COURT OF APPEALS
DECISION
DATED AND RELEASED

April 25, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2995

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

ARTHUR H. HURCKMAN, JULIE HURCKMAN, JESSICA and MARCIE HURCKMAN, minors, by their Guardian ad Litem THOMAS T. GEORGE,

Plaintiffs-Co-Appellants,

v.

SECURA INSURANCE COMPANY, BURLINGTON MOTOR CARRIERS, INC., U.S. DEPARTMENT OF LABOR, MICHAEL D. JENSEN and TERRY ALLEN SHIELDS,

Defendants,

AMERICAN SOUTHERN INSURANCE COMPANY, BADGER CAB COMPANY, INC. and JOSEPH K. ZARDA,

Defendants-Appellants,

MICHAEL J. FOLEY,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Dane County: MORIA G. KRUEGER, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

EICH, C.J. Arthur Hurckman was seriously injured in a multiple-vehicle accident that occurred when Michael Jensen drove down an embankment and into traffic on the Beltline Highway on the outskirts of Madison. He sued several parties, including Michael J. Foley, who was not involved in the accident--or even at the accident scene--but had attempted to follow Jensen after finding him in his (Foley's) home committing a burglary.

The trial court granted summary judgment dismissing Hurckman's action against Foley. Hurckman and one of the other drivers involved in the accident, Joseph Zarda, appeal, claiming that disputed issues of material fact preclude summary judgment.[1] We conclude that the material facts are not in dispute and that the trial court properly entered summary judgment dismissing Foley from the lawsuit.

When we review a summary judgment, we apply the same methodology as the trial court, and we consider the issues de novo. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment is appropriate in cases where there is no genuine issue of material fact and the moving party has established his or her entitlement to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis.2d 293, 296, 349 N.W.2d 733, 735 (Ct. App. 1984). Generally, our role is to determine only whether a material factual issue exists, resolving doubts in that regard against the moving party, because that party has the burden of establishing the absence of a factual issue. ***State Bank of La Crosse v. Elsen***, 128 Wis.2d 508, 512, 383 N.W.2d 916, 918 (Ct. App. 1986). We have also said that, while the party seeking summary judgment must "`establish a record sufficient to demonstrate ... that there is no triable issue of material fact on any issue presented,' ... [t]he ultimate burden ... of demonstrating that there is sufficient evidence ... to go to trial at all ... is on the party that has the burden of proof on the issue that is the object of the motion." ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 290, 507 N.W.2d 136, 139 (Ct. App. 1993) (citation omitted; quoted source omitted).

[1] In referring to the parties' arguments, we will refer to the appellants collectively as "Hurckman," as their positions are complementary.

Summary judgment "methodology" is well known. If the pleadings state a claim and the answer joins the issue, we examine the moving party's affidavits and other proofs to determine whether they present material evidentiary facts stating a *prima facie* claim or, as here, where the defendant is the moving party, a *prima facie* defense to the action. *See* ***State Bank of La Crosse***, 128 Wis.2d at 511, 383 N.W.2d at 917. If a *prima facie* defense is stated, we next examine the affidavits and proofs of the opposing party to determine whether a genuine issue of material fact exists--or whether reasonable conflicting inferences may be drawn from the undisputed facts--which would require resolution at trial. ***Dean Medical Ctr., S.C. v. Frye***, 149 Wis.2d 727, 730, 439 N.W.2d 633, 634 (Ct. App. 1989). Summary judgment is not a short-cut trial on affidavits, but is available only where there is no substantial issue of material fact to be tried. ***Baxter v. DNR***, 165 Wis.2d 298, 312, 477 N.W.2d 648, 654 (Ct. App. 1991).

