

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 21, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2436

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

AMANDA GOMILLA,

PLAINTIFF-APPELLANT,

**OUTAGAMIE COUNTY DEPARTMENT OF HEALTH AND HUMAN
SERVICES,**

INVOLUNTARY-PLAINTIFF,

V.

**LIBERTAS, ST. MARY'S HOSPITAL MEDICAL CENTER
AND OHIO HOSPITAL INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS,

PATIENTS COMPENSATION FUND,

DEFENDANT.

APPEAL from a judgment of the circuit court for Brown County:
DENNIS J. MLEZIVA, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., and Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Amanda Gomilla appeals the judgment entered in her favor in the amount of \$76,000 against Libertas, St. Mary's Hospital Medical Center and Ohio Hospital Insurance Company. Gomilla alleged Libertas' employee, Talib Akbar, sexually assaulted her. She sued Libertas, claiming it was liable for negligently hiring, training and supervising Akbar.

¶2 Gomilla contends that the trial court erred by improperly fashioning a verdict that: (1) allowed the jury to determine that Akbar's conduct was both intentional and negligent; (2) compared Akbar's negligence with Libertas' negligence; and (3) considered Gomilla's contributory negligence. We reverse and remand with instructions to enter judgment in Gomilla's favor in the amount of \$368,000.

BACKGROUND

¶3 Akbar sexually assaulted Gomilla, a seventeen-year-old female, while she was an inpatient at a mental health treatment center owned and operated by Libertas. Libertas employed Akbar as an aide. Gomilla commenced an action against Libertas seeking damages for injuries she sustained as a result of the sexual assault. She based her claim on Libertas' negligent hiring, training and supervision of Akbar.

¶4 The case proceeded to a jury trial. The verdict required the jury to determine whether Akbar's conduct was negligent, intentional or both. The verdict also allowed the jury to compare the negligence of Akbar, Libertas, and Gomilla.

¶5 The jury found that Akbar's conduct was both intentional and negligent. The jury further found that Libertas was negligent in hiring, training and supervising Akbar and that Libertas' negligence was a cause of the sexual assault against Gomilla. The jury determined that Gomilla's total damages were \$400,000. It then apportioned negligence as follows: Akbar 73%, Libertas 19%, and Gomilla 8%.

¶6 Gomilla brought a motion for judgment on the verdict for the entire \$400,000 because the jury had found that Akbar committed an intentional assault and that the assault was caused by Libertas' negligence in training, hiring and supervising Akbar. Libertas moved for judgment for \$76,000, representing its 19% of the causal negligence found by the jury.

¶7 The trial court granted Libertas' motion and entered judgment against Libertas in the amount of \$76,000. This appeal followed.

STANDARD OF REVIEW

¶8 The application of the law to facts as found by the jury is a question of law for the court. See *Chang v. State Farm Mut. Auto. Ins. Co.*, 182 Wis. 2d 549, 560, 514 N.W.2d 399 (1994). We review questions of law independently, without deference to the trial court's findings. See *id.* A trial court is required to enter judgment on a jury verdict if the jury's findings are supported by substantial credible evidence. See *Tennyson v. School Dist. of Menomonee*, 232 Wis. 2d 267, 283, 606 N.W.2d 594 (Ct. App. 1999).

DISCUSSION

I. INTENTIONAL V. NEGLIGENT CONDUCT

¶9 We first address whether the trial court improperly allowed the jury to determine whether Akbar’s conduct was both intentional and negligent. The evidence presented at trial showed that Akbar had kissed Gomilla and told her “to be naked” when he came to her room that night. The trial court reasoned that the jury could conclude that Akbar thought he was having consensual sex with Gomilla and that his conduct could be regarded as negligent. The trial court then fashioned a verdict allowing the jury to determine whether Akbar’s conduct was intentional, negligent or both. The verdict contained the following questions:

1. Answer these questions concerning the wrongful act of Talib Akbar involving plaintiff, Amanda Gomilla, while she was at Libertas:

a. Was the act of Libertas’ employee, Talib Akbar involving the Plaintiff, Amanda Gomilla, intentional?

