COURT OF APPEALS
DECISION
DATED AND FILED

August 28, 2008

David R. Schanker
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. 2007AP1132 **Cir. Ct. No. 2005CV172**

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

LISA DAWN BERGLUND, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JOSEPH MARK BERGLUND, DECEASED AND LISA DAWN BERGLUND, INDIVIDUALLY,

PLAINTIFFS-APPELLANTS,

V.

MANDY J. HUNSAID, AMERICAN FAMILY INSURANCE COMPANY AND PROGRESSIVE INSURANCE COMPANY, A/K/A PROGRESSIVE NORTHERN INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Reversed and cause remanded for further proceedings.*

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

¶1 HIGGINBOTHAM, P.J. This is a negligence apportionment case. Joseph Berglund negligently caused a motor vehicle accident on a Wisconsin highway. As a result, his car and the car he collided with were disabled on the highway. Soon thereafter, a vehicle driven by Mandy Hunsaid struck and killed Berglund. Lisa Berglund, as special administrator of the estate of her deceased husband, Joseph Berglund, and on her own behalf (collectively "the Estate"), brought this action against Mandy Hunsaid and her automobile insurance providers, American Family Mutual Insurance Company and Progressive Insurance Company (collectively "Hunsaid").

¶2 The Estate appeals an order of the circuit court granting summary judgment to Hunsaid on the basis that Berglund's negligence exceeded Hunsaid's negligence as a matter of law. The Estate contends that there are disputed material facts regarding the apportionment of negligence between Berglund and Hunsaid and therefore the circuit court erred in granting summary judgment to Hunsaid. On the summary judgment submissions, we conclude that a material factual dispute exists as to whether Berglund's negligence exceeded that of Hunsaid in the second accident. Specifically, we conclude, based on Hunsaid's failure to observe warnings alerting approaching drivers of the disabled vehicles in the road, that a reasonable jury could find that Hunsaid was negligent and that her negligence exceeded Berglund's negligence in the second accident. We therefore reverse the circuit court's summary judgment order and remand for further proceedings.

BACKGROUND

¶3 The affidavits and other summary judgment submissions reveal the following when viewed in the light most favorable to the Estate, the nonmoving party. At approximately 5:30 p.m. on December 14, 2004, Joseph Berglund was

driving toward Minong on State Highway 77 with his coworker, William Slayton, when his pickup truck rear-ended a pizza-delivery truck driven by Patricia Butler. Butler was waiting to turn left into a driveway as another vehicle approached from the opposite lane. It was nearly dark and, according to Slayton, the road was slippery in spots. Berglund's car battery was damaged in the accident, rendering his tail lights and hazards inoperable.

¶4 Shortly thereafter, another vehicle driven by Terry Mignerey became disabled when it hit some debris from the accident. After bringing his car to rest approximately 150 feet east of Berglund's disabled vehicle on the eastbound shoulder of the road, Mignerey activated his vehicle's emergency flashers.[1] He then stood in the middle of the eastbound lane 30 feet behind his car and approximately 120 feet to the east of Berglund's disabled vehicle holding an emergency flashlight with red and yellow flashers.

¶5 Several minutes later, a vehicle driven by Mandy Hunsaid approached the accident site in the same westbound lane where Berglund's vehicle sat disabled. Mignerey waived his emergency flashlight with red and yellow flashers over his head to warn Hunsaid of the disabled vehicle in the road. Hunsaid approached the scene at highway speeds[2] and accelerated as she passed Mignerey. Hunsaid attempted to avoid hitting Berglund's truck by veering into the ditch, which was where Berglund was standing. Hunsaid's vehicle struck Berglund, who died as a result of injuries suffered in the accident.

[1] Whether Mignerey also left on the headlights of his vehicle is disputed.

[2] Mignerey estimated the Hunsaid's vehicle was traveling at approximately 50 miles per hour. He disputed an estimate in a police report that put the vehicle's speed at 35 miles per hour. Hunsaid testified that she was traveling at "55 or less" as she approached the scene.

¶6 Lisa Berglund, as special administrator of Joseph Berglund's estate, sued Hunsaid, alleging negligence. Hunsaid moved for summary judgment. Hunsaid argued that Berglund's negligence exceeded her own negligence as a matter of law and therefore a reasonable jury could not find in favor of Berglund. The circuit court agreed with Hunsaid and granted summary judgment in her favor. Berglund appeals. Additional facts will be provided as necessary in our discussion.

STANDARD OF REVIEW

¶7 This appeal seeks review of the circuit court's decision granting summary judgment in favor of Hunsaid and the insurance companies. An appellate court reviews a circuit court's grant of summary judgment de novo, applying the same methodology as the circuit court. ***State v. Bobby G.***, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2005-06).[3] In evaluating the affidavits and other submissions, we draw all reasonable inferences from the summary judgment materials in favor of the nonmoving party. ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781.

¶8 The sole issue in this case is whether the circuit court erred by concluding that Berglund's negligence exceeded Hunsaid's negligence as a matter of law. Whether a plaintiff's negligence exceeds a defendant's negligence as a

[3] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

matter of law is a question of law that we review de novo. ***Hansen v. New Holland N. Am., Inc.***, 215 Wis. 2d 655, 667, 574 N.W.2d 250 (Ct. App. 1997) (citation omitted). "[T]he instances in which a court may rule that, as a matter of law, the plaintiff's negligence exceeds that of [a] defendant are extremely rare." ***Id.*** at 669. Thus, "[s]ummary judgment should only be used in the exceptional case where it is clear and uncontroverted that one party is substantially more negligent than the other and that no reasonable jury could reach a conclusion to the contrary." ***Id.*** "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." ***Alvarado v. Sersch***, 2003 WI 55, ¶29, 262 Wis. 2d 74, 662 N.W.2d 350 (quotation and citation omitted). Whether a party is negligent is ordinarily not determined by the court. ***Id***.

DISCUSSION

¶9 Wisconsin is a comparative negligence state. WIS. STAT. § 895.045(1). Under our system of negligence apportionment, a plaintiff's contributory negligence does not bar recovery where the plaintiff's negligence is not greater than the defendant's negligence. ***Id.***; ***Bain v. Tielens Constr., Inc.***, 2006 WI App 127, ¶5, 294 Wis. 2d 318, 718 N.W.2d 240. The apportionment of comparative negligence is generally a matter left to the trier of fact. ***Phelps v. Physicians Ins. Co. of Wis., Inc.***, 2005 WI 85, ¶45, 282 Wis. 2d 69, 698 N.W.2d 643. However, the court must bar recovery when the plaintiff's negligence is greater than the negligence of the defendant as a matter of law. ***Jankee v. Clark County***, 2000 WI 64, ¶50, 235 Wis. 2d 700, 612 N.W.2d 297.

¶10 The Estate argues that the circuit court erred in granting summary judgment to Hunsaid because a disputed question of material fact exists regarding whether Berglund's negligence exceeded Hunsaid's negligence in the second accident. Hunsaid's insurers[4] contend that Berglund was "100% negligent" in the first accident, and that, but for the first accident, the second accident would not have occurred. In the insurers' view, these facts compel the conclusion that Berglund's negligence was greater than Hunsaid's in the second accident. The insurers maintain that, even if Hunsaid was negligent in failing to slow down in approaching the disabled vehicles, under no reasonable view of the evidentiary submissions was Hunsaid's negligence greater than Berglund's as a matter of law. For the reasons that follow, we conclude that the circuit court erred in determining that Berglund's negligence in the second accident exceeded that of Hunsaid as a matter of law.