The rule does not require a complete absence of *all* factual disputes, however. We have held, for example, that "the `mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'" ***Baxter***, 165 Wis.2d at 312, 477 N.W.2d at 654 (emphasis in the original; quoted source omitted). A factual issue is considered "genuine" if the evidence is such that reasonable jurors could return a verdict for the nonmoving party. ***Id.*** at 312, 477 N.W.2d at 654. And a "material fact" is one that is "of consequence to the merits of the litigation." ***Interest of Michael R. B.***, 175 Wis.2d 713, 724, 499 N.W.2d 641, 646 (1993).

Hurckman's complaint alleged that Foley was negligent in "pursuing ... Jensen at a high rate of speed, causing Mr. Jensen to operate his vehicle in a reckless and dangerous manner ...." Foley answered the complaint, joining the issue by stating a general denial, and moved for summary judgment. In support of the motion, he submitted his own affidavit, together with that of Rick Lange, a 911 dispatcher.

Foley's affidavit states that when he arrived home on the evening in question, he found Jensen in the process of burglarizing his house. According to Foley, Jensen ran from the house, got into his car and drove away. Foley got into his own car and dialed 911 on his cellular phone. Lange, the dispatcher on duty, suggested that Foley attempt to follow the burglar "at a safe

distance" and remain on the telephone to help police pinpoint his location. Foley said that by the time he started his car, Jensen "had driven down Osmundson [Road] and was out of my sight." Foley continued:

> When I reached the intersection of Highway PD and Osmundson, I was not certain whether the burglar had turned onto PD or continued on Osmundson. After waiting for a car to go by on PD, I crossed Highway PD on Osmundson and entered [a residential area]. When I did not see the burglar, I turned around and traveled west on Highway PD. When I got to the top of Highway PD, I saw the burglar's vehicle approximately one-quarter mile away speeding around the corner going north on Seminole Highway. I attempted to follow the burglar on Seminole Highway, but due to the winding nature of the street and other vehicles between us, my view was obstructed and I could not be certain that his vehicle was still in front of me. I last saw what I believed to be the burglar's vehicle heading north on Seminole Highway toward the Beltline.

Foley said that at that time, when he was approximately one-half mile away from Jensen's vehicle, he lost sight of it. He continued driving on Seminole Highway across the Beltline and turned around, re-crossing the highway and entering it from an access road. He left the highway at the next exit, stating that he had given up his attempt to locate Jensen, and turned around to head back toward his home, when the 911 dispatcher asked him to "stop and check an accident that had just occurred on the Beltline at Seminole Highway." He came upon the accident scene and identified Jensen's car as one involved in the collision.

Foley stated in his affidavit: "At no time did I chase the burglar's vehicle. Rather, I attempted only to keep him in sight in order to assist the police in locating him," and "[t]hroughout the entire time I attempted to follow the burglar, I never got closer than one-quarter to three-tenths of a mile from his car." In a supplemental affidavit, Foley stated: "The entire time I was on

Seminole Highway, I did not exceed the speed limit because there were other vehicles between my car and what I believed to be Jensen's vehicle."

Lange's affidavit incorporated a handwritten statement concerning Foley's 911 call:

Foley said he was leaving his residence to follow the suspect, who by this time had fled the area in a vehicle.

> ... I specifically asked Foley to keep the suspect in sight, but to be careful in doing so. I told Foley not to break any laws while following the suspect.... I recall that just south of Seminole Highway and the Beltline by a few blocks, Foley told me that he had lost sight of the suspect. As Foley started to follow the suspect, Foley was fairly close as I recall. As the incident progressed, however, the suspect pulled away from Foley.... When Foley told me he lost the suspect, he said he would drive in the area to see if he could locate the suspect's vehicle.... Several minutes after Foley lost the suspect, [we] began receiving phone calls about what later turned into an injury accident.... The accident was on the beltline a short distance from Seminole Highway ....
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> ... I directed him to ... the scene of the accident.... [H]e identif[ied] the suspect vehicle ... as one of the vehicles in the accident.

