**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**October 6, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP2415** **Cir. Ct. No. 2009CV172**

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

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**VICTOR KING,**

**PLAINTIFF-APPELLANT,**

**V.**

**TIMOTHY FAUBEL, CHIZEK ELEVATOR & TRANSPORT, INC. AND DISCOVER PROPERTY & CASUALTY INSURANCE COMPANY,**

**DEFENDANTS-RESPONDENTS,**

**FOODLINER, INC. AND COTTINGHAM & BUTLER CLAIMS SERVICES, INC. AS THIRD PARTY ADMINISTRATOR FOR ZURICH INSURANCE COMPANY,**

**THIRD-PARTY DEFENDANTS-SUBROGATED-PARTIES-RESPONDENTS.**

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APPEAL from an order of the circuit court for Clark County: JON M. COUNSELL, Judge. *Reversed and cause remanded.*

Before Lundsten P.J., Vergeront and Blanchard, JJ.

¶1 BLANCHARD, J. Victor King appeals a circuit court order dismissing his negligence claims against Timothy Faubel and other defendants after the court granted summary judgment in the defendants' favor.[1] King's claims arose from an accident in which King's vehicle struck Faubel's vehicle after Faubel parked on a highway exit ramp during the early morning hours. King argues that the circuit court erred in granting summary judgment because the court resolved genuine issues of material fact against him that should be left for the jury, and further erred in concluding that, as a matter of law, King was negligent and King was more negligent than Faubel. We agree with King. We therefore reverse the court's order and remand for further proceedings.

## BACKGROUND

¶2 In his complaint, King alleged that the accident resulted in whole or in part from Faubel's negligence. Faubel asserted as an affirmative defense that King's negligence was the sole cause of the accident.

¶3 King was deposed and testified in part as follows. On the night of the accident, he was driving his tractor-trailer on a state highway. It was snowing, reducing visibility to roughly half a mile or three quarters of a mile. King pulled off the highway onto an exit ramp, where he struck the back of Faubel's parked vehicle, also a tractor-trailer.

[1] The other defendants include Faubel's employer and its insurer.

¶4 On the topic of whether King saw Faubel's vehicle before impact, King gave inconsistent testimony. At one point he testified, "[a]ll of a sudden here is this big old black box in front of me and it's dark out and no lights on and [I] didn't have any time to react." However, he also testified that he did not see Faubel's vehicle before impact.

¶5 Regarding the location of Faubel's rig at the time of impact, King testified that it was "not totally off the surface" and that, because snow was "piled up on the shoulders" at the time of the early morning crash, the rig "could not get all the way off the ramp."

¶6 Faubel was also deposed and testified in part as follows. When Faubel parked on the highway exit ramp, he turned off his headlights but left his "marker lamps" on and activated his "four-way flasher[s]." Faubel further testified that he was parked off the "driven path" of the ramp, which he explained meant that he was on the shoulder of the ramp or "off, beyond the [fog] line."[2] He conceded that he was later cited and found guilty for parking on the ramp area, a posted no-parking zone.

¶7 Faubel retained an accident reconstruction expert. While reconstruction was complicated by the fact that immediately after the collision Faubel drove to a nearby truckstop for help before anyone else arrived, the expert opined that at the time of impact Faubel's vehicle was parked fully on the asphalt or gravel shoulder area of the ramp, "not invading the travel lane."

[2] It is apparent from the context of Faubel's testimony that Faubel's reference to "the line" meant the fog line.

¶8 Faubel moved for summary judgment. The circuit court granted Faubel's motion after concluding as a matter of law that King "drove into the rear of a lighted vehicle parked off the travelled portion of the road surface." The court also concluded, as a matter of law, that both King and Faubel were negligent, but that King was more negligent then Faubel. The court therefore dismissed Faubel's claims.[3]

## STANDARD OF REVIEW

¶9 We review a grant of summary judgment de novo, applying the same methods as the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). A party is entitled to summary judgment under WIS. STAT. § 802.08(2) "'if 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 judgment as a matter of law.'" ***Voss v. City of Middleton***, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991) (citation omitted). "An issue of fact is genuine if a reasonable jury could find for the nonmoving party." ***Central Corp. v. Research Prods. Corp.***, 2004 WI 76, ¶19, 272 Wis. 2d 561, 681 N.W.2d 178.

¶10 The court's role in summary judgment is not to choose among competing reasonable inferences. Rather, "[w]e draw all reasonable inferences from the evidence in favor of the nonmoving party." ***H&R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (Ct. App.

[3] There is no dispute that, under WIS. STAT. § 895.045(1) (2009-10), King cannot recover against Faubel as a matter of law if King was more causally negligent than Faubel. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

2007), *review denied*, 2010 WI 5, 322 Wis. 2d 123, 779 N.W.2d 176. "Whether an inference is reasonable is a question of law, as is whether there is more than one reasonable inference." ***Wisconsin Chiropractic Ass'n v. Chiropractic Exam. Bd.***, 2004 WI App 30, ¶33 n.12, 269 Wis. 2d 837, 676 N.W.2d 580. If reasonable but differing inferences can be drawn from undisputed facts, then summary judgment should not be granted. ***Delmore v. American Family Mut. Ins. Co.***, 118 Wis. 2d 510, 516, 348 N.W.2d 151 (1984).

## DISCUSSION

¶11 We begin with the first part of King's argument, namely, that the circuit court erred in granting summary judgment because the court resolved genuine issues of material fact. We then address King's related argument that the court erred in concluding, as a matter of law, that both of the following are the only reasonable inferences from the evidence submitted on summary judgment: (1) King was negligent, and (2) King was more negligent than Faubel. For the reasons discussed below, with agree with King on both arguments.

### A. Genuine Issues of Material Fact

¶12 King argues that the court reached the above conclusions because it erred in resolving two particular genuine issues of material fact against him: (1) whether Faubel's vehicle was lighted at the time of impact, and (2) whether Faubel's vehicle was completely outside the travel lane at the time of the accident. We address each in turn and agree with King that there is more than one

reasonable inference that can be reached from the evidence on each of these two issues.[4]

### 1. Whether Faubel's Parked Vehicle Was Lighted

¶13 The circuit court concluded that King "drove into the rear of a *lighted* vehicle …." (Emphasis added.) We agree with King that this conclusion improperly resolved a genuine issue of material fact because the summary judgment record includes conflicting facts and competing inferences on this point. Although Faubel testified that he had "marker lamps" and "four-way flasher[s]" on, other testimony raises a reasonable inference to the contrary.

¶14 As noted above, King testified that "all of a sudden here is this big old black box in front of me and it's dark out and no lights on and [I] didn't have any time to react." King further testified that he believed Faubel's lights were not on because "it was just pure dark going up the ramp."

¶15 Based on this testimony, a fact finder could reasonably infer that Faubel's lights were not on. Whether King failed to see Faubel's rig before impact, or instead saw it only just before impact, a reasonable inference from King's testimony is that King did not see the vehicle in time to avoid collision at least in part because the lights of Faubel's rig were not on. Accordingly, the court's conclusion that Faubel's vehicle was "lighted" resolved a genuine issue of material fact.

[4] King also argues that the circuit court erred in "finding" that he was negligent in how he controlled his vehicle. However, there is no need for us to address this argument separately in light of our conclusion below that the court erred in concluding that King was negligent as a matter of law.

¶16 In addition, there is other evidence from which a reasonable jury could find that any lights that might have been turned on or reflective strips on the rear of Faubel's rig were of no value due to accumulated snow at the time of impact. King testified that, although under more normal conditions a driver would see the lights on a trailer in front of him, when it is snowing to the degree that it was that night, "the snow will go up on the back of the trailer and you would not see [lights] so much." King also testified that the snow might have covered up rear-side reflective tape that semi-trailers are required to have. "Usually when it is snowing you don't [see the tape] because of the air coming off the back of the trailer[;] the snow sticks to the back of the trailer pretty good." Adding to the weight of this testimony, Faubel conceded that, during the time leading up to the accident, he never checked to see if any parts of his trailer were obscured by accumulated snow.[5]

¶17 Faubel contends that King's testimony cannot be credited because it is internally contradictory. Similarly, Faubel argues that King's testimony shows that King was in no position to see whether Faubel's vehicle was lighted. Faubel points to the portions of King's testimony in which he stated that he did not see Faubel's vehicle before striking it and was knocked unconscious upon impact, and suggests that King therefore is not a credible witness on any aspect of the crash.

¶18 Faubel's arguments miss the mark. The inconsistencies in King's testimony are insufficient to render it incredible as a matter of law.

[5] We appreciate that evidence regarding the snow conditions might reasonably be viewed as unfavorable to King on the issue of whether he exercised reasonable care in the operation of his vehicle at the time of the collision, given the weather. However, in reviewing a summary judgment we must view the evidence and reasonable inferences from that evidence in the light most favorable to King.

"Discrepancies in the testimony of a witness do not necessarily render it so incredible that it is unworthy of belief as a matter of law." ***State ex rel. Brajdic v. Seber***, 53 Wis. 2d 446, 450, 193 N.W.2d 43 (1972). Rather, "[i]t is the function of the jury to determine where the truth lies in a normal case of confusion, discrepancies, and contradictions in testimony of a witness." ***Id.*** We conclude that King's testimony falls within the normal range of "confusion, discrepancies, and contradictions."

¶19 Relying on the "sham affidavit" rule set forth in ***Yahnke v. Carson***, 2000 WI 74, 236 Wis. 2d 257, 613 N.W.2d 102, Faubel also argues that King cannot create fact issues by relying on testimony that contains contradictions. This argument misconstrues the sham affidavit rule. The rule is that "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." ***Yahnke***, 236 Wis. 2d 257, ¶21 (emphasis added). Here, the asserted contradictions are all within King's deposition testimony.

¶20 Faubel cites no authority for extending the sham affidavit rule to inconsistencies within deposition testimony, and the rationale for the rule as discussed in ***Yahnke*** counsels against doing so. The court explained that "[t]he rule is based in part on the proposition that testimony given in depositions, in which witnesses speak for themselves, subject to the give and take of examination and the opportunity for cross-examination, is more trustworthy than testimony by affidavit, which is almost always prepared by attorneys." ***Id.***, ¶15. In contrast, the reasoning of ***Brajdic***, which is that the testimony of witnesses often reflects inconsistencies that need to be sorted out by the fact finder, applies here. Accordingly, we do not apply the sham affidavit rule.

¶21 As for Faubel's suggestion that King admits to facts that undermine his credibility about what he witnessed, these are arguments for a jury to assess in light of the evidence presented at trial. On a motion for summary judgment, courts may not weigh competing factual inferences.

**2. Location of Faubel's Parked Vehicle**

¶22 We turn to King's argument that the circuit court improperly resolved a genuine dispute of material fact as to the location of Faubel's vehicle. The circuit court concluded that Faubel's vehicle was "parked off the travelled portion of the road surface." Similarly, the court concluded that Faubel "was off the marked lane portion of the ramp—i.e. he was to the right of the fog line on the shoulder area of the off ramp." In context, it is clear that the court concluded as a matter of law that Faubel's entire rig was outside the travel lane, which is a factor that the court weighed significantly in favor of negligence on King's part and against comparatively greater negligence on Faubel's part.

¶23 There is no question that Faubel submitted evidence that, if credited, supports the view that he was parked completely outside the travel lane. That evidence includes Faubel's testimony that he was off the "driven path" of the exit ramp and the opinion of his accident reconstruction expert that Faubel was "not invading the travel lane." In addition, the record contains a police report stating that "[i]t appeared from the crash and the tracks in the snow" that Faubel "had been parked off of the roadway on the paved shoulder …."

¶24 King argues, however, that other evidence creates a genuine issue of fact on this topic, because it supports a reasonable inference that Faubel was parked at least partly in the travel lane. We agree. So far as the summary judgment record reflects, a jury could credit King's testimony on this topic. As

noted above, King testified that Faubel was "not totally off the surface." In a similar vein, King testified, "When it snowed the way it was there was snow piled up on the shoulders so [Faubel] could not get all the way off the ramp." Viewed in a light favorable to King, this evidence describes a situation in which snow is so deeply piled or drifting on the ramp shoulder that it would have been impossible for a tractor-trailer to pull fully onto the shoulder. Thus, King's testimony supports a reasonable inference that Faubel was parked at least partly in the travel lane at the time of the accident. Whether or not King saw Faubel's parked rig immediately before impact, a reasonable inference from King's testimony is that Faubel was at least partly in the travel lane because snow piles, berms, or drifts along the length of the ramp would have prevented Faubel's rig from being parked completely outside the travel lane.

¶25 As he did in connection with the lighted-rig issue we address above, Faubel argues that King's testimony regarding the location of Faubel's rig is inconsistent and incredible as a matter of law. We disagree for the same reasons already discussed: such inconsistencies are for a jury to resolve.

