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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

February 23, 2023

To:

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Electronic Notice

Vincent Scipior
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Gary Vissers
201 Raccoon Berry Way
Green Bay, WI 54311

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

2021AP1831 American Family Mutual Insurance Company, S.I. v. Secura Insurance, A Mutual Company (L.C. # 2019CV466)

Before Blanchard, P.J., Kloppenburg, and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

American Family Mutual Insurance Company appeals an order granting summary judgment against it and dismissing American Family's action for subrogation for damages it paid to its insured for water damage to the insured's condominium unit, after a pipe burst in a nearby condominium unit owned by Frank and Deana Haselwander. American Family claims that its loss was caused by the negligence of the Haselwanders by failing to maintain adequate ambient air heat in the Haselwanders' unit during extremely cold weather. 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 (2021-22).[1] We summarily affirm.

The following facts are taken from the summary judgment material. The Haselwanders own a condominium unit in Prairie du Sac. In February 2019, while the Haselwanders were away from home, Wisconsin experienced extremely cold weather. A pipe inside an exterior wall in the Haselwanders' unit burst, causing water damage to a nearby unit insured by American Family. At that time, the thermostat setting determining the ambient air temperature in the Haselwanders' unit was set to 48 degrees.

American Family brought this subrogation action against the Haselwanders and their insurer, as well as Frank's brother John, who regularly checked on the Haselwanders' unit when they were out of town. John moved for summary judgment, arguing that American Family's claim failed to establish causation in the absence of expert opinion. In support, John submitted an expert opinion that the ambient air temperature in the Haselwanders' unit did not cause the pipe to burst. The expert took the position that the sprinkler system of which the pipe at issue was a part was designed to maintain its integrity when ambient indoor temperature fell to as low as 40 degrees. The expert identified various design and installation deficiencies that the expert believed were the cause of the pipe freezing and breaking, resulting in the subsequent water damage. The circuit court granted summary judgment and dismissed American Family's claims.

We independently review a circuit court decision to grant summary judgment. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). Our review includes an

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

independent review of the record to determine whether the moving party is entitled to judgment as a matter of law. ***Streff v. Town of Delafield***, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

"A showing of negligence requires proof of causation." ***Pinter v. Village of Stetsonville***, 2019 WI 74, ¶62, 387 Wis. 2d 475, 929 N.W.2d 547 (quoted source omitted). Expert testimony is required on the issue of causation when "the matter is not within the realm of ordinary experience and lay comprehension." ***Id.***, ¶63 (quoted source omitted); ***Racine Cnty. v. Oracular Milwaukee, Inc.***, 2010 WI 25, ¶28, 323 Wis. 2d 682, 781 N.W.2d 88 ("[E]xpert testimony is not necessary to assist the trier of fact concerning matters of common knowledge or those within the realm of ordinary experience."). The party bearing the burden of producing an expert opinion at trial must make a showing that it can do so to avoid summary judgment in favor of the opposing party. *See* ***Dean Med. Ctr., S.C. v. Frye***, 149 Wis. 2d 727, 734-35 & n.3, 439 N.W.2d 633 (Ct. App. 1989). Whether expert testimony was necessary presents a question of law that we independently review. ***Grace v. Grace***, 195 Wis. 2d 153, 159, 536 N.W.2d 109 (Ct. App. 1995).

American Family argues that expert testimony is not required because the fact that water freezes at 32 degrees Fahrenheit or colder is a matter of common knowledge. Starting from this premise, American Family contends that a jury in this case could rely on this common knowledge to find that the pipe in the Haselwanders' unit burst because the thermostat in the unit was set to 48 degrees during very cold weather, causing the water in the pipe to freeze and the pipe to burst.

We agree with American Family that it is common knowledge that water freezes when it is 32 degrees or colder. The problem with American Family's argument, of course, is that it does

not follow from this commonly understood fact that water will freeze in a pipe that is located inside the exterior wall of a condominium unit when it is very cold outside and the ambient air in the unit is heated to 48 degrees.

American Family argues that it did not need an expert to support its negligence claims under the reasoning in ***Oracular*** and ***Walker v. Ranger Ins. Co.***, 2006 WI App 47, 289 Wis. 2d 843, 711 N.W.2d 683. As we now explain, however, neither ***Oracular*** nor ***Walker*** supports American Family's contention that this is within the realm of common knowledge.

In ***Oracular***, 323 Wis. 2d 682, ¶5, our supreme court held that the plaintiff was not required to name an expert witness to support its breach of contract claim in order to survive summary judgment. The court explained that the breach of contract claim, as alleged in that case, did "not present issues so 'unusually complex or esoteric' as to demand the assistance of expert testimony." ***Id.***, ¶30 (quoted source omitted). "Rather, the alleged breaches concern[ed] matters of common knowledge and [were] within the realm of ordinary experience." ***Id.*** More specifically, the breach of contract claim was premised on allegations that the alleged breaching party had "not complet[ed] the project on time" and "fail[ed] to provide competent training" regarding a planned upgrade to an institution's human resources, payroll, and financial software systems. ***Id.*** The court explained that, as to those allegations, "the trier of fact [was] capable of drawing its own conclusions without the assistance of expert testimony." ***Id.***

The situation in ***Oracular*** bears no resemblance to the situation here. Whether the water pipe here froze and burst due to the condominium unit's temperature setting of 48 degrees—or instead froze due to other factors, such as those offered in the opinion of John's expert—is not an issue similar to assessing whether a party completed a project on time or provided a competent

training program. *See* ***Pinter***, 387 Wis. 2d 475, ¶63 (expert testimony required on causation when "the matter is not within the realm of ordinary experience and lay comprehension").

