**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 20, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-1003** **Cir. Ct. No. 99-CV-2117**

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

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**BRYAN BAUMEISTER, ROBIN BAUMEISTER, JEFFREY BROWN AND STACY BROWN,**

**PLAINTIFFS-APPELLANTS,**

**HERITAGE MUTUAL INSURANCE COMPANY,**

**SUBROGATED-PLAINTIFF,**

**V.**

**AUTOMATED PRODUCTS, INC.,**

**DEFENDANT,**

**EDWARD A. SOLNER AIA D/B/A SOLNER AND ASSOCIATES,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Bryan Baumeister, his wife Robin Baumeister, Jeffrey Brown, and Brown's wife, Stacy Brown (collectively referred to as "Baumeister and Brown"), are the appellants. Bryan Baumeister and Jeffrey Brown are construction workers. They were injured when roof trusses they were installing collapsed. They claim that architect Edward Solner negligently failed to "design" or "approve" safe temporary truss bracing for use during construction. Baumeister and Brown appeal an order of the circuit court granting summary judgment in favor of Solner. We conclude that summary judgment was appropriate and affirm the order of the circuit court. In addition, Solner has filed a motion requesting that we declare this appeal frivolous. That motion is denied for the reasons set forth in Judge Deininger's concurrence.

## *Background*

¶2 Holy Trinity Lutheran Church contracted with architect Edward Solner to design a church. Holy Trinity separately contracted with a general contractor, Roberts Construction Associates, Inc., to build the church. Bryan Baumeister and Jeffrey Brown, the injured plaintiffs-appellants, were construction workers employed by a Roberts subcontractor, Diamond Builders.

¶3 The contract between Holy Trinity and Roberts Construction included two requirements related to truss installation: first, that Roberts "[c]omply with recommendations of TPI [Truss Plate Institute] Design Specifications for Metal Plate Connected Wood Trusses and State of Wisconsin Code requirements" and, second, that Roberts "[i]nstall materials and systems in accordance with manufacturer's instructions and approved submittals."

¶4 Solner designed the building and prepared "contract specifications" for the wood trusses. Roberts Construction subcontracted with Automated Products to supply trusses that fit Solner's specifications. Attached to Automated's truss design was the following direction: "The Builder shall be responsible for proper truss handling and bracing. A guide for the qualified Builder may be but is not limited to: 'handling and erecting wood trusses' by TPI, Inc." The Truss Plate Institute HIB-91 Summary Sheet arrived with the trusses at the construction site.

¶5 During installation of the wood trusses, they collapsed. The Truss Plate Institute guidelines for installation and temporary bracing were not followed. Baumeister and Brown were seriously injured. For purposes of summary judgment, we assume the trusses collapsed because of inadequate temporary bracing either on the trusses themselves or on other components of the building.

¶6 On September 3, 1999, General Casualty Company of Wisconsin, the insurance company for Holy Trinity, brought suit against the subcontractor, Diamond Builders, alleging negligent installation of temporary bracing during the installation of the roof trusses. Baumeister and Brown intervened in the action. Among other arguments, Baumeister and Brown assert that their injuries were caused by architect Solner's negligence. Solner moved for summary judgment. The circuit court granted summary judgment and dismissed all claims against Solner.[1]

[1] Solner moved twice for summary judgment. His first motion was denied. We are asked to review the circuit court's decision granting Solner summary judgment on Solner's second motion, that is, his motion for reconsideration. Because there is nothing significant, for purposes of this appeal, about the fact that summary judgment was granted pursuant to a motion for reconsideration, we ignore this in our opinion, except to briefly address the topic in the (continued)

## *Discussion*

¶7 We review summary judgment decisions *de novo*, applying the same method as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2001-02).[2] Although the party seeking summary judgment must establish that there is no issue of material fact for trial, the ultimate burden of demonstrating that there is sufficient evidence to go to trial is on the party who has the burden of proof on that issue at trial. *See* ***Kaufman v. State St. Ltd. P'ship***, 187 Wis. 2d 54, 58, 522 N.W.2d 249 (Ct. App. 1994).

¶8 Baumeister and Brown assert that their injuries were caused by architect Solner's negligence. In order to maintain a cause of action for negligence, they must prove: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury. ***Rockweit v. Senecal***, 197 Wis. 2d 409, 418, 541 N.W.2d 742 (1995).

¶9 In their complaint, Baumeister and Brown assert:

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context of Solner's request that we deem this appeal frivolous. We will generally speak of Solner's motions as if there had been a single motion.

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

> [Architect] Solner negligently failed to approve or design proper or temporary adequate bracing roof trusses during the installation of the roof trusses.
>
> ….
>
> That said failure to approve or design temporary bracing during the construction process was a substantial factor in causing [injury to Baumeister and Brown].

We conclude from our review of the arguments, both in the circuit court and before this court, that when Baumeister and Brown use the phrase "approve or design," they mean that Solner did not *provide* safe temporary truss bracing instructions. That is, they mean that Solner was negligent because he neither personally designed and provided safe temporary truss bracing instructions nor otherwise identified and provided such instructions. Accordingly, when we refer to Baumeister's and Brown's "approve or design" allegation, we will speak in terms of Solner's alleged failure to provide safe temporary truss bracing instructions.

¶10 As best we can discern, Baumeister and Brown make the following arguments.[3] First, they argue that Solner had a contractual duty to provide safe temporary truss bracing instructions. Second, they contend that Solner had a duty under the Wisconsin Administrative Code to personally supervise truss installation. Third, they assert that Solner had a duty to provide safe temporary truss bracing instructions under either general common law negligence principles or because he had a professional duty to do so as an architect.

[3] Baumeister and Brown make several undeveloped arguments that we will not address. *See* ***State v. Jackson***, 229 Wis. 2d 328, 337, 600 N.W.2d 39 (Ct. App. 1999) ("A party must do more than simply toss a bunch of concepts into the air with the hope that either the trial court or the opposing party will arrange them into viable and fact-supported legal theories.").

¶11 We clarify that Baumeister and Brown do not contend that Solner failed to specify bracing instructions, but that he failed to specify *safe* bracing instructions. Indeed, one of their arguments is that Solner acted negligently when he, in effect, specified that the trusses should be installed using Truss Plate Institute guidelines. Thus, while much of our discussion is directed at determining whether Solner was required to specify bracing instructions at all, we also address Baumeister's and Brown's assertion that Solner negligently directed the use of the Truss Plate Institute guidelines.

¶12 In various contexts, Baumeister's and Brown's appellate briefs repeatedly suggest that Solner was negligent because he did not *personally* supervise the installation of the trusses. However, their attorney expressly disavowed any such argument before the circuit court.[4] Moreover, with the arguable exception of Baumeister's and Brown's administrative code argument, the general argument that Solner had a duty to personally supervise truss installation is vague and undeveloped. Thus, apart from the administrative code argument, we will ignore the topic. *See* ***Truttschel v. Martin***, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Ct. App. 1997) ("[W]e do not decide issues that are not adequately developed by the parties in their briefs.").

[4] Baumeister's and Brown's attorney stated: "I'm not suggesting that [Solner] should have been out there, supervising. The plaintiffs' argument, from day one, has been very consistent here. [Solner] had a duty to approve and/or design the temporary bracing." The circuit court sought clarification, stating "[t]he duty is not on Solner, to provide on-site supervision, because Diamond Builders was to do that." Baumeister's and Brown's attorney agreed and repeated the assertion that Solner was nonetheless obligated to "design the bracing."

### *A. Whether Solner Had a Contractual Duty to Provide Safe Temporary Truss Bracing Instructions*

¶13 The contract between Solner and Holy Trinity expressly provides that Solner is *not* the entity responsible for on-site construction procedures:

> The Architect shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility under the Contract for Construction. The Architect shall not be responsible for the Contractor's … failure to carry out the Work in accordance with the Contract Documents. The Architect shall not have control over or charge of acts or omissions of the Contractor, Subcontractors, or their agents or employees, or of any other persons performing portions of the Work.

Holy Trinity could have hired Solner to supervise construction, but chose not to. Rather, Solner's on-site obligation under the contract was limited to determining whether the completed building was "in accordance with the Contract Documents."[5] Indeed, nothing in any contract to which Solner was a party

[5] The contract provides:

> The Architect shall visit the site at intervals appropriate to the stage of construction or as otherwise agreed by the Owner and Architect in writing to become generally familiar with the progress and quality of the Work completed and to determine in general if the Work is being performed in a manner indicating that the Work when completed will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of on-site observations as an architect, the Architect shall keep the Owner informed of the progress and quality of the Work, and shall endeavor to guard the Owner against defects and deficiencies in the Work. *(More extensive site representation may be agreed to as an Additional Service, as described in Paragraph 3.2.)*

requires that Solner supervise installation of the trusses or provide temporary truss bracing instructions.

¶14 Baumeister and Brown argue that "Solner's contract specifications concerning the installment of the trusses indicate that installation should comply with [the Truss Plate Institute] Design Specifications and that materials should be installed in accordance with the manufacturer's instructions." Baumeister and Brown assert that the manufacturer's instructions "explicitly state that temporary bracing is Solner's responsibility." We agree with Solner that this argument is meritless.

¶15 First, nothing in the truss manufacturer's instructions "explicitly" states that "Solner" is responsible.

¶16 Second, Baumeister and Brown do not even attempt to explain why a directive from the truss manufacturer could impose a contractual duty on the building architect.

¶17 Third, the manufacturer's instructions do not say that the architect of the building is responsible for providing temporary truss bracing instructions. Rather, the manufacturer's instructions read: "both temporary and permanent bracing are required and their design is the responsibility of the project architect or engineer." Baumeister and Brown do not provide any basis on which to conclude that Solner was the "*project* architect" within the meaning of the manufacturer's instructions. Certainly Solner was the architect who designed the church, but does that make him the "project architect" within the meaning of the instructions? Baumeister and Brown provide no answer.

¶18 Fourth, the manufacturer's instructions put responsibility on the "project architect *or engineer*." Baumeister and Brown do not explain why, with respect to this particular project, it is the project architect and not the project engineer who was responsible.

### *B. Whether Solner Had a Duty Under the Wisconsin Administrative Code to Personally Supervise Truss Installation*

¶19 Baumeister and Brown appear to argue that, when Solner filed a state form called a "compliance statement," Solner effectively admitted he was the "supervising architect" and, as such, he had a duty under a particular section of the Wisconsin Administrative Code to personally supervise construction. Because this argument is inadequately developed, we could choose not to address it. Nonetheless, we will explain why the Code does not support the proposition that Solner had a duty to personally supervise truss installation.

¶20 It is undisputed that WIS. ADMIN. CODE ILHR § 50.10 was applicable to the church construction project because the volume of the planned church exceeded 50,000 cubic feet. *See* WIS. ADMIN. CODE ILHR § 50.07(2).[6] Section ILHR 50.10 of the Code states:

> All constructions or installations under s. ILHR 50.07(2) and (3) shall be supervised by a Wisconsin registered architect or engineer …. The person responsible for supervision shall also be responsible for the construction and installation being in substantial compliance with the approved plans and specifications.

Section ILHR 50.10(1) defines "[s]upervision of construction" as:

[6] Baumeister and Brown cite to a prior version of the Wisconsin Administrative Code. Since Solner points to the same version, we will assume that the parties are relying on the Code provision in effect during the pertinent time period.

> a professional service, as distinguished from superintending of construction by a contractor, and means the performance, or the supervision thereof, of *reasonable on-the-site observations to determine that the construction is in substantial compliance with the approved plans and specifications*.

(Emphasis added.) We agree with Solner that this language is unambiguous and did not place on Solner the duty to personally supervise or assure safe construction. The regulatory duty to supervise pertains only to ensuring that the construction is completed in accordance with the "approved plans and specifications." Baumeister and Brown have presented no evidence or cogent legal argument to the contrary.

### *C. Whether Solner Had a Duty to Provide Safe Temporary Truss Bracing Instructions Under Either General Common Law Negligence Principles or Because he Had a Professional Duty to Do So as an Architect*

¶21 In Wisconsin, "'[e]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.'" ***Alvarado v. Sersch***, 2003 WI 55, ¶13, 262 Wis. 2d 74, 662 N.W.2d 350 (quoting ***Palsgraf v. Long Island R.R. Co.***, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)). A "general duty" arises under the rule that one must use ordinary care in all of one's activities and one is negligent when one fails to exercise ordinary care. *See* ***Alvarado***, 262 Wis. 2d 74, ¶14. A "'person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.'" ***Gritzner v. Michael R.***, 2000 WI 68, ¶22, 235 Wis. 2d 781, 611 N.W.2d 906 (quoting WIS JI—CIVIL 1005).