¶11 The summary judgment submissions, when viewed in the light most favorable to the Estate, support a reasonable inference that Hunsaid was negligent in failing to take adequate precautions in approaching the scene of the first accident. Mignerey's vehicle sat on the shoulder of the eastbound lane facing Hunsaid's approaching vehicle, approximately 150 feet east of Berglund's disabled vehicle. Mignerey stood in the middle of the eastbound lane 30 feet behind his vehicle, and 120 feet in front of Berglund's disabled vehicle waiving an

[4] Progressive and American Family filed separate responsive briefs in this case. (Hunsaid did not submit a brief.) While the briefs differ in some particulars, the insurers' arguments are in essence the same. For example, while only Progressive asserts that Berglund was "100% negligent" in the first accident, both argue that it was Berglund's negligence in the first accident that caused the second accident and, therefore, his negligence exceeded Hunsaid's in the second accident as a matter of law. We therefore address Progressive's and American Family's arguments jointly throughout except in footnote 6, *infra*, which addresses a separate argument of American Family.

emergency flashlight with yellow and red hazards. According to Mignerey's testimony, Hunsaid did not slow down as she approached the scene; she accelerated as she passed Mignerey and closed on Berglund's disabled vehicle. It was dark and the road was slippery in spots.

¶12 Hunsaid testified that it appeared that Mignerey's vehicle was moving toward her in the eastbound lane as she approached what turned out to be the accident scene. She testified that she did not see anyone waiving a flashlight with red and yellow hazards or observe any vehicles with flashing lights activated. She also testified that she did not see anybody on the roadway as she approached the accident site. This testimony, if believed by a jury, could either be viewed in support of Hunsaid's position that her negligence was minimal, or could be viewed in support of the Estate's position that Hunsaid was negligent in failing to observe attempts to warn oncoming vehicles of the potential for danger.

¶13 Moreover, a jury could reasonably conclude, based on the summary judgment materials, that Hunsaid's negligence was greater than Berglund's negligence in the second accident. Even if, as the insurers claim, Berglund was "100% negligent" in the first accident,[5] it does not necessarily follow that Berglund's negligence in the first accident compels a finding that his negligence exceeded Hunsaid's negligence in the second accident. Although the record shows that Berglund's negligence likely caused the first accident that disabled his vehicle on the highway, a reasonable jury could also find that the second accident would not have occurred had Hunsaid heeded the flashing lights of Mignerey's

[5] Although the record supports a reasonable inference that Berglund was 100% negligent in the first accident, we note that no fact finder has made such a determination.

vehicle and the flashlight waived by Mignerey and slowed her vehicle as she approached the scene so that evasive action was not required to avoid a collision with Berglund's disabled vehicle. Whether Hunsaid was negligent in this regard, and, if so, how this negligence compares with Berglund's negligence in the second accident, are matters for a jury.[6]

¶14 Of course, a jury could reasonably conclude that Berglund's negligence in the first accident, which resulted in his car being disabled on a highway at night without lights or hazards, caused him to exceed Hunsaid's negligence in the second accident as a matter of law. However, on the evidentiary submissions before us, we cannot conclude that Berglund's negligence in the second accident was greater than Hunsaid's negligence as a matter of law.

¶15 Accordingly, we reverse the circuit court's summary judgment order and remand for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.

[6] American Family claims that the Estate has not appealed the circuit court's determinations in the summary judgment order that Berglund was negligent in the first accident and that "the first collision was a cause in fact of the second fatal collision and must be included when apportioning responsibility for Joseph Berglund's death." It argues that these determinations of the circuit court are now the "law of the case." We disagree. Our review of an order granting summary judgment is de novo. We are not bound by any part of the circuit court's reasoning in granting summary judgment. Moreover, we note that the Estate has appealed the dismissal of all of its claims on summary judgment.

In a separate matter, we note that several pages of statements of fact contained in American Family's brief are devoid of citations to the record. We remind American Family that citations to the record are required by WIS. STAT. RULE 809.19(1)(d).