Walker is similarly inapposite. There, the Walkers' tenant abandoned the Walkers' mobile home and failed to pay for propane heating for the home. ***Walker***, 289 Wis. 2d 843, ¶¶2-3. The gas company shut off the propane supply to the mobile home in February, leaving it completely unheated, without notifying the Walkers. ***Id.***, ¶3. The pipes burst, flooding the mobile home. ***Id.***, ¶4. The Walkers sued the gas company and, on appeal, we reversed the circuit court's decision to allow the gas company's expert to testify as to the standard of care the gas company owed to the Walkers according to propane industry standards. ***Id.***, ¶¶1, 5. We explained that the issue was the gas company's duty of care and whether it breached that duty by shutting off the propane supply to the mobile home, which did not require that the fact-finder have an understanding of the standard of care within the propane industry. ***Id.***, ¶¶1, 5, 14-15. Thus, ***Walker*** addressed whether expert testimony was admissible to establish whether a gas company breached its duty of care when it left a home *completely unheated* in Wisconsin in February, which is readily distinguishable from the issue here. There is no allegation that the Haselwanders left their unit completely unheated; rather, the allegation is that they had the heat set to 48 degrees. Moreover, the issue here is not whether American Family was required to present an expert to establish that the Haselwanders had a duty of care to maintain heat in their condominium in the winter. Rather, the issue is whether American Family was required to present an expert to establish that the temperature setting of 48 degrees in the Haselwanders' unit during the winter caused water to freeze in a pipe in an exterior wall. For those reasons, American Family's reliance on ***Walker*** is misplaced.

In sum, we conclude, as a matter of law, that whether the Haselwanders' condominium temperature setting of 48 degrees during extremely cold weather caused a pipe inside an exterior wall to burst was beyond "the realm of ordinary experience and lay comprehension." *See* ***Pinter***, 387 Wis. 2d 475, ¶63. To illustrate this point, American Family does not identify what temperature setting would have prevented the pipe from freezing but merely points to evidence that the ambient air temperature in its insured's condominium unit was set to 62 degrees and no pipes burst during the same cold snap.

For these reasons, we conclude that an expert opinion was required on the issue of whether the temperature setting in the Haselwanders' unit caused the pipe to freeze and burst and that the circuit court properly granted summary judgment because American Family did not oppose summary judgment with the necessary expert opinion on causation. *See* ***Dean Med. Ctr.***, 149 Wis. 2d at 735 & n.3 (summary judgment should be granted when the party bearing the burden of producing expert testimony fails to do so).

American Family makes several other arguments as to why the circuit court erred by granting summary judgment and dismissing its claims. We address them briefly in turn.

American Family argues that the Haselwanders admitted in their responses to American Family's interrogatories that 48 degrees was too low of a temperature setting during the extremely cold weather in the area at the time, and that the low temperature setting caused the pipe to freeze and burst. It contends that, because the Haselwanders were able to reach those conclusions without the aid of an expert, the jury could do so as well, and no further proof was required on the issue of causation. However, as we have explained, we conclude that an expert

was necessary to establish causation under the facts of this case. The Haselwanders' responses to the interrogatories do not satisfy that requirement.

American Family separately argues that the circuit court's order granting summary judgment was in direct conflict with its prior ruling denying summary judgment, and that the court did not adequately explain its ruling. Because our review of an order granting summary judgment is de novo, neither argument is persuasive.

American Family further argues that John cited unpersuasive cases that were either unpublished or from other jurisdictions in support of his summary judgment motion. We do not address those cases in this decision, and we therefore do not discuss further any of American Family's arguments based on those cases.

American Family also argues that nothing in the opinion offered by John's expert witness refuted American Family's position that using a 48-degree indoor setting during extremely cold weather was "unreasonably low." American Family argues that even if it is true, as the expert retained by John opines, that the pipe should not have burst at any setting of 40 degrees or higher, it was nevertheless "unreasonable" for the Haselwanders to set the temperature to 48 degrees during the very cold weather at the time. We have some trouble tracking this argument but we reject it on the following ground. Assuming without deciding that the Haselwanders had a duty of care to maintain a temperature higher than 48 degrees because of the risk of pipes bursting and they breached that duty, that would not supply the missing evidence that, in this instance, the temperature setting of 48 degrees caused the pipe to burst. At best, American Family attempts to shift the focus from causation to a duty of care, which is a different topic.

American Family also points out that a jury would not be required to accept John's expert's opinion. *See* ***Seng Xiong v. Vang***, 2017 WI App 73, ¶34, 378 Wis. 2d 636, 904 N.W.2d 814. For this reason, it argues, John's expert's opinion merely created a factual issue for the jury. However, as explained, American Family's negligence claim fails in the absence of expert opinion to support its claim that the temperature setting of 48 degrees caused the water in the pipe to freeze and the pipe to burst. This remains the case even if a jury were to reject John's expert's opinion. That is, the possibility that a jury would not credit John's expert's testimony does not relieve American Family of its burden to produce an expert to support its theory of causation to survive summary judgment.

American Family also argues that John improperly relied on American Family's objections to interrogatories as part of his argument in favor of summary judgment. However, we do not rely on any of American Family's interrogatory objections in reaching our decision.

We affirm the circuit court order granting summary judgment and dismissing American Family's claims.

IT IS ORDERED that the order appealed from is summarily affirmed under WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals