COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3270 **Cir. Ct. No. 02CV000748**

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

WILMA WENDT,

PLAINTIFF,

V.

UNITED GOVERNMENT SERVICES AND CIGNA HEALTH CENTER,

SUBROGATED-PLAINTIFFS,

GENERAL CASUALTY COMPANY OF WISCONSIN,

DEFENDANT-APPELLANT,

ST. PAUL INSURANCE COMPANY,

DEFENDANT,

SOCIETY INSURANCE, A MUTUAL COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. General Casualty Company of Wisconsin has appealed from a judgment dismissing Society Insurance from this lawsuit. We affirm the trial court's grant of summary judgment to Society.

¶2 This action arises from injuries suffered by the plaintiff, Wilma Wendt, in a slip and fall on December 23, 2001, in a strip mall parking lot. The parking lot and shopping mall are owned by Arthur Goldner & Associates (Goldner). A Sentry grocery store is one of six tenants in the mall. Wendt alleged in her complaint that she slipped on a patch of ice and was injured while walking from the parking lot to the adjacent Sentry store. At the time, a contract existed between Goldner and C&D Construction under which C&D was obligated to provide snow removal and salting services for the parking lot.

¶3 Wendt filed suit against three insurance companies: (1) General Casualty, which provides insurance to C&D; (2) St. Paul Insurance Company, which provides insurance to Goldner; and (3) Society Insurance, which insures Allison Foods, Inc., doing business as Sentry Foods.[1] Wendt alleged that her injuries resulted from the negligence of Goldner, C&D, and Sentry in failing to protect her from the slippery, icy condition or to warn her of it.

[1] Wendt also joined two subrogated plaintiffs, United Government Services and Cigna Health Center.

¶4 The trial court granted Society's motion for summary judgment, determining that Sentry had no responsibility for nor control over the maintenance of the parking lot, and therefore could not be liable for Wendt's injuries based upon negligence or the safe-place statute, WIS. STAT. § 101.11(1) (2001-02).[2] General Casualty has appealed the judgment.[3]

¶5 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).

¶6 General Casualty contends that material factual issues exist as to Society's liability under the safe-place statute. It relies on WIS. STAT. § 101.11(1), which provides in part: "Every employer … shall furnish a place of employment

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

[3] Neither Wendt nor any of the other parties to this litigation have appealed the trial court's judgment dismissing the complaint against Society.

which shall be safe for employees therein and for frequenters thereof ....” It contends that an issue exists for trial as to whether the parking lot where Wendt fell is a place of employment for Sentry within the meaning of WIS. STAT. § 101.01(11), which defines “place of employment” for purposes of the safe-place statute.

¶7 We reject General Casualty’s argument because the summary judgment record establishes as a matter of law that the parking lot where Wendt fell is not a place of employment for Sentry. It is undisputed that at the time of the accident, the strip mall and parking lot were owned by Goldner. Sentry, along with five other businesses, leased space in the strip mall. The lease agreement between Sentry and Goldner provided that Goldner, as the landlord of the strip mall, would maintain all common areas, including the parking lot, in good condition and repair. Goldner in turn contracted with C&D to perform snow removal, salting and sweeping of the parking lot. Goldner would then bill the tenants, including Sentry, for the maintenance costs of the parking lot on a pro rata basis.

¶8 Sentry customers, like the customers of the other tenants in the mall, could use the parking lot, but Sentry had no contractual obligation to maintain it except for its responsibility to pay a pro rata share of the maintenance costs when billed by Goldner. Although Sentry employees sometimes assisted customers by carrying their groceries out to the parking lot, and they picked up grocery carts from cart corrals in the parking lot, the undisputed testimony of Goldner’s real estate manager, the Sentry manager, and C&D’s owner is that prior to the accident Sentry was not involved with plowing or salting the parking lot, and, as provided in its contract with Goldner, relied on C&D to maintain the lot. The deposition testimony further indicated that C&D had discretion as to when to plow or salt the

parking lot, and that it was the practice of C&D's owner to inspect the parking lot at least once a day to determine whether maintenance was needed.

¶9 Based upon these facts, the parking lot cannot be considered a place of employment for Sentry. The parking lot belongs to Goldner, and the lease between Sentry and Goldner gives the responsibility for maintaining it to Goldner. When the duty of maintenance clearly rests with one other than the employer, the area cannot be considered a place of employment for the employer. ***Gordon v. Schultz Savo Stores, Inc.***, 54 Wis. 2d 692, 698, 196 N.W.2d 633 (1972). The application of this rule is not altered by Sentry's responsibility to pay a pro rata share of the maintenance costs paid by Goldner. *See* ***id.*** at 697-98. Moreover, while the record indicates that Sentry employees picked up carts from cart corrals in the parking lot and carried groceries into the lot for Sentry customers, these activities do not demonstrate such dominion and control over the parking lot as to render it a place of employment for Sentry. *Cf.* ***id.*** (a grocery store did not exercise dominion and control over a parking lot even though its employees occasionally carried groceries to cars parked in the lot, it controlled the parking lot lights from inside the grocery store, and markings on the surface of the parking lot directed the flow of traffic to enable customers of the grocery store to conveniently drive into the parcel pickup area).