Opposing Foley's motion, Hurckman submitted the affidavit of his attorney incorporating a copy of what appears to be a police report of the accident which, according to the attorney, was a record "regularly kept in the course of business by the Town of Madison Police Department and w[as] obtained by your affiant directly from the ... Department." The affidavit directed attention to only a few lines in the lengthy document where one of the officers responding to the accident states that he came upon a man "later identified as ... Foley," who "stated *he had chased this subject from his residence and*

was in a car chase, [and] lost the subject somewhere near Seminole Hwy. and the Beltline." (Emphasis added.) No other proofs were submitted.[2]

Hurckman's argument that disputed material facts exist which preclude summary judgment is based on the italicized phrase in the police report. He claims that Foley's purported statement to the officer that he "chased" Jensen contradicts the portion of his affidavit stating: "At no time did I chase the burglar's vehicle.... Rather I attempted only to keep him in sight in order to assist the police in locating him," and he maintains that this in itself is enough to defeat summary judgment. We disagree. Even if the difference between "following" and "chasing" is something more than mere semantics,[3] the undisputed fact is that Foley was not "pursuing" Jensen at the time Jensen drove down the embankment onto the Beltline Highway.

Our conclusion is compelled by ***Smith v. County of Milwaukee,*** 162 Wis.2d 340, 470 N.W.2d 274 (1991), where the supreme court affirmed a summary judgment under similar circumstances. In ***Smith***, a Milwaukee County sheriff's deputy, Charles Franklin, saw a car driven by Emmitt Huston

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[2] Hurckman argues that we should strike Lange's affidavit as hearsay; Foley argues that we should strike the Town of Madison police report as an unauthenticated document. We have considered both documents for what they are worth. Lange's statement, which we consider to be admissible as reflecting Foley's present-sense impressions relayed to Lange over the telephone while he was following Jensen, *see* § 908.03(1), STATS., adds little to Foley's own affidavit. And the only authority cited by Foley in support of his argument that the "unauthenticated" police report is inadmissible, ***State v. Nowakowski***, 67 Wis.2d 545, 227 N.W.2d 697 (1975), does not so hold. ***Nowakowski*** simply held that a political campaign committee report which the court described as "a public document, filed under oath [and] notarized ..., is one having `circumstantial guarantees of trustworthiness' under sec. 908.03(24), Stats.," the catch-all provision of the hearsay rule. ***Id***. at 561-62, 227 N.W.2d at 705.

[3] According to Webster, "chase" and "follow" are synonyms, with the former implying an intention to "overtake," and the latter placing "less emphasis upon speed or intent to overtake." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 228 (1991). Foley's own words, in his affidavit, plainly state his intention, as directed by the 911 dispatcher, *not* to speed or overtake Jensen. That a Town of Madison police officer, recalling his conversation with Foley, used the word "chase" seems to us to be insignificant. In any event, as may be seen in the discussion that follows, the difference is immaterial in light of the supreme court's decision in ***Smith v. County of Milwaukee***, 162 Wis.2d 340, 470 N.W.2d 274 (1991).

pass him on the median strip of an interstate highway, striking the median barrier several times while doing so. Franklin activated the lights and siren on his squad car and pulled Huston over. When Franklin approached Huston's car on foot, Huston "sped off," leading Franklin on an 80-mile-per-hour chase down a city street. Franklin lost sight of Huston's car in the 2300 block of Fourth Street, and Huston, now being followed by other officers, crashed into another car in the 2800 block. Franklin learned of the crash over the police radio. The driver of the other car sued Milwaukee County for injuries suffered in the crash, claiming that Franklin had negligently pursued Huston at an unsafe speed and that Franklin's negligence was a proximate cause of the collision. ***Id***. at 341-43, 470 N.W.2d at 275.

The supreme court held that at the time Franklin lost sight of Huston, "[his] pursuit of Huston ... ended" and, as a result, "the County has presented a defense which defeats [the motorist's] claim." ***Smith***, 162 Wis.2d at 344, 470 N.W.2d at 276. The court reasoned that because Franklin was "a significant distance from the scene of the accident" when it occurred and had "lost visual contact with Huston's vehicle" several blocks earlier, he had, in effect, "abandoned" the pursuit and, as a result, the collision was "unrelated to the conduct of Deputy Franklin." ***Id***. at 342 n.1, 344, 346, 470 N.W.2d at 275, 276, 279.[4]

Thus, even if we were to accept Hurckman's argument that there is a factual dispute as to whether Foley was, as he stated in his affidavit, simply following Jensen or, as the officer reported he had said at the scene, "chasing" him, the fact is not material because the evidence is undisputed that Foley had lost sight of Jensen's car one-half mile from the scene of the accident and was unaware of either the collision or Jensen's whereabouts at the time it occurred. The supreme court concluded as a matter of law in ***Smith*** that Franklin's abandonment of the "chase" absolved him of any responsibility for the

[4] The driver had argued that summary judgment was improper because several material facts were in dispute, notably: (1) whether Huston was aware he was being pursued by Franklin; (2) whether the manner in which Franklin was pursuing him caused Huston to operate his vehicle negligently; and (3) whether Huston would have struck the other car had he not been pursued by Franklin. ***Smith***, 162 Wis.2d at 345, 470 N.W.2d at 276. The court said that while those facts may be disputed, they were not material, because "[t]he controlling legal issue is whether ... Franklin was pursuing Huston at the time Huston's car struck [the other vehicle], and these disputed facts are not material to that issue." ***Id***. at 345-46, 470 N.W.2d at 276.

subsequent accident, and the material undisputed facts in this case are considerably less egregious. Franklin pursued Huston in a squad car, with sirens engaged and lights flashing, down a city street at speeds in excess of 80 miles per hour. Foley, who did not even start his car until after Jensen had driven away and was out of sight, followed him in his private vehicle at the legal speed limit, with other cars in between. Franklin lost sight of Huston approximately five blocks from the collision. Foley lost sight of Jensen when he was approximately one-half mile away, after which he continued across the road onto which Jensen had abruptly driven and turned around to go back, "giving up" his "attempt to locate the burglar." It was only then that he learned of the accident from the dispatcher.[5]

Finally, we reject Hurckman's argument that questions of duty (the "foreseeability" of adverse results from Foley's conduct) and causation (whether Foley's actions were in fact a proximate cause of Hurckman's injuries) cannot be resolved on summary judgment. ***Smith*** suggests otherwise. In that case, as we have indicated, the supreme court ruled that a much more egregious "pursuit" than this one had ended where, as here, the "pursuer" lost sight of the "pursued one." As a result, said the court, the plaintiff's claim failed as a matter of law and there was no need to consider any issues relating to duty or cause. ***Smith***, 162 Wis.2d at 344, 470 N.W.2d at 276.

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[5] Hurckman argues at length that Foley's own affidavit establishes that he did not cease or abandon the chase after losing sight of Jensen's car on Seminole Highway, but continued his "pursuit" until, "attempt[ing] to elude his pursuer," Jensen "desperately dr[ove] down an embankment onto the Beltline, thereby causing the ... accident." He bases the argument on Foley's statement that, after losing sight of Jensen's car, he "continued driving on Seminole Highway, went a few blocks beyond the Beltline, and turned around," driving along the Beltline to the next exit, and that "[a]t that point I gave up my attempt to locate the burglar ...." Hurckman reads that last remark as indicating that Foley's "pursuit" of Jensen continued even after he lost sight of him.

It may be that one can drive around searching for a vehicle after losing sight of it, but we do not see how Foley's driving back and forth over and along a roadway after he admittedly lost sight of Jensen's car can be considered a "pursuit" of the type suggested by Hurckman.

The ***Smith*** opinion drew a strong and persuasive dissent. The majority opinion, however, is binding on us and requires us to affirm the trial court's decision.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.