter of public policy, Infinity should not be held liable on a claim of negligent supervision because "This legal theory is exactly the type of field that has no sensible or just stopping point …." In addition, it concluded that there was no proof that any tortious conduct by Reimer injured Fun-World and therefore dismissed the action against Reimer. The court denied Fun-World a stay to develop its proofs. Finally, the court denied Infinity, Challe, Reimer and the insurance companies' motions for sanctions for filing a frivolous action pursuant to WIS. STAT. § 814.025.

II. STANDARD OF REVIEW

¶31 It has often been stated "summary judgment is a drastic remedy and should not be granted unless the material facts are not in dispute, no competing inferences can arise, and the law that resolves the issue is clear." ***Lecus v. American Mut. Ins. Co.***, 81 Wis. 2d 183, 189, 260 N.W.2d 241 (1977). Summary judgment does not permit "a trial on affidavits and depositions." ***Id.***

¶32 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). On summary judgment, a court must view the facts in the light most favorable to the non-moving party. ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 512, 383 N.W.2d 916 (Ct. App. 1986).

> On summary judgment the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine

> issue of material fact should be resolved against the party moving for summary judgment.

Energy Complexes, Inc. v. Eau Claire County, 152 Wis. 2d 453, 461-62, 449 N.W.2d 35 (1989). The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980). "If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment." ***Id.*** at 339.

¶33 While the existence of negligence is a mixed question of law and fact that is generally left to the jury, *see* ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis. 2d 723, 732, 275 N.W.2d 660 (1979), when an essential element of a claim cannot be proved, under any view of the evidence, summary judgment is appropriate. *See* ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 233, 568 N.W.2d 31 (Ct. App. 1997). A court does not decide credibility issues in ruling on a motion for summary judgment. *See* ***Pomplun v. Rockwell Int'l Corp.***, 203 Wis. 2d 303, 306-07, 552 N.W.2d 632 (Ct. App. 1996). Nonetheless, a circuit court must evaluate the parties' affidavits to determine whether they "set forth such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3).[16]

[16] On summary judgment, "Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3). Also, an adverse party's response to summary judgment, "by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial." ***Id.*** "If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party." ***Id.***

III. ISSUES

A. "Sham" Affidavit

¶34 Fun-World argues that the trial court erroneously disregarded Graham's affidavit as a "sham" affidavit. Because Graham's affidavit is consistent with portions of his deposition, we conclude that his affidavit is not a "sham" under ***Yahnke v. Carson***, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102.

¶35 In ***Yahnke,*** our supreme court adopted the federal "sham" affidavit rule: "[T]he ability to create trial issues by submitting affidavits in direct contradiction of deposition testimony reduces the effectiveness of summary judgment as a tool for separating the genuine factual disputes from the ones that are not, and undermines summary judgment's purpose of avoiding unnecessary trials." ***Id.***, ¶11. Consequently, an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial unless the contradiction is adequately explained. ***Id.***, ¶12. If unexplained, the affidavit is considered a "sham" affidavit. ***Id.***, ¶11.

¶36 Here, Infinity and Challe claim that Graham's entire affidavit should be disregarded as a sham. They rely on portions of Graham's deposition where he disavows expertise to explain the source of the computer attacks. They argue that his deposition directly contradicts his affidavit. The problem with this analysis is that it neglects portions of Graham's deposition where he claims expertise in determining the source of the attacks.

¶37 We are not persuaded that Graham's affidavit directly contradicts his deposition. Conflicting inferences may be drawn from Graham's deposition. On

the one hand, he unequivocally attests that he can trace the computer attacks to Infinity. On the other, he himself draws his own qualifications into question. Therefore, his deposition is not conclusive. When portions of an affidavit are arguably contradictory to certain portions of a deposition but consistent with other portions, we are not convinced the affidavit is a sham. We conclude that because his deposition is equivocal, his affidavit cannot be considered a sham under ***Yahnke***.

¶38 This is not to say that unsubstantiated personal opinions are sufficient to create an issue of fact. *See* WIS. STAT. § 802.08(3). "An affidavit opposing a motion for summary judgment is insufficient if it sets forth only opinion." ***Yahnke***, 236 Wis. 2d 257, ¶12. Personal opinions, in the absence of a validating basis, do not constitute evidentiary facts. ***Id.*** Without adequate foundation to support opinions, they cannot stand as evidentiary facts. ***Id.*** Consequently, we will disregard unsubstantiated opinions contained in Graham's affidavit. Similarly, Hunter's affidavit may be disregarded to the extent it relied on assumptions. *See* ***Bituminous Cas. Corp. v. United Military Supply Inc.***, 69 Wis. 2d 426, 433, 230 N.W. 2d 764 (1975). We see no reason, however, to disregard the portions of Graham's or Hunter's affidavits based upon their direct observations.

B. DISPUTES OF MATERIAL FACT

1. Fun-World's Negligent Supervision Claim Against Infinity and Challe

¶39 Fun-World argues that disputes of material facts preclude summary judgment in favor of Infinity and Challe. We agree. Even without Graham's conclusions and Hunter's assumptions offered in their affidavits, we are satisfied

that other summary judgment proofs give rise to conflicting inferences concerning Fun-World's claim of negligent supervision against Infinity and Challe.

a. Disputes regarding Graham's expert qualifications

¶40 At the outset, Infinity's arguments imply that due to Graham's inconsistent deposition, he is not qualified to offer an opinion as to the source of computer attacks on Fun-World and, therefore, his deposition must be entirely disregarded. However, as Infinity readily admits, Graham's deposition on this issue is "clearly conflicting." Graham testified to his qualifications based upon expertise derived from working in the computer field.[17]

¶41 We reject this argument because it asks us to resolve a factual dispute with respect to Graham's qualifications to render expert testimony. Wisconsin courts recognize lay experts as persons whose expertise or special

[17] WISCONSIN STAT. § 907.02 provides:

> **Testimony by experts.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

A witness qualifies as an expert by "knowledge, skill, experience, training, or education …." WIS. STAT. RULE 907.02. The qualification of an expert depends on experience, not on more formal attributes such as professional licensure. ***Martindale v. Ripp***, 2001 WI 113, ¶44, 246 Wis. 2d 67, 629 N.W.2d 698. "A witness must be qualified to answer the question put to him." ***Id.*** "[A] witness who is eminently qualified on one subject may not be sufficiently qualified to give helpful testimony on another, albeit related, issue in the case." 7 DANIEL D. BLINKA, *Wisconsin Practice Evidence* § 702.4, at 371 (2001) (citing ***Lemberger v. Koehring Co.***, 63 Wis. 2d 210, 216 N.W.2d 542 (1974)). A related issue that turns on Graham's qualification as an expert is whether, under WIS. STAT. RULE 907.03, he may rely in part on an FBI report for his opinion. "The facts upon which an expert bases an opinion or inference may be those perceived by or made known to the expert before the hearing." ***Martindale***, 246 Wis. 2d 67, ¶50. Because this issue was not briefed, we do not address it on appeal.

competence derives from experience working in a field of endeavor rather than from studies or diplomas. ***Netzel v. State Sand & Gravel Co.***, 51 Wis. 2d 1, 7-8, 186 N.W.2d 258 (1971).

¶42 "The qualification of an expert witness to testify on an issue is a preliminary question of fact for the circuit court to decide under WIS. STAT. § 901.04(1)." ***Martindale v. Ripp***, 2001 WI 113, ¶45, 246 Wis. 2d 67, 629 N.W.2d 698 (citing 7 DANIEL D. BLINKA, *Wisconsin Practice Evidence* § 702.4, at 369 (2001)). ***Martindale*** continues: "The determination of a witness's qualifications to offer an expert opinion is normally a decision left to the discretion of the circuit court." ***Id.***

¶43 Whether characterized as factual or discretionary, the determination must rely on factual underpinnings. While at some points in his deposition Graham deferred to experts, he also asserted he was qualified based upon expertise derived from working in the computer field. Although Graham questioned his own qualifications, his testimony raises conflicting inferences concerning his qualifications and, therefore, whether he was able to trace the source of the computer attacks.

¶44 We are unconvinced we must strike portions of Graham's deposition regarding his qualifications simply because it conflicts with others. Rather, it is a trial court's fact-finding function to resolve inconsistencies. *See* ***id.*** Disputes concerning Graham's level of expertise and qualifications to render expert testimony are factual issues unsuitable for summary judgment resolution.

b. Disputes regarding elements of negligent supervision.

¶45 To establish the tort of negligent supervision, four elements must be shown: (1) the employer has a duty of care; (2) the employer breached that duty; (3) the act of the employee was a cause-in-fact of the plaintiff's injury and the act or omission of the employer was a cause-in-fact of the wrongful act of the employee; and (4) an actual loss or damage must result. ***Miller v. Wal-Mart***, 219 Wis. 2d 250, 267-68, 580 N.W.2d 233 (1998). The employer's liability does not result solely because of the relationship of the employer and employee, but instead because of the employer's independent negligence. ***L.L.N. v. Clauder***, 209 Wis. 2d 674, 698-99 n.21, 563 N.W.2d 434 (1997).

¶46 A defendant's duty is established when it can be said that it was foreseeable that the act or omission to act may cause someone harm. ***Miller***, 219 Wis. 2d at 260. When an employer negligently hires, trains or supervises its employees, it breaches a duty to customers. ***Id.*** at 261. An employer is liable for negligent supervision only if the employer knew or should have known the employee would subject a third party to an unreasonable risk of harm. ***L.L.N.***, 209 Wis. 2d at 698-99.

¶47 Liability results because the employer antecedently had reason to believe an undue risk of harm would exist because of employment. ***Id.*** If "the risk exists because of the quality of the employee, there is liability only to the extent that the harm is caused by the quality of the employee which the employer had reason to suppose would be likely to cause harm." ***Id.***

¶48 Here, the parties focus on the cause element. "Regarding cause-in-fact, the test is whether the negligence was a substantial factor in producing the injury." ***Id.*** at 261-62. "[T]here can be more than one substantial factor

contributing to the same result and thus more than one cause-in-fact." ***Id.*** "If reasonable people could differ on whether the defendant's negligence was a cause-in-fact of the plaintiff's injuries, the question is one for the jury." ***Id.*** "The determination of cause-in-fact is a question for the court only if reasonable people could not disagree." ***Id.*** "The act of the employee, whether intentional or unintentional, must be causal to the injury sustained. But equally important, the negligence of the employer must be connected to the act of the employee." ***Id.*** at 262.

¶49 "In other words, there must be a nexus between the negligent … supervision and the act of the employee." ***Id.*** A two-part inquiry must be satisfied: (1) did the employee's wrongful act cause the plaintiff's injury and (2) was the employer's negligence a cause of the employee's wrongful act. ***Id.*** "[T]he negligence of the employer must be connected to the act of the employee." ***Id.*** "[I]f the wrongful act of the employee was a cause-in-fact of the plaintiff's injury, then the trier of fact must further determine if the failure of the employer to exercise due care in the ... supervision of the employee was a cause-in-fact of the act of the employee which caused the injury." ***Id.*** at 262-63.

¶50 We conclude the record permits reasonable people to disagree whether Infinity's and Challe's failure to exercise due care was a cause-in-fact of Konopka's wrongful act that in turn caused Fun-World's injury. First, if Bailey's, D'Amico's, Lemieux's and Graham's testimony is to be believed, the record permits an inference that Konopka, an employee of Infinity, engaged in a series of wrongful acts to interfere with Fun-World's computer system.

¶51 This brings us to the second question, which is at the heart of the dispute. "[I]f the wrongful act of the employee was a cause-in-fact of the

plaintiff's injury, then the trier of fact must further determine if the failure of the employer to exercise due care in the ... supervision of the employee was a cause-in-fact of the act of the employee which caused the injury." ***Id.*** at 262-63. We conclude that if believed, Graham's deposition, along with other proofs of record, permit reasonable people to disagree about the answer to this question.

¶52 Infinity and Challe contend that the record fails to show "any connection between Konopka's role as Infinity's Systems Administrator and any of the alleged hacking attacks." If believed, Graham's and Bailey's depositions permit competing inferences regarding Konopka's use of Infinity's technology to attack Fun-World and the extent of Infinity's and Challe's complicity in his wrongful acts. Konopka, a known hacker and convicted felon, was, as the court pointed out, "a deranged criminal" who wreaked havoc for his own amusement. Konopka was provided unlimited and unsupervised access to Infinity's computer system. Bailey testified that Konopka admitted hacking Fun-World in the presence of other Infinity employees. Konopka also sent Challe an email about hacking Fun-World's message board. Challe knew that Graham accused Infinity as being a source of hacking. In addition, Bailey testified that Challe told him that he understood what Konopka did outside work, that Konopka was a hacker, and it made him uneasy. According to Bailey, Challe knew "of the liabilities basically around that … there was an issue of Joe bringing in friends of his after work hours and sitting there at night."

¶53 Also, Infinity's supervisor, "Gene Glinecki …. would discuss it because [Konopka] was part of it. We were a pretty tight-knit organization, almost family there." In addition to D'Amico and Glinecki, Aaron Rickert and "most of the tech support guys" knew that Konopka was a hacker. Bailey stated that it was "just common knowledge" throughout that "subcommunity" that

Konopka, "known as Dr. Chaos, is one of the elite hackers in town." Although Bailey had no direct knowledge of Konopka hacking while on Infinity's premises, he knew Konopka carried on other illegal activities at Infinity, such as copying software on his own machine. The record permits the inferences that Challe knew Fun-World was allegedly being hacked, he knew Fun-World claimed the hacking originated at Infinity and he knew Konopka was a hacker.

¶54 In addition, Graham attested that he had been threatened not to start a computer business competitive with Infinity and that he discovered evidence showing Infinity as the source of the computer attacks. Graham testified he traced computer attacks to Infinity's computers. We conclude that Graham's and Bailey's depositions are sufficient to permit reasonable persons to disagree whether Konopka used Infinity's computer technology to attack Fun-World, whether Infinity had reason to know he did so, whether it supervised or regulated his activities. Thus, the record permits reasonable people to disagree whether Infinity's and Challe's failure to exercise due care in supervising Konopka and the use of Infinity's technology was a cause-in-fact of Konopka's wrongful acts that in turn caused Fun-World's injury. *See* ***Miller***, 219 Wis. 2d at 262-63.

¶55 Infinity and Challe claim: "Fun-World produced no evidence to even suggest that any *successful* hacking attack emanated from Infinity or that equipment that he had access to by virtue of his role as Infinity's systems administrator facilitated any of the alleged hacking attacks." We disagree. "Negligence may, like other facts, be proved by circumstantial evidence, which is evidence of one fact from which the existence of the fact from to be determined may reasonably be inferred." ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25 ¶3, 241 Wis. 2d 804, 623 N.W.2d 751. Although Graham's documentary evidence may have shown only attempted intrusions, his deposition, along with other

witnesses, support conflicting inferences whether successful intrusions emanated from Infinity and its equipment.[18]

¶56 Infinity and Challe further suggest that because the record indicates the hacking may have occurred from a distant location and not from Infinity's premises, they are entitled to summary judgment. We disagree. Infinity's suggestion is just one of several inferences. It does not eliminate material disputes of fact concerning Konopka's use of Infinity's premises or equipment to launch his attack on Fun-World.

¶57 Infinity and Challe also contend that they have no duty to supervise or uncover an "employee's concealed, clandestine or personal activities," citing ***Tichenor v. Roman Catholic Church of the Archdiocese***, 32 F.3d 953, 960 (5th Cir. 1994). Contained in the duty to exercise reasonable diligence is the duty to inquire. ***Doe v. Archdiocese of Milw.***, 211 Wis. 2d 312, 318-19, 340, 565 N.W.2d 94 (1997) ("Plaintiffs may not ignore means of information reasonably available to them, but must in good faith apply their attention to those particulars which may be inferred to be within their reach."); ***Spitler v. Dean***, 148 Wis. 2d 630, 638, 436 N.W.2d 308 (1989) ("Plaintiffs may not close their eyes to means of information reasonably accessible to them and must in good faith apply their attention to those particulars which may be inferred to be within their reach."). Infinity and Challe's arguments ignore this duty. Because the record permits competing inferences regarding the degree to which Konopka's actions were concealed, clandestine or personal, we reject this argument.

[18] No potential issue concerning hearsay is sufficiently developed to permit appellate review.

2. Fun-World's Claims Against Reimer

¶58 Reimer argues that Fun-World has no evidence showing that Reimer participated in anything other than sending tasteless messages to Fun-World's message board or making unsuccessful hacking attempts. Reimer argues there is no showing that his conduct was tortious or damaged Fun-World and, therefore, the trial court properly entered summary judgment dismissing Fun-World's claims against Reimer.

¶59 Fun-World, on the other hand, contends that Graham's deposition testimony leads to inferences that Reimer participated with Konopka in hacking, flooding and spoofing its computer system, causing inordinate amounts of time responding to the attacks, and ultimately going out of business due to losing too many of its customers. Graham stated that he had "to focus our direction in stopping the hacking, the spoofing and protecting our customers" other than building Fun-World. He stated that flooding the message board "physically knocked us down … they were actually shutting down our gaming."

¶60 Our review of the record leads us to conclude that Fun-World has not linked the unlawful computer attacks to Reimer. The portions of the record cited in Fun-World's brief do not indicate tortious conduct. Reimer admitted that he visited Konopka at Infinity to play games on the network or to bring his computer in for Konopka to fix. He went after business hours, "at, like 11:00 at night because I sat up all night trying to fix my computer and he would say bring it down and I would stop down at that time." Reimer denied that he told investigators that Konopka trained others on various forms of hacking. Although there is evidence Reimer posted, in the words of the trial court, "tasteless, even disgusting" messages on Fun-World's message board, even Graham admitted that

posting messages was not actionable. We conclude that the trial court correctly dismissed Fun-World's claims against Reimer.

C. Public Policy Considerations

¶61 Fun-World argues that the trial court erroneously relied on public policy considerations to dismiss its claims against Infinity and Challe. The trial court stated that it dismissed Fun-World's claim of negligent supervision because "this legal theory is exactly the type of field that has no sensible or just stopping point." Because the record shows disputed material facts, we conclude that the court erroneously applied public policy considerations to eliminate Infinity's and Challe's liability.

¶62 Our supreme court recently held:

> After negligence has been found, a court may nevertheless limit liability for public policy reasons. The public policy considerations that may preclude liability are: (1) the injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the tortfeasor's culpability; (3) in retrospect it appears too highly extraordinary that the negligence should have resulted in the harm; (4) allowing recovery would place too unreasonable a burden on the tortfeasor; (5) allowing recovery would be too likely to open the way for fraudulent claims; [or] (6) allowing recovery would enter a field that has no sensible or just stopping point.
>
> In most cases, the better practice is to submit the case to the jury before determining whether the public policy considerations preclude liability. Only in those cases where the facts are simple to ascertain and the public policy questions have been fully presented may a court review public policy and preclude liability before trial.

Alvarado v. Sersch, 2003 WI 55, ¶¶17-18, 662 N.W. 2d 350 (citations omitted).

¶63 The issues in this case are complex and the factual connections attenuated. The record permits conflicting inferences regarding the tort of negligent supervision, and the case is inappropriate for summary judgment. We conclude that to have "findings as to actual negligence, damage, and the causal relationship between them would be material and helpful in evaluating the public policy considerations." ***Id.***, ¶24. Accordingly, it is inappropriate to limit liability before the court has "the benefit of a full presentation of facts or a jury's verdict on negligence." ***Id.***, ¶28.

D. Course of Employment

¶64 Fun-World argues that the trial court relied on an erroneous view of the law when it held that the tort of employer's negligent supervision requires the employee to be acting within the "scope of employment." We conclude Fun-World's characterization of the trial court's holding is incomplete.

¶65 The trial court ruled: "[W]hat must be a critical element of the tort of negligent supervision is that the alleged wrongdoer was acting in the course of the wrongdoer's employment." It also stated: "What is assumed in the facts in ***Miller***, and not discussed at any great length thereafter, because the fact is obvious, and what must be a critical element of the tort of negligent supervision, is that the alleged wrongdoer was acting the course of the wrongdoer's employment." The court then explained that the "'nexus' that Justice Bablitch discusses at some length in ***Miller***" must be present.

¶66 The court's immediate reference to "nexus" indicates that the court correctly observed under ***Miller,*** 219 Wis. 2d at 262-63, an employer's negligence must be a cause of the employee's wrongful act. However, the court's reference to the term "course of employment" is not helpful to the analysis. The term is not

used in ***Miller*** and is more closely related to other theories of liability rather than negligent supervision. On remand, the element of cause as defined in ***Miller*** should be applied.

III. Conclusion

¶67 We conclude that Graham's affidavit in opposition to summary judgment does not directly contradict his deposition testimony and therefore is not a sham affidavit. Nonetheless, its unsubstantiated personal opinions are not sufficient to raise an issue of material fact. WIS. STAT. § 802.08(3). However, Graham's deposition raises issues of material fact because conflicting inferences may be drawn regarding his qualifications to provide expert testimony concerning the source of the computer attacks. We further conclude that, if believed, Graham's testimony, along with the testimony of Bailey, Hunter, and other proofs of record, give rise to issues of material fact whether Infinity and Challe are liable on Fun-World's negligent supervision claim. Because there are material issues of fact, public policy considerations to eliminate liability should not be applied at this stage of proceedings. We therefore reverse the summary judgment in favor of Infinity and Challe.

¶68 We further conclude that the record reveals no support for Reimer's liability. Therefore, the court properly entered summary judgment dismissing Fun-World's claims against Reimer. Although the preceding issues are dispositive, we further note that the elements of proof set out in ***Miller*** do not include the element of course of employment, but rather a causal connection between the employer's negligence and the employee's wrongful act.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded. Costs awarded to Reimer from Fun-World, and to Fun-World from Challe and Infinity.

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