¶10 General Casualty attempts to distinguish ***Gordon*** on the ground that the parking lot involved in that case was publicly owned, while the lot involved here is privately owned. "In order for an area open to the public to be deemed a place of employment, the owner of the adjoining premises must have almost complete dominion and control over the area in question; and where the general public uses the area, the requisite dominion and control appear to be lacking." ***Id.*** at 697.

¶11 Although open to the general public, the municipally owned parking lot in ***Gordon*** was primarily used during the week by grocery store customers. ***Id.*** at 696-97. Moreover, while the parking lot in which Wendt fell was owned by a private company rather than a municipality as in ***Gordon***, according to the testimony of Goldner's real estate manager it was available to the general public. In addition, its use was shared by all the tenants of the strip mall, and it provided parking for all of their customers, visitors and employees, not just those of Sentry.

¶12 Most importantly, although the parking lot in ***Gordon*** was owned by the city, by agreement between the city and the landowner who owned the adjacent land, the parking lot was maintained by the landowner. ***Id.*** at 694. The landowner in turn leased a store on its adjacent property to Schultz Savo Stores, a grocery business, but retained responsibility for maintaining the lot. ***Id.*** at 694-95. Because the duty of maintaining the parking lot remained with the landowner, and the grocery store tenant did not exercise dominion and control over the lot, the grocery store was not liable under the safe-place statute when one of its customers fell in the parking lot. *See* ***id.*** at 697-98. Similarly, because Goldner retained responsibility for maintaining the parking lot, and Sentry did not exercise dominion and control over the lot, Sentry is not liable under the safe-place statute for injuries suffered by one of its customers in a fall in the parking lot.

¶13 General Casualty also relies on ***Callan v. Peters Construction Co.***, 94 Wis. 2d 225, 242, 288 N.W.2d 146 (Ct. App. 1979), to argue that ownership is not a prerequisite to finding a store owner liable under the safe-place statute for injuries suffered by a customer on land appurtenant to the store. General Casualty is correct that ownership is not a prerequisite to liability. *See* ***id.*** However, ***Callan*** is distinguishable. In ***Callan***, a customer on her way to the Marshall Field store fell and was injured near a sidewalk entrance to Marshall Field during a

remodeling project to enclose the Mayfair Shopping Center. ***Id.*** at 230. The Marshall Field store claimed that since it was a mere tenant in the Mayfair Shopping Center, and since the plaintiff's injuries occurred on a sidewalk in a common area to which it lacked legal title, it could not be liable. ***Id.*** at 241. This argument was rejected and Marshall Field's liability was upheld because it had the right and power to close the sidewalk entranceway to the public, to tell the construction contractor to keep construction materials away from the entrance, to change the flow of pedestrian traffic, and to control the activities of the contractor for the safety of its frequenters. ***Id.*** at 243. Pursuant to an agreement with the owner of the shopping center, Marshall Field also had a duty to participate in cleaning up debris while the remodeling was going on. ***Id.*** In contrast, nothing in the summary judgment record supports a determination that Sentry had the right or responsibility to maintain the parking lot, or that it exercised control over the area.[4] No basis therefore exists to conclude that the parking lot was a place of employment for Sentry.[5]

[4] Contrary to General Casualty's contention, the fact that Michael Braatz, the manager of Sentry, on occasion voluntarily walked around and checked the parking lot outside Sentry for garbage or hazards is insufficient to establish that Sentry exercised sufficient custody and control over the parking lot as to render it a place of employment, particularly in light of his testimony that Sentry employees never salted any snow or ice in the parking lot prior to Wendt's fall and that he never contacted C&D about plowing or salting the parking lot before Wendt's accident.

[5] General Casualty argues that an issue of fact exists for trial because Braatz replied "yes" in response to a deposition question asking him if the parking lot would be a place of employment for Sentry with respect to assisting customers in carrying groceries and picking up carts from the cart corrals. While Braatz's testimony that Sentry employees collect carts and carry groceries in the parking lot is factual testimony as to acts of Sentry employees, whether those acts are sufficient to render the parking lot a "place of employment" for Sentry involves a legal conclusion. His testimony that the parking lot is a place of employment for Sentry therefore does not create an issue of fact for trial.

¶14 Because the parking lot was not a place of employment for Sentry, Sentry had no duty to render it safe for Wendt under the safe-place statute. Because Sentry had no duty to keep the parking lot safe, General Casualty's argument that Sentry improperly delegated its duty must fail. The trial court therefore properly granted summary judgment dismissing the claim against Society.[6]

By the Court.—Judgment affirmed.

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

[6] We need not address Society's alternative argument that it was entitled to dismissal of the complaint because it was an additional insured under the policy issued by St. Paul Insurance Company to Goldner. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (this court need not decide an issue if the resolution of another issue is dispositive).