COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1390 **Cir. Ct. No. 02CV001284**

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

MARCO A. GONZALEZ,

PLAINTIFF-APPELLANT,

V.

THE CINCINNATI INSURANCE COMPANY, PROGRESSIVE NORTHERN INSURANCE COMPANY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

WISCONSIN MEDICAID PROGRAM AND MEDICAL ASSISTANCE PROGRAM,

NOMINAL-DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Reversed and cause remanded*.

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Marco A. Gonzalez appeals from an order granting summary judgment and dismissing his personal injury action against the respondents, The Cincinnati Insurance Company, Progressive Northern Insurance Company, and State Farm Mutual Automobile Insurance Company. Gonzalez sought damages for injuries he sustained on the night of December 8, 1998, as he attempted to cross Capitol Drive in Brookfield, Wisconsin. In his complaint, Gonzalez alleged that while crossing Capitol Drive, he was struck first by a vehicle driven by Neil Rossman, and subsequently by a vehicle driven by Christopher Trotier. The trial court granted summary judgment based on its determination that Gonzalez was minimally 51% causally negligent. We conclude that material issues of fact exist for trial as to the negligence of Rossman and Trotier, and the apportionment of negligence between them and Gonzalez. We therefore reverse the order granting summary judgment and remand the matter for further proceedings consistent with this decision.

¶2 We review a trial court's grant or denial of summary judgment de novo. ***Waters v. United States Fid. & Guar. Co.***, 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). "[S]ummary 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." ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995). We will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). In our review we, like the trial court, are prohibited from deciding issues of fact; our inquiry is limited to determining whether a material factual issue exists. ***Id.*** Any reasonable doubt as

to the existence of a factual issue must be resolved against the moving party. ***Maynard v. Port Publ'ns, Inc.***, 98 Wis. 2d 555, 563, 297 N.W.2d 500 (1980).

¶3 Summary judgment is not generally suited to negligence actions because the court must be able to say that no properly instructed, reasonable jury could find, based on the facts presented, that the defendants failed to exercise ordinary care. ***Alvarado v. Sersch***, 2003 WI 55, ¶29, 262 Wis. 2d 74, 662 N.W.2d 350. "The concept of negligence is peculiarly elusive, and requires the trier of fact to pass upon the reasonableness of the conduct in light of all the circumstances, 'even where historical facts are concededly undisputed.'" ***Id.*** (citation omitted). This is ordinarily not a decision for the court. ***Id.*** Consequently, summary judgment should be granted in negligence actions only in rare cases. ***Ceplina v. South Milwaukee Sch. Bd.***, 73 Wis. 2d 338, 342-43, 243 N.W.2d 183 (1976).

¶4 The trial court granted summary judgment after determining that Gonzalez was minimally 51% causally negligent. It based this determination on deposition testimony and other material in the summary judgment record indicating that Gonzalez was crossing Capitol Drive on foot at 9:30 p.m. in a poorly lit area when he was first struck. The trial court noted that Gonzalez was crossing approximately 100 feet from a crosswalk, and was wearing dark clothing. It concluded that even though Rossman attempted to avoid striking him, he did not observe Gonzalez with sufficient time to do so. It further determined that Trotier attempted to avoid Gonzalez as he lay in the road, but may have struck him.

¶5 WISCONSIN STAT. § 346.25 (2001-02)[1] provides that every pedestrian crossing a roadway at any point other than within a marked or

[1] All references to the Wisconsin Statutes are to the 2001-02 version.

unmarked crosswalk must yield the right-of-way to all vehicles upon the roadway. Because the evidence in the summary judgment record indicated that Gonzalez was crossing Capitol Drive outside a crosswalk when he was struck by Rossman, and that he did not yield the right-of-way to Rossman's vehicle, the trial court could properly conclude that Gonzalez was causally negligent as a matter of law. *See* ***Staples v. Glienke***, 142 Wis. 2d 19, 31, 416 N.W.2d 920 (Ct. App. 1987).

¶6 However, a defendant is not relieved of the duty of maintaining a proper lookout and exercising ordinary care in the management and control of his or her vehicle even when the pedestrian who is struck was negligent as a matter of law. *See* ***Schoenberg v. Berger***, 257 Wis. 100, 107-09, 42 N.W.2d 466 (1950). Moreover, even though the summary judgment record permitted the trial court to conclude that Gonzalez was causally negligent as a matter of law, it does not automatically follow that his negligence exceeded that of the defendants. *See* ***Metz v. Rath***, 275 Wis. 12, 17-19, 81 N.W.2d 34 (1957) (when a pedestrian crossing a highway and the driver of the vehicle who struck him could both be found negligent, the comparison of negligence of the driver and pedestrian was for the jury, even when the pedestrian was negligent as a matter of law for failing to yield the right-of-way).[2]

[2] The respondent insurers cite ***Staples v. Glienke***, 142 Wis. 2d 19, 31, 416 N.W.2d 920 (Ct. App. 1987), and ***Field v. Vinograd***, 10 Wis. 2d 500, 505, 103 N.W.2d 671 (1960), for the proposition that the statutory duty of a pedestrian to yield the right-of-way when crossing a street outside a crosswalk is absolute regardless of any negligence on the part of the driver, and that failure to yield constitutes causal negligence as a matter of law. However, these cases do not support a claim that summary judgment dismissing Gonzalez' action was warranted based solely on his causal negligence. In ***Staples***, the court held that the comparison of negligence was for the jury. ***Staples***, 142 Wis. 2d at 34-35. In ***Field***, the supreme court held that when a minor pedestrian was struck by the defendant's vehicle while crossing a street outside the crosswalk, the trial court properly instructed the jury that the pedestrian was causally negligent as a matter of law for failing to yield the right-of-way, but also upheld instructing the jury as to its duty to determine the defendant's negligence, if any, and to compare the negligence of the pedestrian and driver. *See* ***Field***, 10 Wis. 2d at 505-06.

¶7 The facts and reasonable inferences from the facts do not lead to the inescapable conclusion that Rossman and Trotier were totally without negligence, or that, while negligent, their negligence was exceeded by that of Gonzalez. Because the summary judgment record did not permit the trial court to determine that Gonzalez was minimally 51% causally negligent as a matter of law, questions of fact exist for the jury. *See* ***Ceplina***, 73 Wis. 2d at 344.

¶8 We first examine the summary judgment record related to Rossman. The record indicates that after leaving work, Gonzalez was walking across Capitol Drive on foot when he was struck by Rossman.[3] Gonzalez was struck in the center lane of the three eastbound lanes of Capitol Drive. Gonzalez' place of employment was on the north side of the road, permitting the inference that he had already crossed the three westbound lanes, the median, and one of the eastbound lanes when he was struck. At the time Rossman's vehicle struck him, Rossman was driving east in the center lane.

¶9 The evidence in the summary judgment record permits the inference that Rossman was negligent as to lookout or management and control. Rossman testified that he was driving the speed limit of forty-five miles per hour when he first saw Gonzalez and that he was constantly looking forward, but that Gonzalez "pretty much just appeared" in the center lane when Rossman's vehicle was only eight feet or a car length away from him. The undisputed evidence indicates that the road was straight and dry, and that the night was neither snowy, rainy, nor foggy. Although Rossman contended that some of the streetlights in the area were out on Capitol Drive and that the lighting was poor, he acknowledged that his

[3] Gonzalez suffered severe injuries, and his deposition testimony indicates that he has no memory of what occurred on December 8, 1998, after being at his place of employment.

vision was unobstructed, that he had his headlights on, and that lights from some businesses in the area aided in lighting the street. Rossman testified that he did not see Gonzalez running or walking before he struck him, and that Gonzalez "just appeared" eight feet ahead of him. Rossman testified that he immediately slammed on his brakes and swerved, but was unable to steer the car to the left at all before striking Gonzalez in the center lane where he first saw him.

¶10 A reasonable jury could infer, based on this evidence, that Rossman was negligent as to lookout or management and control. Nothing in the record indicates that Gonzalez was running across the road, or that he had suddenly and unexpectedly stepped into the road from a curb or the side of the road. Although Rossman testified that he was looking forward and that Gonzalez simply appeared eight feet ahead of his vehicle in the center lane of the eastbound lanes, a jury could determine that since Gonzalez had to have crossed the three westbound lanes of Capitol Drive, the median, and one of the three eastbound lanes before arriving in the center lane, Rossman should have seen Gonzalez sooner, despite the fact that Gonzalez was wearing dark clothes. Although Rossman contended that the streetlighting was poor, the summary judgment record would permit the conclusion that the area was sufficiently lighted by Rossman's headlights, lights from area businesses, and those streetlights that were working to permit Rossman to see Gonzalez sooner than he did.

¶11 Based on the evidence, a jury would be warranted in concluding that Rossman should have seen Gonzalez sooner than he did, and that, if he had, he could have slowed down or changed lanes to avoid striking him. *Cf.* ***Metz***, 275 Wis. at 16 (a jury was entitled to find that the defendant driver was causally negligent when the evidence permitted it to conclude that the driver should have seen a pedestrian crossing the highway sooner, and, if he had, the driver would

have had time to take effective steps to avoid striking the pedestrian). A jury could also determine that if the road was so dark as to prevent Rossman from seeing Gonzalez as he crossed more than half of the six-lane, divided road, Rossman, in the exercise of ordinary care, should have been using his high beams or driving more slowly.

¶12 Material issues of fact also exist as to whether Trotier was negligent. In his deposition, Rossman indicated that after striking Gonzalez, he drove onto the median, ultimately stopping in the turn area of the median, with his car facing south and his lights and emergency flashers activated. Rossman testified that he banged on his car when he exited it after realizing it was damaged. He testified that he then walked over to Gonzalez, who was lying thirty feet to the west of Rossman's car in the center lane of the eastbound lanes. Rossman testified that he attempted to talk to Gonzalez, but Gonzalez was moaning and unresponsive. Rossman testified that he was standing three feet from Gonzalez when he saw Trotier's car approaching, and saw it run over Gonzalez' legs. He also testified that he did not see any other vehicles pass between the time he initially struck Gonzalez and the time Trotier ran over him, and believed Trotier's car was the only vehicle to pass going eastbound on Capitol Drive.[4]

[4] In arguing that the trial court's order should be affirmed, Trotier's insurer, Progressive Northern Insurance Company, places great weight on Trotier's deposition testimony that he was driving in a "pack" of cars and only saw an object in the road when the car in front of him suddenly changed lanes, leaving him with only a second or two to react. However, as already stated, in reviewing an order granting or denying summary judgment, we are prohibited from deciding issues of fact, and are limited to determining whether a material factual issue exists. Based on Rossman's deposition testimony, material factual issues exist as to whether Trotier ran over Gonzalez' body after Gonzalez was struck by Rossman, and, if so, the circumstances surrounding that second event.

¶13 Based upon this testimony, a material factual issue exists as to whether Trotier was negligent as to lookout for failing to observe what was going on ahead of him as he drove east on Capitol Drive, and for failing to take timely action to avoid striking Gonzalez' prostrate body. "One who looks without seeing that which is in plain sight is in precisely the situation [he or] she would have been if [he or] she had not looked at all." ***Schoenberg***, 257 Wis. at 108. A jury could find that Trotier should have observed Rossman standing by Gonzalez in the middle of the road sooner than he did, or should have seen Rossman walking towards Gonzalez or observed the lights or flashers of Rossman's car, and taken cautionary steps to avoid driving into a dangerous situation. In addition, Rossman's testimony would permit an inference that Trotier had sufficient time to pull over, stop, or otherwise avoid striking Gonzalez, and that he was thus negligent as to management and control. *See* WIS JI—CIVIL 1105 (2003).

¶14 Contrary to the argument of Trotier's insurer, this court cannot conclude as a matter of law that the emergency doctrine bars any negligence claim against Trotier. For the emergency doctrine to apply, the time element in which action is required must be short enough to preclude deliberate and intelligent choice of action, and the element of negligence being inquired into must concern management and control. ***Totsky v. Riteway Bus Serv., Inc.***, 2000 WI 29, ¶22, 233 Wis. 2d 371, 607 N.W.2d 637. Based upon Rossman's deposition testimony, a material factual issue exists as to whether Trotier was negligent as to lookout. In addition, Rossman's testimony would permit an inference that Trotier had

sufficient time to make a deliberate and intelligent choice of action to evade Gonzalez' body, thus obviating the application of the emergency doctrine.[5]

¶15 Summary judgment was therefore improperly granted, and the matter must be remanded for trial to determine whether Rossman and/or Trotier were negligent, and if so, to compare their negligence to that of Gonzalez. In reaching these conclusions, we reject the respondents' arguments that Gonzalez must be deemed more negligent than Rossman and Trotier as a matter of law because he crossed Capitol Drive outside of a crosswalk and failed to yield the right-of-way.

¶16 The respondents rely on ***Crawley v. Hill***, 253 Wis. 294, 34 N.W.2d 123 (1948); ***Post v. Thomas***, 240 Wis. 519, 3 N.W.2d 344 (1942); and ***Weber v. Barrett***, 238 Wis. 50, 298 N.W. 53 (1941). However, in ***Crawley*** and ***Weber***, the pedestrian ran into the path of the oncoming car. ***Crawley***, 253 Wis. at 297; ***Weber***, 238 Wis. at 53. In ***Post***, the pedestrian came out onto the street from between two parked cars. ***Post***, 240 Wis. at 526. In contrast, nothing in the summary judgment record indicated that Gonzalez was running across the road, ran into the path of Rossman's car, or had suddenly stepped into the road and into Rossman's path. The facts of this case are thus distinguishable from the cases relied on by the respondents. *See* ***Staples***, 142 Wis. 2d at 34-35.

[5] In arguing that the order granting summary judgment must be reversed as to Trotier, Gonzalez argues that a pedestrian who is lying in the road unconscious when struck by a motorist is not precluded from recovery based on his failure to yield the right-of-way. Because we conclude that material issues of fact exist for trial as to whether Trotier was negligent based on lookout or management and control, and the apportionment of negligence, we reverse the order granting summary judgment on that ground. We need not address whether, under ***Staples***, 142 Wis. 2d at 33, a defendant who is rendered unconscious as a result of his voluntary act of crossing a street outside the crosswalk and failing to yield to an oncoming car is thereafter precluded from relying on his unconscious state when he is struck by a second vehicle.

¶17 The only inference permitted from the summary judgment record is that this is a jaywalking case rather than a dart-out case. As noted above, Gonzalez could be deemed causally negligent as a matter of law for crossing outside a crosswalk and failing to yield to an oncoming vehicle. *See* ***id.*** at 31. However, the summary judgment record does not permit the trial court or this court to say that Gonzalez' negligence exceeded that of the drivers who struck him as a matter of law. *See* ***Metz***, 275 Wis. at 18; ***Staples***, 142 Wis. 2d at 35. The order granting summary judgment is therefore reversed, and the matter is remanded for further proceedings.

By the Court.—Order reversed and cause remanded.

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