

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 2, 2012

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. 2010AP2992

Cir. Ct. No. 2008CV132

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**WEATHER SHIELD MFG., INC. AND CONTINENTAL CASUALTY
INSURANCE COMPANY,**

PLAINTIFFS-APPELLANTS,

v.

**COMPASS GROUP USA, INC., LEXINGTON INSURANCE COMPANY,
C.L. SWANSON CORPORATION AND CINCINNATI INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS,

C.L. SWANSON CORPORATION AND CINCINNATI INSURANCE COMPANY,

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-RESPONDENTS,**

v.

**KWIK KAFE, INC., ABC INSURANCE COMPANY, WESTGATE SYSTEMS,
INC., D/B/A KWIK KAFE AND DEF INSURANCE COMPANY,**

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Taylor County: ANN KNOX-BAUER, Judge. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. Weather Shield Manufacturing and its insurer, Continental Casualty Insurance Company, appeal an order of summary judgment dismissing Weather Shield's negligence claims against Compass Group USA, Inc., C.L. Swanson, and their insurers. We conclude that the undisputed facts do not permit a finding that Compass and Swanson breached a duty of ordinary care and that summary judgment was therefore appropriate. Accordingly, we affirm.

BACKGROUND

¶2 This case arises out of damage sustained to Weather Shield's corporate offices in Medford, Wisconsin. In January 2008, Weather Shield's offices sustained substantial water damage when a plastic, flexible water hose connecting a countertop coffeemaker to the rigid part of the water supply line failed at the point the hose connected to the rigid part of the water supply line. At the time, coffee and vending services were provided to Weather Shield by Compass through its subsidiary, Canteen Vending Services Division. Compass's services included, among other things, supplying a coffeemaker and connecting it to the water supply line of which the flexible water hose at issue here was a component. Before Compass began providing coffee and vending services to Weather Shield, those services were provided by Swanson¹ from approximately

¹ Swanson subcontracted to Kwik Kafe the coffee and vending services it contracted with Weather Shield to provide.

March or April 2003 until December 2006, when Compass took over. Like Compass, Swanson connected the coffeemaker it supplied to the water line, which included the flexible water hose at issue. It is undisputed that neither Compass nor Swanson installed the flexible water hose, which was in place at the time both Compass and Swanson installed their coffeemakers.

¶3 In 2008, Weather Shield commenced the present negligence action against Compass and Swanson, alleging that Compass and Swanson were negligent in connecting their individual coffeemakers to the flexible water hose. Weather Shield argued that when Compass and Swanson began providing coffee and vending services to it, they had a duty to inspect the plumbing connection and replace the flexible water hose with copper tubing or, in the alternative, to warn Weather Shield regarding the hose because, according to Weather Shield, a flexible water hose does not conform to the Wisconsin Plumbing Code. Weather Shield asserted that because Compass and Swanson negligently failed to do so, Weather Shield's property and business sustained substantial damage when the flexible water hose failed at its connection with the ridged portion of the water line, causing substantial damage to Weather Shield's property and business.²

¶4 Swanson and Compass moved for summary judgment. The circuit court determined that neither Compass nor Swanson had a duty to inspect the plumbing connection or to replace the flexible water hose with copper tubing. Accordingly, the court granted Compass' and Swanson's motion for summary

² Swanson filed a cross-claim against Compass and a third-party complaint against Kwik Kafe, seeking indemnification and/or contribution if Swanson was found to be negligent. Kwik Kafe's insurer filed cross-claims against Compass and Swanson for indemnification and/or contribution in the event that Kwik Kafe was found liable for any of Weather Shield's damages.

judgment, entered judgment in their favor and dismissed all claims and cross-claims. Weather Shield appeals. Additional facts will be discussed below as necessary.

DISCUSSION

A. Standard of Review

¶5 We review a grant of summary judgment de novo. *Smaxwell v. Bayard*, 2004 WI 101, ¶12, 274 Wis. 2d 278, 682 N.W.2d 923. We will affirm a grant of summary judgment where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2009-10).³ The inferences to be drawn from the 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.

B. Negligence

¶6 The issue presented here is whether the circuit court properly granted summary judgment against Weather Shield on Weather Shield's negligence claims against Compass and Swanson. In deciding a motion for summary judgment in a negligence case, a court must first consider the four elements of negligence. *Behrendt v. Gulf Underwriters Ins. Co.*, 2009 WI 71, ¶14, 318 Wis. 2d 622, 768 N.W.2d 568. Those elements are: (1) the existence of

³ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

a duty of care on the part of the defendant; (2) a breach of that duty of care; (3) a causal connection between the defendant's breach of the duty of care and the plaintiff's injury; and (4) an actual loss or damage as a result of the injury. *Id.* The issue in this case relates to the first two elements: whether Compass and Swanson had a duty of care to Weather Shield and breached that duty by failing to inspect the plumbing connection and either replace the water hose at issue with copper tubing or inform Weather Shield that the hose was a problem. The existence of a duty and the scope of such duty present questions of law for the courts to decide. *Hoida, Inc. v. M & I Midstate Bank*, 2006 WI 69, ¶23 n.12, 291 Wis. 2d 283, 717 N.W.2d 17.

¶7 In Wisconsin, everyone owes to the world at large a duty to refrain from doing acts that may unreasonably threaten the safety of others. *Behrendt*, 318 Wis. 2d 622, ¶17. The supreme court has thus explained that in analyzing the question of breach and duty in a negligence case “a defendant’s conduct ‘is not examined in terms of whether or not there is a duty to do a specific act, but rather whether the conduct satisfied the duty placed upon individuals to exercise that degree of care as would be exercised by a reasonable person under the circumstances.’” *Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, ¶45, 308 Wis. 2d 17, 746 N.W.2d 220 (quoted source omitted). What conduct satisfies that duty “‘is determined by what would be reasonable given the facts and circumstances of the particular claim at hand’” and may depend “‘on the relationship between the parties or on whether the alleged tortfeasor assumed a special role in regard to the injured party.’” *Behrendt*, 318 Wis. 2d 622, ¶18 (quoting *Hoida*, 291 Wis. 2d 283, ¶32).

¶8 Although everyone in Wisconsin owes a duty to refrain from doing acts that may unreasonably threaten the safety of others, the extent of that duty is

not all encompassing. “Occasionally, there are cases where a negligence claim fails because the duty of care does not encompass the acts or omissions that caused the harm...” *Behrendt*, 318 Wis. 2d 622, ¶21. *See, e.g., Hoida*, 291 Wis. 2d 283, ¶30 n.15 (stating that the majority opinion “turns on [] whether the circumstances of [that] case require [the defendants] to undertake all the affirmative acts that [the plaintiff] requests.”) We conclude that this is such a case.

¶9 Weather Shield’s negligence claims against Compass and Swanson are not based upon a special relationship, such as a fiduciary relationship. The only relationship Compass and Swanson had with Weather Shield was that established by the contracts between them. Accordingly, we must examine what a reasonable coffee vendor in the position of Compass and Swanson would be obligated to do in similar circumstances. *See id.*, ¶34.

¶10 Weather Shield’s argument is based on the proposition that Compass and Swanson had either statutory or contractual obligations, or both, to inspect the plumbing connections when they installed their coffee-making equipment. We first examine whether Compass and Swanson had a statutory obligation, as Weather Shield contends, and then review whether such an obligation arose under the language of the contracts which Compass and Swanson separately entered into with Weather Shield.

¶11 Weather Shield contends that Compass and Swanson had a statutory obligation to inspect the plumbing connections when they connected their equipment to the flexible water hose to ensure that the connection, that is, the flexible water hose, conformed to the provisions of the Wisconsin Plumbing

Code, WIS. ADMIN. CODE § SPS. chs. 381-387 (Dec. 2011).⁴ Relying on WIS. STAT. § 145.13,⁵ WIS. ADMIN. CODE § SPS 382.01⁶ and 384.01,⁷ Weather Shield argues that “[a]ll plumbing installations,” including connections to plumbing performed by a coffee vendor, are required to conform to the Wisconsin Plumbing Code, which obligated Compass and Swanson in this case to replace the flexible water hose when they installed their coffee makers or to “[a]t a very minimum ...

⁴ In December 2011, WIS. ADMIN. CODE § COMM. chs. 82-87 were removed from the Administrative Code and incorporated into WIS. ADMIN. CODE § SPS chs. 381-387. The code sections at issue here were not modified at the time they were relocated.

⁵ WISCONSIN STAT. § 145.13 provides:

The state plumbing code and amendments to that code as adopted by the department have the effect of law in the form of standards statewide in application and shall apply to all types of buildings, private or public, rural or urban, including buildings owned by the state or any political subdivision thereof. The state plumbing code shall comply with ch. 160. All plumbing installations shall so far as practicable be made to conform with such code.

⁶ WIS. ADMIN. CODE § SPS 382.01 provides:

The provisions of this chapter apply uniformly to the design, construction, installation, supervision, maintenance and inspection of plumbing, including but not limited to sanitary and storm drainage, water supplies, wastewater treatment, and dispersal or discharge for buildings, except for POWTS systems as regulated by ch. SPS 383.

⁷ WIS. ADMIN. CODE § SPS 384.01 provides:

(1) The provisions of this chapter govern the quality and installation of materials, fixtures, appliances, appurtenances, and equipment relating to plumbing.

(2) A department interpretation of the requirements in this chapter shall supersede any differing interpretation by a lower level jurisdiction. A department decision on the application of the requirements in this chapter shall supersede any differing decision by a lower level jurisdiction.

notif[y] Weather Shield that ... copper, rather than plastic [] tubing should be used....” We disagree.

¶12 We find no language in the plumbing code requiring a party, such as a beverage vendor, who connects its equipment to existing plumbing connections to inspect the existing plumbing to ensure that it is current with present plumbing code regulations. To the contrary, WIS. ADMIN. CODE § SPS 382.22(1)(c), which is titled “maintenance and repairs” and which provides that “[t]he owner shall maintain plumbing systems,” plainly confers the responsibility which Weather Shield seeks to impose on Compass and Swanson lay with Weather Shield itself as the owner of the flexible water hose. Accordingly, we conclude that Compass and Swanson did not have a statutory obligation to inspect the plumbing connection and either replace it or inform Weather Shield that copper tubing was recommended.

¶13 Weather Shield argues that Compass and Swanson also had contractual obligations to inspect the plumbing connection to ensure that it conformed to the provisions of the Wisconsin Plumbing Code. In some cases, the contractual language of parties involved in a business relationship can shape a party’s duty of care by setting forth what the parties agree is reasonable under certain circumstances. *See, e.g., Hoida*, 291 Wis. 2d 283, ¶38 (explaining that “contractually assumed obligations and agreed upon limitations for [the defendant] shaped its duty of ordinary care ... because they set out what the parties agreed was reasonable under the circumstances.”). *See also Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶¶21, 24, 277 Wis. 2d 21, 690 N.W.2d 1. Here, the written vending service agreements between Weather Shield and Compass, and Weather Shield and Swanson specified those tasks that Compass and Swanson were obligated to perform. The contractually assumed obligations in this case

shaped Compass's and Swanson's duty of ordinary care in that the obligations set out what the parties agreed was reasonable under the circumstances. *See, e.g., Hoida*, 291 Wis. 2d 283, ¶38.