¶22 We are uncertain whether Baumeister and Brown assert that there is a factual dispute such that a jury could find Solner negligent without the assistance of expert testimony. If that is one of their arguments, it has no merit. Absent expert testimony, jurors would not know whether an architect is normally responsible for either the safe construction of a building the architect has designed or the safe installation of a building component the architect has specified. *See* ***Herkert v. Stauber***, 106 Wis. 2d 545, 570, 317 N.W.2d 834 (1982) (expert testimony is usually necessary to demonstrate negligent conduct by an architect); *see also* ***Thiery v. Bye***, 228 Wis. 2d 231, 245, 597 N.W.2d 449 (Ct. App. 1999) ("Expert testimony is generally required to establish the standard of care and breach of duty in a malpractice action, except when the breach is either so obvious that it may be determined by the court as a matter of law, or when it is within the ordinary knowledge and experience of laypersons.").

¶23 Baumeister and Brown *do* argue that, although the "contractor may have been responsible for putting the [truss] bracing in place," Solner had "superior knowledge" regarding the temporary bracing needed for safe installation. They assert this superior knowledge, *by itself*, created a duty to provide temporary truss bracing instructions. This argument, however, is not supported by legal authority or reasoned argument. Obviously, superior knowledge alone does not create liability. For example, the fact that a manufacturer of an electric circular saw has superior knowledge of the safe use of circular saws does not, by itself, create a duty on the part of the manufacturer to oversee the safe use of the circular saws it sells. Baumeister and Brown seem to think that it is self-evident that an architect who designs or specifies a building component has a duty to ensure safe installation regarding that component. We

disagree. Without expert testimony, a juror would not know whether such an architect is normally responsible for safe installation.

¶24 We turn our attention to whether Solner had a professional duty to provide safe temporary truss bracing instructions. We agree with Solner that the question here is whether, by failing to provide safe temporary truss bracing instructions, Solner breached a professional duty of care exercised by a reasonable architect under similar circumstances. *See* ***Kerkman v. Hintz***, 142 Wis. 2d 404, 422, 418 N.W.2d 795 (1988) ("In determining whether a chiropractor breaches [professional] duties, the chiropractor is held to that degree of care, diligence, judgment, and skill which is exercised by a reasonable chiropractor under like or similar circumstances."). Architects, like builders and contractors, are held to a standard of reasonable care for the protection of anyone who may foreseeably be endangered by their negligence. ***A.E. Inv. Corp. v. Link Builders, Inc***., 62 Wis. 2d 479, 488, 214 N.W.2d 764 (1974). Specifically, an architect has the duty to use the standard of care ordinarily exercised by members of that profession. ***Id***. at 489.

¶25 Accordingly, we must determine whether Baumeister's and Brown's submissions show they are prepared to produce expert testimony rebutting the affidavits submitted by Solner's experts averring that, under the circumstances of this case, Solner had no professional duty to provide safe temporary truss bracing instructions.

¶26 Solner offered two affidavits supporting his factual contention that he had no responsibility as an architect to provide safe temporary truss bracing instructions. In his own affidavit, Solner avers that "[i]n [his] professional opinion as an architect, to a reasonable degree of professional certainty, [he] had no

professional duty … to provide any design, suggestion, erection or supervision for the temporary bracing employed by the contractor during erection of the trusses." The affidavit of architect Lee H. Madden avers:

> In my professional opinion, to a reasonable degree of professional certainty, under the contracts involved here, there was no professional duty or obligation as an architect, on the part of Edward Solner, to design, approve, or inspect the temporary bracing used for erection of the Holy Trinity Lutheran Church trusses, nor was Mr. Solner under any professional duty or obligation as an architect to investigate the structural adequacy or design of the trusses as they were specified by Engineer Korpela or as they were constructed by Automated Products, Inc.

Excising from Madden's affidavit any implicit opinion that the contract did not impose a duty on Solner, Madden plainly asserts that, under undisputed facts in this case, Solner had no professional duty to design temporary truss bracing or personally supervise truss installation.

¶27 Baumeister and Brown rely on three affidavits containing the sworn statements of Engineering Professor Kenneth E. Buttry. Solner has several responses regarding Buttry's affidavits, including a detailed factual analysis as to why the conclusory statements in Buttry's affidavits do not fit several undisputed facts in this case.

¶28 We agree with Solner's assertion that the Buttry affidavits do not present admissible evidence on the topic of Solner's professional standard of care because Buttry does not assert directly or assert facts establishing that he is qualified to give an expert opinion on the professional responsibility of architects.

¶29 We could stop here, but we will address a few additional reasons why summary judgment is appropriate.

¶30 First, Buttry's first affidavit, dated May 17, 2001, lacks necessary clarity. Buttry asserts that his conclusions were reached "based upon my review of these facts." However, there is no means of discerning what Buttry means by "these facts." Buttry recounts that he has read documents, looked at photographs, conversed with people, and reviewed various publications. However, nowhere does he indicate the factual assumptions that underlie his "conclusion" that the "architect of the project, Mr. Solner, is responsible for indicating the required bracing to the contractors." Does Buttry reach this conclusion because he believes Solner is contractually responsible? Is Buttry's conclusion based on his belief that all designing architects, regardless of the purpose for which they were hired and regardless of duties delegated by contract, are responsible? Buttry's "conclusion" that Solner was "responsible for indicating the required bracing to the contractors" is simply too vague to create a factual issue on the topic. Buttry's second and third affidavits do not correct the problem. They were untimely, and Baumeister and Brown have not explained why the circuit court misused its discretion in disregarding them.[7] Moreover, even if those affidavits are considered, they do not clarify the factual assumptions made by Buttry.

¶31 Second, even if we construe Buttry's affidavits as containing admissible evidence that, as a general proposition, an architect in Solner's position is responsible for providing temporary truss bracing instructions, summary judgment would still be appropriate. As discussed above, the undisputed facts

[7] It is undisputed that the two later filed Buttry affidavits were untimely under WIS. STAT. § 802.08(2), and that it was within the circuit court's discretion to disregard them. *See* ***Kotecki & Radtke, S.C. v. Johnson***, 192 Wis. 2d 429, 447, 531 N.W.2d 606 (Ct. App. 1995) (circuit court has discretion to determine whether and to what extent it will enforce deadlines). Nowhere do Baumeister and Brown explain why we should conclude that the circuit court misused its discretion in this respect.

show that Solner's contract with Holy Trinity directs that the contractor, not Solner, is responsible for "construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work." Buttry's affidavits do not address this topic, and Baumeister and Brown have not supported their assertion that architects may not contractually delegate this "duty" to others. In this regard, we note that our decision in ***Kaltenbrun v. City of Port Washington***, 156 Wis. 2d 634, 643, 457 N.W.2d 527 (Ct. App. 1990), explains that in some circumstances a party may contract away a "duty." In ***Kaltenbrun***, we held, with regard to a construction project, that the owner of the property could fulfill the duty to exercise reasonable care by "turning the project over" to another party and entering into a contract that specifically obligated the other party to implement all safety precautions necessitated by the project. ***Id***. at 642-43.

¶32 Third, Baumeister and Brown have a causation problem. They assert that Solner was negligent when he required that the Truss Plate Institute bracing instructions be followed. In this respect, the undisputed facts are these: (1) Solner directed the general contractor, Roberts Construction, to follow the truss manufacturer's installation instructions; (2) Automated Products, the truss manufacturer, specified that the Truss Plate Institute temporary bracing procedure be followed; and (3) the TPI bracing procedures were not followed. Under this scenario, there is simply no cause and effect. "'The test of cause in Wisconsin is whether the defendant's negligence was a substantial factor in producing the injury.'" ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis. 2d 462, 475, 529 N.W.2d 594 (1995) (quoting ***Clark v. Leisure Vehicles, Inc.***, 96 Wis. 2d 607, 617, 292 N.W.2d 630 (1980)). An alleged negligent act is the legal cause of an injury only if it is "actively operating at the time of the injury producing accident and this actively operating negligence was a cause in fact of the accident."

***Fondell v. Lucky Stores, Inc.***, 85 Wis. 2d 220, 227, 270 N.W.2d 205 (1978). Since Baumeister and Brown did not follow the Truss Plate Institute guidelines, they cannot show that a directive that the guidelines be followed was a substantial factor in producing their injuries.[8]

***Frivolous Appeal***

¶33 Solner has moved for attorneys' fees pursuant to the frivolous appeal statute, WIS. STAT. RULE 809.25(3). Judge Deininger's concurring opinion, joined by Judge Vergeront, is the majority opinion on this topic. I respectfully dissent from the majority's conclusion that the appeal is not frivolous.

¶34 This court has the statutory power to sanction a party who pursues an appeal when "[t]he party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." WIS. STAT. RULE 809.25(3)(c)2. When an appellant's attorney should have known that the assertion of trial court error was without any reasonable basis in law or equity, the appellate court may conclude the appeal is frivolous without the necessity of a remand for fact finding. ***Vierck v. Richardson***, 119 Wis. 2d 394, 399, 351 N.W.2d 169 (Ct. App. 1984). Furthermore, before awarding attorney fees for a frivolous appeal, this court must

[8] In their reply brief, Baumeister and Brown argue that Solner may not rely on a lack of causation argument to support the circuit court's decision because the circuit court did not rely on this theory. This argument is not consistent with their brief-in-chief, in which Baumeister and Brown complain that the circuit court "evidently" found persuasive Solner's "lack of causation" argument. Regardless, because we review summary judgment decisions *de novo*, ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987), we are not bound by the reasoning of the circuit court.

conclude that the entire appeal is frivolous. ***Nichols v. Bennett***, 190 Wis. 2d 360, 365 n.2, 526 N.W.2d 831 (Ct. App. 1994).

¶35 I conclude that Baumeister's and Brown's appeal is frivolous. Solner established grounds for summary judgment in his favor and, as demonstrated in the prior sections of this opinion, none of Baumeister's and Brown's counter-arguments have arguable merit. To the extent Baumeister and Brown respond to Solner's frivolous appeal motion by rehashing arguments made in their appellate brief, we have already dealt with those arguments. With respect to those arguments, I conclude that a reasonable attorney should have known there was no "reasonable basis in law or equity" for the appeal and that it "could not be supported by a good faith argument for an extension, modification or reversal of existing law." WIS. STAT. RULE 809.25(3)(c)2.

¶36 Only one topic gives me pause: whether a reasonable attorney would have known that appellate arguments based on the Buttry affidavits are frivolous. More specifically, would reasonable counsel have been apprised that it would be necessary on appeal to address and present non-frivolous arguments as to why the Buttry affidavits show that Buttry was prepared to give admissible testimony on the topic of Solner's professional duties as an architect. I find no place where the circuit court plainly addresses this admissibility topic. Nonetheless, I conclude that the attorneys for Baumeister and Brown should have known because they were repeatedly advised of the issue by Solner's attorney during the circuit court proceedings.

¶37 Before the circuit court, both in writing and during oral arguments, Solner's attorney repeatedly asserted and explained why Buttry's affidavits do not contain admissible evidence on the topic of an architect's professional duties or

responsibilities. Before the circuit court and on appeal, the attorneys for Baumeister and Brown have steadfastly declined to address this admissibility issue in anything other than conclusory terms.

¶38 In their response to Solner's motion requesting that this court find the appeal frivolous, Baumeister and Brown appear to expand on arguments raised, but not developed, in their appellate briefing. For example, they discuss their "assumed duty" argument. But, even at this late stage, Baumeister and Brown do not provide any developed arguments supported by record cites or legal authority.

¶39 Baumeister and Brown spend time in their response to Solner's motion critiquing the reasoning of the circuit court. However, the question on appeal, given our *de novo* standard of review, is not whether the trial court used the wrong reasoning to grant summary judgment but, rather, whether summary judgment was inappropriate. In that regard, Baumeister and Brown have failed to present in their appellate briefs an argument demonstrating the existence of a genuine issue of material fact that should have defeated summary judgment.

¶40 Baumeister and Brown appear to argue that their appeal must not be frivolous because, at least at an earlier stage in the proceedings, both the circuit court and counsel for Solner thought the negligence claim against Solner had some merit. Baumeister and Brown point to the circuit court's initial decision denying summary judgment and to a portion of a letter written by Solner's trial counsel in which counsel seems to say it is highly unlikely that Solner will be dismissed as a party. However, the question is not whether the circuit court at some point in time thought Baumeister and Brown had a valid claim against Solner but, instead, whether summary judgment was appropriate in light of undisputed facts.

Similarly, the opinion of Solner's attorney regarding the chances of a favorable summary judgment decision is irrelevant. First, it is not clear that Solner's attorney was opining on the merits of the case against Solner. More importantly, it should be obvious that this court is not interested in the opinion of Solner's attorney on this topic; this court is interested in a substantive discussion of whether the challenges raised on appeal are frivolous.

¶41 In their responsive brief to Solner's motion, Baumeister and Brown assert:

> It is evident that [Solner's attorney] is playing musical chairs with numerous arguments believing that if enough arguments are made, one of them is bound to find the proverbial chair. Having adequately muddled the issues at the trial court level, [Solner's attorney] is once again disregarding his previous position and reasserting his initial arguments in an attempt to accomplish the same at the appellate level.

This characterization is more aptly leveled at the attorneys for Baumeister and Brown. Moreover, it may be that Solner's attorney changed some arguments as this case proceeded, but my review persuades me that Solner's attorney was simply reacting to a moving target.

¶42 The majority correctly observes that all doubts regarding frivolousness must be resolved against declaring an appeal frivolous. Because I am unable to identify an argument against summary judgment that has any arguable merit, I respectfully dissent. I conclude that Solner's appeal is frivolous within the meaning of WIS. STAT. RULE 809.25(3).

## *Conclusion*

¶43 We affirm the circuit court's decision granting summary judgment in favor of Solner because we conclude that Solner is entitled to judgment as a matter of law. Solner's motion requesting that we declare the appeal frivolous is denied for the reasons set forth in Judge Deininger's concurrence.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

¶44 DEININGER, P.J. (*concurring*). Judge Vergeront and I join the lead opinion insofar as it affirms the trial court's granting of summary judgment in favor of Solner. We conclude, however, that Solner's motion for fees and costs under WIS. STAT. RULE 809.25(3) (2001-02)[9] should be denied. Accordingly, this concurrence is the opinion of the court with respect to the motion to declare the appeal frivolous.

¶45 Under WIS. STAT. RULE 809.25(3), this court may award attorney fees and costs to a respondent if we conclude either that (1) the appeal "was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another"; or (2) the appellant or the appellant's attorney "knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." RULE 809.25(3)(c).[10] Solner's claim is that this appeal is frivolous under the second standard.

¶46 We have affirmed the trial court's order granting summary judgment that dismissed all of Baumeister's and Brown's claims against Solner, and we do not consider that decision to have been a close call. Nevertheless, as the supreme court has cautioned, "[f]rivolous action claims are an especially delicate area since

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[9] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[10] The standards for declaring an appeal frivolous parallel those for declaring an action or defense frivolous under WIS. STAT. § 814.025(3).

it is here that ingenuity, foresightedness and competency of the bar must be encouraged and not stifled." ***Radlein v. Industrial Fire & Cas. Ins. Co.***, 117 Wis. 2d 605, 613, 345 N.W.2d 874 (1984). Thus, when an allegation is made that an action or appeal is frivolous, all doubts are resolved in favor of finding it not to be so. *See* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 235, 517 N.W.2d 658 (1994).

¶47 In order to grant Solner's motion, we would have to conclude that the entire appeal was frivolous. ***Tennyson v. School Dist. of Menomonie Area,*** 2000 WI App 21, ¶35, 232 Wis. 2d 267, 606 N.W.2d 594. In light of our traditional reluctance to find the legal arguments of counsel frivolous, we cannot conclude that all of the arguments Baumeister and Brown raise in this appeal are so lacking in arguable merit as to be frivolous within the meaning of WIS. STAT. RULE 809.25(3)(c)2. Although we were not persuaded by their claims of error, Baumeister's and Brown's claim to have established a factual dispute regarding the scope of Solner's professional duties pertaining to truss bracing was not, in our view, "without any reasonable basis in law or equity." Accordingly, we deny Solner's motion for fees and costs under RULE 809.25(3).

As previously noted, Judge Vergeront joins in this concurrence.