¶26 Faubel also appears to contend that his accident reconstruction expert's opinion, which was based on photographs of the vehicles and measurements from the scene of the accident, should be controlling as to the exact location of Faubel's vehicle at the time of impact. Faubel asserts that, because King submitted no expert report of his own, Faubel's expert reconstruction evidence is "unchallenged, raising an inference of negligence against [King]."

¶27 We are uncertain of Faubel's precise argument in this regard, but it does not persuade us that Faubel was entitled to summary judgment. Certainly,

Faubel's expert's opinion "rais[es] an inference" against King, but, in light of King's testimony, that inference is not the only reasonable one.

¶28 If Faubel argues that a party is always required to counter an unfavorable expert opinion with a favorable one in order to survive summary judgment, he cites no case law to support this argument and we consider it too undeveloped to address further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court need not consider issues that are inadequately briefed or arguments not supported by legal authority).

¶29 If Faubel instead argues that his expert's affidavit should be conclusive because it is based on the photographs and measurements, we cannot agree, at least not without explanation beyond what Faubel's briefing and the expert's affidavit provide. Neither the photographs nor the measurements—standing alone or accompanied by the expert's explanatory affidavit—make it apparent to this court that any of this evidence incontrovertibly proves as a matter of law that Faubel was parked fully outside the travel lane at the time of impact.

**B. Faubel's Negligence as a Matter of Law and Comparative Negligence**

¶30 We turn to King's argument that the circuit court erred by concluding, as a matter of law, both that he was negligent and that he was more negligent than Faubel. We agree with King, because the court's conclusions plainly rest on the court's improper resolution of the disputed material facts discussed above. Given these factual disputes, the question of whether King was negligent and, if he was, whether he was more negligent that Faubel, are questions for a jury to decide. Stated another way, Faubel has failed on summary judgment to show as a matter of law, construing all reasonable inferences in King's favor, that King was (1) negligent and (2) more negligent than Faubel.

¶31 We note that, although Faubel initially pled in his answer to King's complaint that King's negligence was the sole cause of the accident, Faubel does not challenge the circuit court's conclusion that *he* was negligent as a matter of law.[6] Therefore, this appeal does not present us with the question of whether there is a genuine issue of material fact as to Faubel's negligence. On remand, it will be for the jury to decide each party's causal negligence, if any.[7]

¶32 We recognize, as did the circuit court, that there are cases in which a driver who struck a stationary vehicle at night is deemed more negligent than another driver as a matter of law. *See* ***Quady v. Sickl***, 260 Wis. 348, 352, 354, 51 N.W.2d 3 (1952); ***Poole v. Houck***, 250 Wis. 651, 654-56, 27 N.W.2d 705 (1947). Such cases, however, are the exception not the rule. "Each case of this kind must be decided upon its own facts, and in the vast majority of such cases the comparison of negligence is for the jury and not the court to determine." ***Vidakovic v. Campbell***, 274 Wis. 168, 175, 79 N.W.2d 806 (1956) (holding that comparative negligence was a jury issue even though driver collided with a stopped vehicle).

¶33 Neither ***Quady*** nor ***Poole*** involves facts so similar to those here that we are prepared to say they are controlling. Both cases involved appeals after a trial. *See* ***Quady***, 260 Wis. at 354; ***Poole***, 250 Wis. at 654. In ***Quady***, the driver

[6] The circuit court based its conclusion at least in part on Faubel's conceded parking violation for parking on the ramp.

[7] King asks us to "affirm summary judgment in part only as to Mr. Faubel's negligence." However, he does not provide any authority for, or argument to support his apparent proposition that, because the trial court concluded, for purposes of resolving the summary judgment motion, that Faubel was to some degree negligent, this represents a partial summary judgment as a matter of law. Accordingly, we do not address it.

who struck a stationary vehicle conceded that he was blinded by bright headlights coming toward him, yet failed to reduce his speed. ***Quady***, 260 Wis. at 352-53. In ***Poole***, it was established that the stationary vehicle was lighted. ***Poole***, 250 Wis. at 655. Thus, both cases present at least one significant factual difference disfavoring the driver who struck the stationary vehicle and distinguishing them from the instant case. While there may be other differences, these are enough for our purposes in resolving the legal questions of whether the circuit court properly concluded, as a matter of law, that there are no reasonable inferences that King was not negligent and that he was more negligent than Faubel.

## CONCLUSION

¶34 For the reasons stated above, we conclude that the circuit court should not have granted summary judgment. We reverse the court's order and remand for further proceedings.

*By the Court*.—Order reversed and cause remanded.

Not recommended for publication in the official reports.