¶14 Under the terms of its contract with Weather Shield, Compass, through its subsidiary Canteen, was required to “provide coffee services and to install vending and other related equipment (Equipment) to dispense food, beverage, and sundry products supplied by Canteen” and to “install, maintain, and service the Equipment in a sanitary manner in accordance with industry standards and all federal, state, and local laws.” The parties agreed that Weather Shield had “no right, title, or interest to Equipment” and that Weather Shield would furnish Canteen with the necessary “utilities to permit the sanitary operation of the services.” Similarly, Swanson was obligated to “install, service, and maintain at high standards of quality, sanitation and cleanliness” a “mutually agreed number and type of vending machines ... for the sale of ... non-alcoholic beverages.” Weather Shield, in turn, was required to provide Swanson “all utilities and facilities reasonable and necessary for the efficient performance of the Agreement.”

¶15 Under the terms of their contracts with Weather Shield, neither Compass nor Swanson expressly agreed to undertake an obligation to inspect existing plumbing fixtures and connections, including the flexible water hose, and to replace it with another type of hose or to advise Weather Shield that the existing flexible water hose was not recommended.

¶16 Weather Shield argues that the terms of the agreements obligated Compass and Swanson to install the equipment in compliance with the Wisconsin Plumbing Code, which in turn, Weather Shield asserts obligated Compass and

Swanson to ensure that the plumbing connections met present code standards at the time their individual coffee making equipment was installed. However, as we explained above in paragraphs 11-12, we find no language in the plumbing code imposing upon a beverage vendor the obligation to ensure that existing plumbing connections are current with present plumbing code regulations when connecting it's beverage equipment to those connections. On the contrary, the obligation plainly confers upon Weather Shield, as the owner of the plumbing. Moreover, Weather Shield has pointed to no evidence that a coffee vendor and/or its employees are obligated to be familiar with the plumbing code.

¶17 Finally, to the extent that Weather Shield means to argue that it presented information that created a material factual dispute regarding whether Compass's and Swanson's duty of ordinary care included inspecting existing water hoses when installing their beverage equipment because doing so was the industry standard and/or practice, we disagree. We conclude that Weather Shield has not presented evidence that coffee vendors as a whole would or should inspect existing plumbing at the time of installation. In its brief, Weather Shield points out that an employee of Choice Vending testified that he will replace an existing flexible water hose line with copper tubing when installing coffeemakers and that two other individuals in the industry "recognized the improperly installed water line connection when they looked under the sink following the damage." However, Weather Shield has not pointed to any testimony or other evidence that inspecting plumbing connections when installing coffee-making equipment was the industry standard. The testimony of a single person that it was his practice to replace flexible water hoses with copper tubing does not constitute an industry standard.

¶18 Moreover, Weather Shield’s industry-standards argument is insufficiently developed. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Weather Shield states in its brief that four individuals testified regarding their personal practices with respect to inspecting or not inspecting plumbing connections when installing coffee making equipment. Weather Shield, however, does not develop an argument as to how that evidence established an industry standard.

¶19 In conclusion, Weather Shield has cited no legal authority that establishes an obligation on the part of a coffee vendor to inspect an existing water hose when connecting its beverage equipment to that hose, and we decline to create such a rule. Accordingly, we conclude that Weather Shield did not establish that Compass and Swanson breached a duty of care and therefore affirm the order of summary judgment in favor of those parties.⁸

CONCLUSION

¶20 For the reasons discussed above, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

⁸ Weather Shield contends that the circuit court erroneously exercised its discretion by disregarding the testimony of its expert. Because we determine that Compass and Swanson did not have a duty to inspect and/or replace the water hose at issue here, we need not determine whether the testimony of Weather Shield’s expert should have been considered. *See Walgreen Co. v. City of Madison*, 2008 WI 80, ¶2, 311 Wis. 2d 158, 752 N.W.2d 687 (stating that if resolution of one issue disposes of the appeal, we need not address the other issues raised). For the same reasons, we do not address arguments made by both parties regarding WIS. STAT. § 893.89, the “builder’s statute.”

