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December 9, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2015AP764 Timothy J. Botdorf and Janice M. Botdorf v. Samuel R. Krebsbach, American Family Mutual Insurance Company and Allstate Property and Casualty Insurance Company, Health Insurance Risk Sharing Plan TN Health Insurance Risk Sharing Plan, p/k/a Wisconsin Physicians Service Corporation (L.C. # 2011CV804)

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

Timothy and Janice Botdorf appeal from an order granting summary judgment to Samuel Krebsbach and his insurers in a personal injury case arising from a single vehicle accident in which Timothy Botdorf's vehicle swerved, hit a utility pole, and rolled over. Based upon our

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We affirm.

The accident occurred when Botdorf was travelling northbound on a narrow two-lane road. The Botdorfs maintained that when Krebsbach turned right from his driveway to enter the southbound lane, he made a wide turn and intruded into the northbound lane. They allege that "[w]hen … Krebsbach's car invaded … Botdorf's lane of traffic," Botdorf was forced to swerve "to avoid a head-on collision." The dispositive issue is whether the Botdorfs have produced sufficient evidence from which a reasonable jury could find that Krebsbach's vehicle invaded Botdorf's lane. We conclude that the Botdorfs have not produced such evidence.

We review the circuit court's grant of summary judgment independently and using the same methodology as the circuit court. ***Hardy v. Hoefferle,*** 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. There is no need to repeat the well-known methodology; the controlling principle is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. ***Id.***; WIS. STAT. § 802.08(2). "The ultimate burden ... of demonstrating that there is sufficient evidence ... to go to trial at all (in the case of a motion for summary judgment) is on the party that has the burden of proof on the issue that is the object of the motion." ***Transportation Ins. Co. v. Hunzinger Const. Co.***, 179 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993). In a situation where a party bearing a burden of proof on an element has failed to produce supporting evidence, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

element of the nonmoving party's case necessarily renders all other facts immaterial." ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 227, 522 N.W.2d 261 (Ct. App. 1994) (quoting ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322-23 (1986)).

Krebsbach's deposition testimony was that on the night of the accident, he stopped at the end of the driveway and then cut his turn short onto the gravel in order to stay on the right side of the road. He stated that he passed Botdorf's vehicle and then, in his rearview mirror, saw Botdorf's vehicle crash.

Botdorf's deposition testimony was that before the accident he remembered seeing a "flash of light":

> And all I can remember was—I remember this big flash of light popping up in front of me, just like a boom, and with that, I remember looking up in the—there was a—right about in this area, and then further over in the right-hand corner, the silhouettes of two turkeys…. [T]his bright light popping on, and boom, boom, turkeys, and that's all I could remember, and then it went blank.

Botdorf had no recollection of seeing another vehicle on the road. Botdorf's accident reconstruction expert stated that it is possible for a vehicle to turn out of the Krebsbach driveway without crossing into the northbound lane. The expert stated that based on the testimony of Krebsbach as to the point from which he pulled onto the road, Krebsbach's vehicle's "right front corner would be about three or four feet from the centerline during his turn." Botdorf's vision and perception expert concluded that Krebsbach's vehicle either intruded into the northbound lane during its turn or that it came close to doing so.

Krebsbach's alleged intrusion into Botdorf's lane is an essential element of the case because the complaint alleges that the intrusion was the cause of Botdorf's need to swerve to avoid an imminent head-on collision. Krebsbach testified that he did not cross into the

northbound lane. Botdorf did not testify to the contrary; he stated that he did not see any vehicle. One of his experts conceded that it was possible to negotiate the turn without crossing the center line, and another concluded that Krebsbach's vehicle either intruded into the northbound lane or came close. It is not sufficient to produce evidence as to an essential element that the claimed version is one of several possibilities. *See, e.g.*, ***Alexander v. Auer Steel & Heating Co.***, No. 2014AP335, unpublished slip op. (WI App Feb. 10, 2015) (affirming summary judgment against plaintiffs where testimony was that asbestos had come from either one source or another). Because the Botdorfs failed to produce supporting evidence that Krebsbach intruded into the northbound lane, there can be no genuine issue as to any material fact. *See* ***Kenefick***, 187 Wis. 2d at 227.

The Botdorfs offer an alternative ground for negligence in their brief in opposition to summary judgment and in their brief on appeal. They argue that a driver turning southbound onto the road can create a perception of a threat, even if he does not enter the northbound lane, and Krebsbach was negligent in not waiting until Botdorf's vehicle passed by first. Krebsbach has a duty of ordinary care to refrain from acts that may unreasonably threaten the safety of others. *See* ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶17, 318 Wis. 2d 622, 768 N.W.2d 568. Botdorf's vision and perception expert concluded that the threat from Krebsbach's vehicle may have been "illusory," but, given the unique circumstances of the drivers' encounter, Botdorf's "reaction to his perception [was] both natural and understandable." That expert's report stated that "a 'near-intrusion' might be perceived as a threat by a northbound driver." No evidence established that Krebsbach unreasonably threatened the safety of other drivers. Though there was evidence of a perceived threat, a perceived threat is not a sufficient basis for negligence.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals