

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2011

A. John Voelker
Acting 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. 2010AP989

Cir. Ct. No. 2008CV650

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WEST BEND MUTUAL INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

V.

INTERCON CONSTRUCTION, INC. AND ARCH INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. West Bend Mutual Insurance Company appeals a summary judgment dismissing its negligence claim against InterCon Construction, Inc., and Arch Insurance Company (collectively “InterCon”). We conclude

summary judgment was inappropriate because the record viewed in the light most favorable to West Bend raises competing inferences concerning material facts. We therefore reverse and remand for further proceedings.

¶2 This case arises out of a sewer backup. West Bend Mutual insured Pember Companies, Inc., which was replacing sewer and water mains in the City of St. Croix Falls during the summer of 2007. Pember utilized a temporary sewer line to allow continuous sewage flow from businesses and residences while it dug ditches and installed new lines between manholes.

¶3 Pember's bypass system, consisting of six-inch flexible hoses, had been in place for at least a month. On the day of the sewage backup, InterCon was installing gas lines. InterCon informed Pember that it was going to be digging in the area and needed to move a Pember bypass hose.

¶4 At this point, the testimony of the two main witnesses diverges. InterCon foreman James Espeseth and Pember foreman Kevin Pigman were the primary witnesses to the events that transpired. Pigman claims that he told Espeseth he would allow the hose to be moved as long as he did not kink it, "otherwise it would obstruct the flow." Pigman also testified, "He didn't tell me he was going to be digging a ... 12-foot long ditch by 2 feet by 3 feet deep. He just told me he needed to move my hose out of the way." InterCon was digging in the area for at least an hour. Pigman was working elsewhere on Pember's project and did not speak to Espeseth personally while he was digging or supervise Espeseth's relocating of the hose.

¶5 Pigman first became aware that there was a problem when a motorist alerted him sewage was flowing from a manhole. Pigman discovered the cause of the backup when he followed the bypass hose and found it collapsed and kinked in

the trench dug by InterCon. When Pigman found the kinked hose, he discovered that InterCon had not filled in the trench and InterCon's backhoe was gone. Pigman pulled the hose out of the trench and placed it in such a way as to take out the kink, alleviating the backup. Pigman later approached Espeseth and explained, "I told him that he had dug a ditch and my hose collapsed in his ditch which caused the pump not to be able to pump because it was kinked."

¶6 Conversely, Espeseth testified that he asked Pigman to move the entire bypass system to the other side of the street and Pigman refused. However, Pigman did say Espeseth could move the hose in order to dig. According to Espeseth, Pigman did not tell him the hose could kink. Pigman told Espeseth the hose contained sewage and Espeseth was aware the hose contained sewage because he observed it.

¶7 Espeseth stated that InterCon used its backhoe to dig under Pember's hose, causing Pember's hose to drape across its trench. After installing the gas line, Espeseth testified he needed to backfill the trench, requiring Pember's hose to be moved. Espeseth contends he moved the hose and took care to make sure the hose did not kink when he moved it. Espeseth did not backfill the entire trench, but claimed he moved the hose five to six feet from the exposed, open area. After moving Pember's hose, Espeseth left the immediate vicinity but did not communicate that fact to Pigman. When Pigman told Espeseth that he found the kinked hose in InterCon's trench, Espeseth claimed it was not his fault because he had placed the hose onto a "flat spot that I had backfilled," and "we didn't have a ditch there." Furthermore, Espeseth claimed the trench was only eighteen inches wide.

¶8 West Bend commenced a negligence action, alleging that InterCon negligently moved and placed the bypass hose in a manner which resulted in the hose being kinked, causing \$69,545.79 in damages to three residences. InterCon moved for summary judgment, which the circuit court granted. West Bend now appeals.

¶9 We review the circuit court’s grant of summary judgment using the same methodology as the circuit court. *City of Beaver Dam v. Cromheecke*, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). That methodology is well-known and need not be repeated 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. WIS. STAT. § 802.08(2) (2009-10); *Beaver Dam*, 222 Wis. 2d at 613. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the summary judgment motion, and doubts as to the existence of a genuine issue of material fact are resolved against the moving party. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶23, 241 Wis. 2d 804, 623 N.W.2d 751.

