COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1553 **Cir. Ct. No. 2005CV209**

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

AMBER BALTS AND ROCKO HUNT, BY HIS GUARDIAN AD LITEM, EDMUND MANYDEEDS, III,

PLAINTIFFS-APPELLANTS,

V.

PAUL BENSON, MARGARET BENSON AND ESTATE OF NORMAN BENSON, BY SPECIAL ADMINISTRATOR, MARGARET BENSON,

DEFENDANTS-RESPONDENTS,

BADGER MUTUAL INSURANCE COMPANY AND PAUL J. KOSTUCH,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. This is a personal injury action arising out of an automobile accident. At the time of the accident, Paul Benson, the driver of the vehicle, and his parents Norman and Margaret Benson[1] were involved in a family farming business. Amber Balts and Rocko Hunt, who were passengers in the vehicle, appeal a judgment entered on a jury verdict.[2] They argue the court should have granted them summary judgment on Norman and Margaret's liability under either a partnership or master-servant theory. We disagree and affirm the judgment.

BACKGROUND

¶2 This action arises out of a May 2004 one-vehicle accident. Paul was the driver of the vehicle. Balts, Paul's fiancée at the time, and her two children, Rocko Hunt and Caesar Kostuch, were passengers. The vehicle veered onto the shoulder and rolled over several times. Balts's children were ejected from the vehicle. Rocko sustained minor injuries; Caesar was killed.

¶3 In March 2005, Balts filed suit against Paul and his parents, Norman and Margaret. Balts alleged Paul's negligence caused the accident, and Norman and Margaret were also liable because Paul was acting as their servant at the time

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[1] For clarity, we refer to the Bensons by their first names throughout this opinion.

[2] Balts and Rocko also purport to appeal from the court's non-final order denying summary judgment. While their appeal of the judgment allows us to review prior non-final adverse rulings, only a final judgment or order is appealable. *See* WIS. STAT. § 808.03(1), RULE 809.10(4).

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

In the remainder of this opinion, we refer to plaintiffs Balts and Rocko collectively as Balts.

of the accident. Balts later amended the complaint to add an allegation that Paul was in partnership with his parents and was driving for the benefit of the partnership.

¶4 In April 2006, Balts moved for partial summary judgment on Norman and Margaret's liability for Paul's negligence. She alleged the undisputed facts showed Paul was "acting in furtherance of a family partnership with his parents," or in the alternative Paul was acting as his parents' servant when the accident occurred. The court denied the motion.

¶5 The matter was tried to a jury beginning in January 2007. The jury found Paul's negligence caused the accident, but Paul was not acting in the scope of a partnership with his parents or as his parents' servant when the accident took place. Balts appeals from the non-final order denying their summary judgment motion and the judgment entered on the jury verdict.

DISCUSSION

¶6 Whether summary judgment is appropriate is a question of law reviewed without deference to the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); ***Green Spring Farms***, 136 Wis. 2d at 315. We view the facts in the light most favorable to the party opposing the motion. ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 511-12, 383 N.W.2d 916 (Ct. App. 1986).

¶7 Balts first argues the court should have granted her summary judgment based on a partnership theory. Members of a partnership are liable for

injuries to third parties caused by a partner "acting in the ordinary course of the business of the partnership, or with the authority of the partner's copartners…." WIS. STAT. § 178.10; *see also* WIS. STAT. § 178.12.

¶8 A "murky line" divides partnership activities from personal activities not considered part of the partnership business. ***Grotelueschen v. American Family Mut. Ins. Co.***, 171 Wis. 2d 437, 453, 492 N.W.2d 131 (1992). An activity is not a partnership activity if it is done solely for the actor's "own benefit or purposes…." ***Id.*** However, if an activity benefits the partnership or furthers its purposes, it is a partnership activity even if furthering the partnership's business was only one of multiple purposes behind the activity. ***Id.*** at 454.

¶9 In support of her summary judgment motion, Balts included an affidavit stating that at the time of the accident Paul had been driving to Menards to pick up supplies for use in remodeling a second house on the farm property. Balts claimed the second house was being remodeled for use as a rental, and Norman had hired Balts's brother Kevin to do some of the remodeling work. Balts said on the day of the accident, Norman had inspected the work and told Kevin to cover a particular wall with drywall mud. Norman told Paul to take the farm van and drive Kevin to Menards to pick up additional mud. Balts also relied on Paul's deposition, in which he stated he and his father were partners in the farm operation, and the second house was part of that operation.

¶10 In response, Margaret and Paul submitted affidavits contradicting much of the Balts affidavit.[3] In her affidavit, Margaret stated the repairs had been

[3] Norman died on November 17, 2005.

done so that Paul could live in the second house. Once Balts and Paul became engaged, the purpose of the repairs included accommodating Balts and her family as well. Margaret stated at the time of the accident Paul and Balts were making all the decisions related to remodeling, including hiring Kevin. She said the van was Paul's only working vehicle, and he parked it at his house and had his own set of keys. Paul's affidavit paralleled much of Margaret's. He also stated he and Kevin alone had decided to go to Menards on the day of the accident, and Norman had nothing to do with that decision.

¶11 If a jury accepted Paul and Margaret's affidavits as true, it could conclude the trip to Menards was made solely for Paul's "own benefit or purposes." *See* ***id.*** at 453. According to Margaret and Paul, the second house was being repaired so that Paul, and eventually Balts and her children, could use it as their personal residence. Paul and Balts, not Norman, were making decisions on what remodeling was necessary. While the second house had been used to generate partnership income in the past, a jury could conclude that when the accident took place the remodeling was intended solely to make the house suitable for Paul and Balts, not to make it suitable to generate partnership income. While the repairs might have added to the house's value, Paul and Balts intended to live in it rent-free indefinitely, preventing the partnership from receiving any benefit from an increased rental value.

¶12 Balts argues she is entitled to summary judgment under ***Grotelueschen***. The court in ***Grotelueschen*** concluded on summary judgment that a partner caused a lawn mowing accident while acting in the ordinary course of the business of a rental partnership. ***Id.*** at 442, 445. At the time of the accident, the partner had been mowing the lawn at a shed he used to store both

personal items and items he used to maintain the partnership's apartment building. ***Id.*** at 444. The court concluded:

> To maintain the apartment building, [the partner] needed tools and materials. Because he had insufficient space at the apartment building, he had to store those tools and materials in the red shed. Therefore, maintaining the red shed and its premises benefitted the partnership.

Id. at 454. Balts argues the same analysis applies here. She points out that the partnership would benefit from Paul living on site because, among other things, he would be easily available for chores and discussing farm business.

¶13 This argument misses the mark, for two reasons. First, although Paul's decision to live in the second house may have had benefits for all concerned, this does not mean that every action connected with living there necessarily benefited the partnership. All businesses benefit from well-fed principals living in well-maintained housing. But this does not mean a partnership's principals are "acting in the ordinary course of the business of the partnership" when they drive to the grocery store or clean out the gutters on their houses. A jury could infer that Paul and Balts were remodeling the house to suit their personal housing needs, not to benefit the partnership, and therefore were acting solely for their "own benefit or purposes" during the trip to Menards. *See* ***id.*** at 453.

¶14 Second, the connection between Paul's choice of residence and the partnership business is much more tenuous than the connection in ***Grotelueschen***. In ***Grotelueschen***, there was no question the activity in question conferred a net benefit on the partnership. ***Id.*** at 454. In this case, the benefits of Paul living in the second house cut both ways; the partnership received some benefit by having Paul living close to his work, but Paul received rent-free housing at the

partnership's expense. A jury could believe Paul received a greater benefit from his use of the house than the partnership did. The court did not err in allowing the jury to decide whether Paul's trip to Menards was within the scope of the partnership.

¶15 Balts next argues the court should have granted her summary judgment based on a master-servant theory. In the automobile context, a master-servant relationship exists when:

> (1) There is some agreement by the driver to act on the [master's] behalf or for his benefit; (2) some benefit results to the [master]; and (3) the [master] retains the right to control the driver and direct him in the accomplishment of his purpose.

Hoeft v. Friedel, 70 Wis. 2d 1022, 1034-35, 235 N.W.2d 918 (1975).

¶16 Here, none of these elements can be resolved on summary judgment. As explained above, the summary judgment record allows competing inferences as to whether the house renovation was for Paul's benefit or for the benefit of the partnership and whether a benefit actually accrued to the partnership. For the same reasons, there is a factual dispute over whether the repairs benefited Norman or Margaret. In addition, Paul stated in his affidavit that by the time of the accident he and Balts were making all the decisions related to remodeling, including hiring Balts's brother to help with the renovation. This creates a factual dispute over whether Norman and Margaret retained the right to control Paul "and direct him in the accomplishment of his purpose." ***Id.*** The court correctly allowed the jury to resolve this factual dispute.

By the Court.—Judgment affirmed.

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