COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 7, 1997

NOTICE

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.

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

No. 97-1478-FT

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

KATHLEEN K. WARD AND CHARLES W. WARD,

PLAINTIFFS-APPELLANTS,

EMPLOYERS INSURANCE OF WAUSAU,

INTERVENING PLAINTIFF,

V.

EMPLOYERS HEALTH INSURANCE COMPANY,

DEFENDANT,

COLONIAL VILLAGE OF GREEN BAY, INC. AND GRE INSURANCE GROUP,

DEFENDANTS-
THIRD PARTY PLAINTIFFS-RESPONDENTS,

V.

FLEMING COMPANIES, INC., S.W. FOODS, INC., D/B/A JUBILEE FOODS AND HERITAGE MUTUAL INSURANCE COMPANY,

THIRD PARTY DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Brown County: JOHN D. MC KAY, Judge. *Reversed and cause remanded.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Kathleen and Charles Ward appeal a summary judgment dismissing their personal injury action against S.W. Foods, Inc., d/b/a Jubilee Foods and its insurers.[1] The trial court concluded that the Wards' action alleging negligence and violation of the safe-place statute must be dismissed because the Wards would not prove beyond speculation or conjecture that the injuries Kathleen suffered in a fall were caused by a small patch of ice outside the grocery store. Because we conclude that the Wards have established sufficient circumstantial evidence of causation to present the causation question to a jury, we reverse the summary judgment and remand the matter for trial.

The parties' supporting papers establish that Kathleen Ward was injured when she slipped and fell as she approached the entrance door of Jubilee Foods. The store manager, Doug Jubert, assisted her after the fall and inspected the area after Ward filled out an accident report and left the store. On the report, Jubert indicates that Ward fell on a small patch of ice injuring her right arm, elbow and shoulder. He observed a small patch of ice, approximately the size of a silver dollar, which appeared to have been there for "a while." Ward was unable to testify as to the cause of her fall. The trial court concluded that attributing her fall

[1] This is an expedited appeal under RULE 809.17, STATS.

to the ice would constitute speculation and conjecture and granted summary judgment dismissing the action for lack of proof of causation.

In order to make a prima facie case for summary judgment, the moving party must show a defense that would defeat the plaintiffs' claims. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477 (1980). Summary judgment is not appropriate if the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance. ***Id.*** The inferences to be drawn from the underlying facts contained in the moving party's materials should be viewed in the light most favorable to the party opposing the motion for summary judgment. ***Id***. at 339, 294 N.W.2d at 477. An inference is reasonable if it can fairly be drawn from the facts in evidence. ***In re Paternity of A.M.C.***, 144 Wis.2d 621, 636, 424 N.W.2d 707, 713 (1988). A proper inference is one drawn from logic and proper deduction. ***Id***. Speculation and conjecture, on the other hand, apply to a choice between liability and nonliability where there is no reasonable basis in the evidence upon which a choice of liability can be made. ***Merco Dist. Corp. v. Commercial Police Alarm Co., Inc.***, 84 Wis.2d 455, 460, 267 N.W.2d 652, 655 (1978). The small measure of speculation required for a jury to settle a dispute by choosing the more reasonable of two inferences does not constitute impermissible speculation or conjecture. *See* ***Lavender v. Kurn***, 327 U.S. 645, 653 (1946).

The Wards' circumstantial evidence that Kathleen slipped on a patch of ice is sufficient to defeat the motion for summary judgment. Jubert observed the small patch of ice that appeared to have been there for a while. He told Kathleen that she slipped on ice. No other attributable cause has been identified. Kathleen testified that she did not trip or stub her toe. Under these circumstances, the cause of Kathleen's fall is an outstanding issue of material fact that precludes

summary judgment. The Wards' proof of causation consists not of speculation or conjecture, but of reasonable inferences that could be drawn from the circumstantial evidence.

By the Court.—Judgment reversed and cause remanded.

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