¶10 In order to constitute a cause of action for negligence, there must exist: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of injury. *See id.*, ¶28. Negligence is ordinarily an issue for the factfinder and not for summary judgment. *Id.*, ¶2. Because of the “peculiarly elusive nature” of negligence and the necessity that the trier of fact pass upon the reasonableness of the conduct in determining whether it constitutes negligence, it is the rare negligence case which can be disposed of by summary judgment, even where the historical facts are concededly undisputed. *See id.*

¶11 Causation is a question of whether the breach of duty is a substantial factor in causing the harm from which the damages are claimed. *Fondell v. Lucky Stores, Inc.*, 85 Wis. 2d 220, 227, 270 N.W.2d 205 (1978). If a defendant is negligent, he or she is liable for all the reasonably foreseeable consequences that flow therefrom, either immediately or thereafter. *Johnson v. Heintz*, 61 Wis. 2d 585, 601, 213 N.W.2d 85 (1973).

¶12 InterCon argues that the record fails to establish a duty to prevent the kink. InterCon insists the scope of its duty did not include assuming responsibility for the functioning of Pember's temporary bypass system. InterCon argues that Pigman's testimony established that the system was under Pember's complete control. InterCon further asserts there could be any number of causes for the failure of the bypass system and no evidence established that InterCon caused the kink. InterCon contends that the record contains "nothing more than speculation and conclusory allegations as to how the failure in its bypass system occurred, and even more speculation tying the sewage backup to InterCon."

¶13 However, viewing the evidence in the light most favorable to West Bend, as we are required to do on summary judgment, material questions of fact arise regarding a duty to move the bypass hose in a manner that would prevent kinking. If the jury believed Pigman's version of events, Espeseth was told he could move the hose as long as he did not kink it. Pigman also told Espeseth that a kink in the line would obstruct the flow of the hose, which Espeseth knew contained sewage. Although Pigman testified that Pember was responsible for the bypass hose system in the weeks preceding the sewage backup, a reasonable jury could infer that on the day of the backup Espeseth assumed responsibility for moving the hose to facilitate its trenching operation.

¶14 Pigman’s testimony also leads to a reasonable inference that InterCon breached its duty of care and caused the damages. After Pigman was alerted to a potential problem, he followed the hose and found it kinked in InterCon’s trench that was not backfilled. Moreover, Pigman was disclosed as an expert witness and testified that the kinked hose caused the sewage to backup. It is not dispositive for purposes of summary judgment that there could be other causes for the failure in the sewage bypass system. Accordingly, summary judgment was inappropriate because the record viewed in the light most favorable to West Bend raises competing inferences concerning material facts.

¶15 InterCon also argues that West Bend raises for the first time on appeal its theory that InterCon’s negligence arises out of Espeseth digging underneath the hose, allowing the hose to drape across the trench and kink. We are not persuaded. First, InterCon claims without record citation that “[West Bend’s] theory below was that InterCon moved the hose around the trench, and was negligent in doing so.” We will not search the record for evidence to support a party’s arguments, and therefore will not further consider the argument. *See Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463.

¶16 In any event, West Bend maintained in the circuit court that InterCon’s negligence in moving the bypass hose caused the backup and resulting damages. In its brief in opposition to summary judgment, West Bend stated, “Based on Mr. Pigman’s deposition it is clear the cause of the sewer backup was a kink in the sewer bypass hose.” West Bend also stated, “[A]t some point, InterCon had either draped the hose across the ditch they were digging or let it fall into the ditch. This caused a kink which caused the sewage in the bypass line to backup.”

¶17 Accordingly, viewing the evidence in the light most favorable to West Bend, we conclude that competing inferences were raised that would allow a jury to conclude InterCon's negligence caused the damages resulting from the sewage backup. Summary judgment was therefore inappropriate.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