....

b. Was the act of Talib Akbar involving the Plaintiff, Amanda Gomilla, negligent?

....

2a. If you answered “Yes” to Question No. 1a, then answer this question:

Was the intentional wrongful act of Talib Akbar a cause of injury to Plaintiff, Amanda Gomilla?

....

2b. If you answered “Yes” to Question No. 1b, then answer this question:

Was the negligent wrongful act of Talib Akbar a cause of injury to Plaintiff, Amanda Gomilla?

¶10 “[I]ntent and negligence are mutually exclusive and one cannot intend to injure someone by negligent conduct.” *State v. Asfoor*, 75 Wis. 2d 411,

428, 249 N.W.2d 529 (1977). While there is evidence that Akbar was negligent in other conduct, the sexual assault itself was, as a matter of law, intentional conduct.

¶11 For conduct to be intentional as a matter of law, two requirements must be met. “First, the conduct must be intentional. Second, the conduct must be substantially certain to cause injury.”¹ *See id.* “[W]here an actor's conduct is substantially certain to result in injury, the existence of such an intention may be inferred as a matter of law without regard to the actor's claimed intent.” *See K.A.G. v. Stanford*, 148 Wis. 2d 158, 163, 434 N.W.2d 790 (Ct. App. 1988). “If these conditions are met, the rule will only be applied if the degree of certainty that the conduct will cause injury is sufficiently great to justify inferring intent to injure as a matter of law.” *Id.*

¶12 The more likely harm is to result from intentional conduct, the more likely intent to harm may be inferred as a matter of law. In this case, we conclude that sexual assault of an inpatient of a health care facility is so certain to result in injury to that patient that the law infers an intent to injure by the actor.

¶13 The trial court erred by allowing the jury to determine whether Akbar's conduct was negligent. Akbar's conduct, as a matter of law, was intentional. As a result, all questions regarding Akbar's negligent conduct were improperly submitted to the jury.

¹ Gomilla alleged that her injuries arose from the sexual assault, not from Akbar's conduct before the assault.

II. COMPARATIVE NEGLIGENCE

¶14 We now address Gomilla's argument that the trial court erred by allowing the jury to compare Akbar's conduct with Libertas' negligence. Based upon our holding that Akbar's conduct was intentional and under the holding in *Miller v. Wal-Mart Stores, Inc.*, 219 Wis. 2d 250, 580 N.W.2d 233 (1998), we conclude that Libertas is liable for Akbar's wrongful act.

¶15 *Miller* recognized the tort of negligent hiring, training and supervision. *See id.* at 274. The elements required to find an employer liable are: (1) there was a wrongful act by the employee; (2) the wrongful act by the employee was a cause of injuries to the plaintiff; (3) the employer was negligent in hiring, training or supervising the employee; and (4) the employer's negligence was a cause of the employee's wrongful act. *See id.* at 267-68.

¶16 The *Miller* court first observed that the general elements of negligence require proof of a duty of care, a breach of that duty, a causal connection between the conduct and the injury, and damages. *See id.* at 260. As to cause, the issue is whether the employer's failure to exercise due care was a cause-in-fact of the wrongful act of the employee that in turn caused the plaintiff's injury. *See id.* at 261. "In other words, there must be a nexus between the negligent hiring, training, or supervision and the act of the employee." *Id.* at 262.

¶17 This nexus involves two questions. The first question is whether the employee's wrongful act caused the plaintiff's injury. The second is whether the employer's negligence was a cause of the employee's wrongful act. *See id.* "[T]he negligence of the employer must be connected to the act of the employee." *Id.* "[I]f the wrongful act of the employee was a cause-in-fact of the plaintiff's injury, then the trier of fact must further determine if the failure of the employer to

exercise due care in the ... supervision of the employee was a cause-in-fact of the act of the employee which caused the injury." *Id.* at 262-63.

¶18 The jury determined that Akbar's conduct was a cause of Gomilla's injury. The jury also determined that Libertas was negligent in the hiring, training and supervision of Akbar and that its negligence was a cause of the wrongful act that injured Gomilla, thus satisfying the nexus requirement in *Miller*. See *id.*² Therefore, under *Miller*, Libertas is liable for Akbar's conduct.

¶19 WISCONSIN JI—CIVIL 1383 provides the framework for allocating negligence between joint tortfeasors under this kind of claim. When an employee commits an intentional tort, and the employer is negligent in hiring, training and supervising the employee, both are jointly liable to the plaintiff. Comparison principles do not allow the intentional conduct of the employee to be compared with the negligent conduct of the employer. See WIS JI—CIVIL 1383 cmt. (1999) (citing *Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen*, 129 Wis. 2d 129, 151, 384 N.W.2d 692 (1986)).

¶20 As a result, we conclude that the verdict improperly asked the jury to compare Akbar's conduct with Libertas' negligence. Libertas is liable for Akbar's conduct.

² On appeal, neither party challenges the jury's findings relating to Libertas' negligence in hiring, training, and supervising Akbar or the causal relationship of that negligence to Gomilla's injuries.

III. GOMILLA’S NEGLIGENCE

¶21 Gomilla argues that she is entitled to the full amount of damages. She argues that the trial court erred by allowing the jury to consider her contributory negligence. We disagree.

¶22 While we recognize that contributory negligence is not a proper defense to intentional battery, Gomilla’s claim against Libertas is not based on an intentional battery, but rather on negligence. *See Vogel v. Grant-Lafayette Elec. Coop.*, 201 Wis. 2d 416, 428, 548 N.W.2d 829 (1996). Had Libertas acted intentionally, then it would be liable to Gomilla for the full amount of damages. However, because Gomilla’s claim is for negligent hiring, training and supervision, the trial court properly applied negligence comparison principles and allowed the jury to allocate negligence between Libertas and Gomilla. *See Foley v. City of West Allis*, 113 Wis. 2d 475, 487-88, 335 N.W.2d 824 (1983).

¶23 As stated above, WIS JI—CIVIL 1383 does not allow the employee’s and the employer’s conduct to be compared. However, nothing in the instruction prevents the comparison between Gomilla and Libertas.³ In fact, the jury is allowed to compare the negligence of several parties whose negligence combined to cause an injury. *See Mulder v. Acme-Cleveland Corp.*, 95 Wis. 2d 173, 178, 290 N.W.2d 276 (1980).

¶24 Gomilla’s claim against Libertas was for the negligent hiring, training and supervision of Akbar, not for Akbar’s intentional sexual assault. An

³ Gomilla’s only argument is that it was improper for the jury to compare her negligence with Libertas’. She does not make a sufficiency of the evidence argument regarding her contributory negligence. Therefore, we do not address whether the record contains sufficient evidence for the jury to determine that Gomilla was negligent.

employee's intentional conduct does not prevent negligence comparison between the employer and the plaintiff. In this case, the proper negligence comparison is between Libertas' negligence in supervising Akbar and Gomilla's contributory negligence. The jury determined that Gomilla was negligent. As a result, Gomilla cannot recover the amount of damages for which she was negligent.

¶25 The jury determined Gomilla to be 8% causally negligent. She cannot recover that 8% because her total damages are "diminished in the proportion to the amount of negligence attributed to" Gomilla. WIS. STAT. § 895.045. As a result, Libertas is liable to Gomilla for 92% of the total damages. We remand to the trial court with directions to enter judgment in the amount of \$368,000.

By the Court.—Reversed and cause remanded with directions.

Not recommended for publication in the official reports.

