COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP917 **Cir. Ct. No. 2001CV118**

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

MICHAEL J. IKE,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

AUTO-OWNERS INSURANCE COMPANY AND JERRY E. MILLER D/B/A J & J RENTAL,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Wood County: GREGORY J. POTTER, Judge. *Affirmed; cross-appeal reversed and cause remanded.*

Before Lundsten, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Auto-Owners Insurance Company and Jerry Miller (collectively, "Miller") appeal a judgment in favor of Michael Ike. Miller argues

that he is entitled to judgment notwithstanding the verdict because policy factors should preclude imposing liability as a matter of law. He also argues that he is entitled to judgment notwithstanding the verdict because Ike's negligence exceeds his negligence as a matter of law. As to these issues, we affirm.

¶2 Ike cross-appeals, arguing the circuit court erred in refusing to submit the issue of punitive damages to the jury. We agree the issue of punitive damages should have been submitted so we reverse and remand for a new trial on punitive damages.

¶3 Ike's foot was amputated by a water extractor at a laundromat owned by Miller. The extractor is a machine that spins at 1,650 rotations per minute to remove water from clothing that had been placed inside it. In an attempt to stop the machine from spinning, Ike opened the lid of the machine and placed his hand on the rotating center spindle to stop the machine. When that approach failed, he inserted his foot into the rotating basket to apply pressure to the top of the rotating center spindle with the heal of his shoe. His foot was caught and torn from his leg. The locking mechanism on the machine's lid, which prevents it from opening while the machine is spinning, did not work and the machine's brake, which stops the spinning, was also not working.

¶4 Ike brought this action against the owner of the laundromat, Jerry Miller, and Miller's insurer, Auto-Owners Insurance Company, alleging that Miller negligently failed to maintain the water extractor in good working condition and violated the safe-place statute, WIS. STAT. § 101.11(1) (2003-04).[1] Ike also

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

requested punitive damages for intentional and reckless disregard of his rights in failing to determine whether or not the water extractor was working safely.

¶5 The trial court dismissed the punitive damages claim based on our decision in ***Wischer v. Mitsubishi Heavy Industries America, Inc.***, 2003 WI App 202, 267 Wis. 2d 638, 673 N.W.2d 303. The jury returned a verdict in favor of Ike, finding Miller eighty percent liable and Ike twenty percent liable. Ike was awarded $787,316 in compensatory damages. Miller moved for a judgment notwithstanding the verdict, which the trial court denied.

¶6 Miller first argues he is entitled to judgment notwithstanding the verdict because imposing liability would contravene public policy. The supreme court has identified a number of factors that must be considered in determining whether or not to limit a defendant's tort liability on public policy grounds. *See* ***Stephenson v. Universal Metrics, Inc.***, 2002 WI 30, ¶43, 251 Wis. 2d 171, 641 N.W.2d 158. An injured party can be denied recovery from a negligent tortfeasor when

> (1) the injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the tortfeasor's culpability; (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; (4) allowing recovery would place too unreasonable a burden upon the tortfeasor; (5) allowing recovery would be too likely to open the way to fraudulent claims; or (6) allowing recovery would have no sensible or just stopping point.

Id. Whether public policy precludes liability is a question of law we decide *de novo*. ***Id.***, ¶41.

¶7 Miller's argument focuses on factors one, two, three and six. We conclude none of these factors preclude liability in this case. The injury is not too

remote from Miller's negligence and the injury was not wholly out of proportion to Miller's culpability. After he purchased the laundromat in 1991, Miller failed to inspect the condition and safety of the laundry equipment he was holding out for public use. For the entire nine-year period between when Miller purchased the laundromat and Ike's accident, Miller never personally made any effort to determine what, if any, safety mechanisms were supposed to be on the appliances in the laundromat. He had no standard inspection program to determine whether the safety devices in the machines were working. He never operated the water extractor that caused Ike's injury to test how it worked. In sum, Miller's negligence was a direct cause of Ike's injury and Ike's injury was not wholly out of proportion to Miller's culpability.

¶8 Miller also cannot show that, in retrospect, it appears too highly extraordinary that the negligence should have brought about the harm. To the contrary, Ike's expert testified that amputations are common when safety devices on laundry equipment, like the lock on the lid and the brake, are not working properly. We also reject the idea that allowing recovery would have no sensible or just stopping point because it would sanction claims from "injured parties [who] intentionally and purposefully engage in [dangerous] conduct …." Where, as here, an injured party is partially to blame for failing to exercise reasonable care for his or her own safety, the party will be held liable in part for their negligence by the trier of fact.

¶9 Miller's next argument is that Ike's negligence exceeds his as a matter of law. We reject this argument. Our review of the evidence shows that the jury acted reasonably in allocating Miller eighty percent of the negligence and Ike twenty percent. Since the jury's apportionment of negligence was reasonable, Ike was not more negligent as a matter of law.

¶10 On cross-appeal, Ike argues that the trial court should not have refused to submit his claim for punitive damages. The trial court relied on our decision in ***Wischer***, 2003 WI App 202, 267 Wis. 2d at 638. At the time, the circuit court was required to follow our opinion. However, while this appeal was pending, the supreme court reversed our decision in ***Wischer***. *See* ***Wischer v. Mitsubishi Heavy Indus. America, Inc.***, 2005 WI 26, 279 Wis. 2d 4, 694 N.W.2d 320, *reconsideration denied*, 2005 WI 134, 282 Wis. 2d 724, 700 N.W.2d 276 (No. 2001AP0724). Based on the supreme court's decision in ***Wischer***, the punitive damages issue should have been submitted to the jury because punitive damages may be awarded if a defendant "acted maliciously to the plaintiff or intentionally disregarded the rights of the plaintiff …." ***Id.***, ¶7. Therefore, we reverse on the punitive damages issue and remand for a new trial on punitive damages.

By the Court.—Judgment affirmed; cross-appeal reversed and cause remanded.

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