COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-0238-FT

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

JULIE A. WILLIAMS,

PLAINTIFF-APPELLANT,

V.

PAUL NELSON AND WISCONSIN AMERICAN MUTUAL INSURANCE COMPANY,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

BRAD TANK, ABC INSURANCE COMPANY, HERB VERHAGEN, AND MINNESOTA FIRE AND CASUALTY COMPANY,

THIRD-PARTY DEFENDANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Oconto County: LARRY L. JESKE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., Hoover, J.

MYSE, P.J. Julie Williams appeals a summary judgment dismissing her negligence claim against Paul Nelson and his liability insurer.[1] Williams contends that the trial court erred by concluding that there were no disputed issues of material fact that Nelson acted negligently and that Williams' injuries were the result of an unfortunate accident. Paul Nelson cross-appeals the summary judgment dismissal of his third-party complaint against Brad Tank, Herb Verhagen and their respective liability insurers and asserts that he filed his cross-appeal to preserve his contribution and/or indemnification rights against Tank and Verhagen. We conclude the trial court erred by dismissing Williams' negligence claim against Nelson because the record reflects a disputed issue of material fact as to whether Nelson breached his duty of care toward Williams. We further conclude that the trial court correctly dismissed Nelson's third-party suit against Tank and Verhagen because there is no evidence that Tank or Verhagen were negligent. Accordingly, we reverse that part of the trial court's judgment dismissing Williams' negligence claim against Nelson and remand for a jury trial. We affirm that part of the trial court's judgment dismissing Nelson's claims against Tank and Verhagen.

Williams was injured while assisting Paul Nelson in erecting a garage wall frame at Nelson's home. Tank and Verhagen also assisted Nelson.

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

The four lifted the wall from the floor of the garage to shoulder height but then determined that the wall was too heavy and they would not be able to completely raise it. Therefore, they agreed to drop the wall back to the ground. After first lowering it to waist height and agreeing to drop the wall on the count of three, they simultaneously dropped the wall to the ground. As all four released the wall, Williams slipped on the dew-covered concrete floor and fell under the wall. It is undisputed that the wall was dropped according to their plan and that no one dropped the wall too quickly or too slowly.

Williams subsequently filed this negligence claim alleging that Nelson breached his duty of care. She maintains that because Nelson organized and was in charge of the project on his land and because he had building experience, Nelson: (1) should have foreseen that more than four persons would be necessary to successfully and safely lift the wall because of its size and weight; (2) failed to use safeguards or mechanical devices in orchestrating the lift; and (3) failed to keep the concrete floor free of moisture or elected to proceed knowing the concrete floor was damp. Nelson moved for summary judgment dismissing Williams' complaint and also filed a third-party action against Tank and Verhagen alleging their negligence also caused Williams' injuries. Verhagen and Tank moved for summary judgment dismissal of Nelson's third-party complaint. The trial court dismissed Williams' complaint and Nelson's third-party complaint on summary judgment concluding that there was no evidence of negligence by any of the defendants. Williams now appeals the dismissal of her complaint, and Nelson cross-appeals the dismissal of this third-party complaint.

As a preliminary matter, we note that a factual error discovered in a prior opinion required withdrawal of that opinion. As a result, we have

re-examined the record and have heard oral arguments. We now consider this matter anew.

When reviewing a grant of summary judgment, appellate courts independently apply the same methodology as the trial court. ***Kloes v. Eau Claire Cavalier Baseball Ass'n***, 170 Wis.2d 77, 83, 387 N.W.2d 77, 79-80 (Ct. App. 1992). That methodology has been set forth numerous times, and need not be repeated here except to emphasize that if a genuine dispute of material fact exists or if the evidence presented is subject to conflicting inferences or factual interpretations, summary judgment must be denied. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476 (1980); *see also*, ***State Bank of La Crosse v. Elsen***, 128 Wis.2d 508, 512, 383 N.W.2d 916, 918 (Ct. App. 1986).

To prevail on summary judgment, Nelson, as moving defendant, must prove facts which establish a defense that would defeat Williams' claims as a matter of law. ***Krezinski v. Hay***, 77 Wis.2d 569, 572-73, 253 N.W.2d 522, 524 (1977). Nelson claims as his defense that because there is no evidence of negligence, Williams failed to establish a prima facie case requiring summary judgment dismissal as a matter of law. We conclude that there is enough evidence in the record to raise a disputed issue of material fact as to whether Nelson breached a duty of ordinary care.

Before we determine whether there is sufficient evidence to raise a disputed issue of material fact as to whether Nelson breached a duty of care, we must first identify Nelson's duty. The existence of a legal duty is a question of law this court determines without deference to the trial court. ***Kramschuster v. Shawn E.***, 211 Wis.2d 699, 703, 565 N.W.2d 581, 583 (Ct. App. 1997). A landowner owes a duty of ordinary care to any person on the premises with the

landowner's permission, so as to avoid exposing the person to an unreasonable risk of harm. ***Antoniewicz v. Reszcynski***, 70 Wis.2d 836, 857, 236 N.W.2d 1, 11 (1975). Here, by virtue of his landowner status, Nelson owed a duty of ordinary care to avoid exposing Williams to an unreasonable risk of harm.

We next determine whether there is sufficient evidence in the record to raise a disputed issue of material fact as to whether Nelson breached that duty;. A person fails to exercise ordinary care when the person acts or omits a precaution under circumstances where a prudent person ought to reasonably foresee that the act or omission will subject a person to an unreasonable risk of injury. ***Rockweit v. Senecal***, 197 Wis.2d 409, 424, 541 N.W.2d 742, 749 (1995). Williams asserts that Nelson breached his duty of care by: (1) expecting only four people to lift a wall that could readily and easily have been determined to be too heavy for four people to lift;[2] (2) orchestrating the lift without the use of any safeguards or additional mechanical devices for leverage; and (3) failing to keep the concrete floor free of moisture or electing to proceed knowing the concrete floor was damp.

Nelson, in support of his summary judgment defense, relies on the deposition testimony of all of the parties, including Williams, that the incident was an accident not caused by anyone's fault. Nelson also relies on deposition testimony indicating that no one ascribed any misconduct to Nelson, Tank or Verhagen, that the lift was a cooperative effort, and that everything went as planned except the slip and fall.

While this evidence is relevant to the actions comprising the actual lift itself, it does not go directly to Williams' allegations of negligence. Her

[2] The record reflects Verhagen expressed concern that the job might be too heavy.

allegations focus on Nelson's omissions in safely organizing, orchestrating, and preparing for the safe completion of this project. Nelson's own testimony provides sufficient evidence to send this issue to a jury. Nelson testified that because the project was at his house, he was "in charge," and if any ultimate decision had to be made on the lift, it would have been his decision. He built the wall and was familiar with its dimensions and size. Nelson testified that no mechanical devices were used to lift the wall, and that he made the arrangements with friends to help with the lift. He further stated that, in terms of preparatory work, he had the framed wall ready to go and was prepared. Nelson also testified that the job was a little larger than most of the jobs these persons did together for each other, that Verhagen alerted him that the job might be too heavy, and that he was aware the cement floor was dew-covered that morning. Tank testified that there were no preparatory discussions other than lifting on the count of three.

To hold that a person is not negligent as a matter of law, we must be able to say that no properly instructed reasonable jury could find a breach of the duty of ordinary care based on the facts presented. ***Ceplina v. South Milwaukee School Bd***., 73 Wis.2d 338, 342-43, 243 N.W.2d 183, 186 (1976). We are satisfied that there is sufficient evidence in the record for a reasonable jury to infer a breach of Nelson's duty of ordinary care. Nelson has failed to establish a defense that defeats Williams' negligence claim as a matter of law, and therefore the trial court erred by granting his motion for summary judgment. Accordingly, we reverse that portion of the trial court's judgment dismissing Williams' negligence claim against Nelson and remand for a jury trial.

Nelson has filed a cross-appeal to preserve his contribution and indemnification rights under his third-party action against Verhagen and Tank. Both Verhagen and Tank sought summary judgment dismissal of Nelson's third-

party complaint. The trial court granted summary judgment dismissal concluding that there was no evidence of Tank's or Verhagen's negligence. We agree and affirm that portion of the trial court's judgment dismissing Nelson's third-party claims against Tank and Verhagen.

Nelson's third-party complaint alleges that Tank and Verhagen breached their duties of ordinary care by failing to have proper control of the wall and by acting carelessly in dropping the wall on Williams. Unlike Williams' complaint, which alleges negligent conduct against Nelson in his organization and preparation for this project, Nelson's complaint against Tank and Verhagen alleges negligent conduct during the actual raising of the garage wall. As moving parties on summary judgment, Tank and Verhagen must present a defense that defeats Nelson's negligence claims as a matter of law. ***Krezinski***, 77 Wis.2d at 572-73, 253 N.W.2d at 524.

Pursuant to the submissions, all of the parties, including Nelson, agreed that neither Tank nor Verhagen did anything during the course of the lift to cause the accident or Williams' injuries. Everyone did everything they were supposed to do during the raising and dropping of the wall. Nelson has submitted no evidence that raises a disputed issue of material fact concerning Tank's or Verhagen's alleged negligence. We agree that reversing summary judgment as to Nelson does not require us to reverse summary judgment as to Tank or Verhagen because the factual allegations of Williams' complaint against Nelson are different from Nelson's third-party allegations against Tank and Verhagen. Finally, we note that the record is unclear whether Nelson's counsel expressly or explicitly opposed the summary judgment motions brought by Tank and Verhagen. We conclude it is unnecessary to determine any waiver or abandonment issue, however, because we conclude that there is no evidence of negligence by Tank

and Verhagen as a matter of law. Accordingly, we affirm that portion of the trial court's judgment dismissing Nelson's third-party claims against Tank and Verhagen.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. Williams to recover her costs on the appeal from Nelson; Verhagen and Tank to recover costs on the cross-appeal from Nelson.

Not recommended for publication in the official reports.