COURT OF APPEALS
DECISION
DATED AND FILED

August 1, 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. 99-2768

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

ALWYN PEDERSON,

PLAINTIFF-APPELLANT,

LITTLE BLACK MUTUAL INSURANCE COMPANY,

PLAINTIFF,

V.

DEBRA HEWITT AND STETTIN MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

MARIA WILSON AND TRACY KARTSONAS,

DEFENDANT.

APPEAL from a judgment of the circuit court for Marathon County: GREGORY E. GRAU, Judge. *Affirmed.*

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

¶1 PER CURIAM. Alwyn Pederson appeals a judgment awarding him $4,000 from the parents of each of three children who opened the cage doors at his mink ranch causing him to lose 398 mink. He argues that (1) the trial court should not have granted summary judgment concluding that one of the children, Mandy Hewitt, was not insured under her mother's liability policy with Stettin Mutual Insurance Company; (2) the court incorrectly concluded after trial that Stettin did not insure Mandy's mother for liability she incurred under the parental liability statute, WIS. STAT. § 895.035 (1997-98);[1] and (3) the court incorrectly found that the release of 398 mink constituted only one act under WIS. STAT. § 895.035(4). We reject these arguments and affirm the judgment.

¶2 Thirteen-year-old Mandy and two friends came upon Pederson's mink ranch while they were building a fort. Mandy knew that she was not supposed to be on the property and was not supposed to release mink. She also knew that the mink were being cared for and fed. Her friends began releasing the mink while Mandy was not present. When she arrived, her friends had released approximately fifty mink. Mandy then began opening cages and releasing additional mink. Mandy denied any intent to harm Pederson or the mink, but opened the cage doors knowing that the mink would get out and that nothing would keep them from running off Pederson's property. She knew that someone would have to catch the mink and put them back into the cages and knew that she would be in trouble if anyone discovered that she released the mink.

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

¶3 The trial court correctly concluded that Mandy's acts were not insured under her mother's liability policy. Construction of the policy is a question of law that we decide without deference to the trial court. *See* ***Katze v. Randolph & Scott Mutual Fire Ins. Co.***, 116 Wis. 2d 206, 212, 341 N.W.2d 689 (1984). The policy excludes coverage for "property damage which results directly or indirectly from … an intentional act of an insured …." Mandy intentionally opened the cages and released the mink knowing that they would run away. She understood that, at a minimum, the owner would be inconvenienced attempting to recapture them. Although the harm that occurred may have been different in character and magnitude from that intended, coverage is excluded under the policy because she intended some harm. *See* ***Raby v. Moe***, 153 Wis. 2d 101, 111, 450 N.W.2d 452 (1990).

¶4 Pederson argues that Mandy's deposition showed that the incident amounted to nothing more than children having fun. Tort liability does not depend on hostile intent or a desire to harm. It is sufficient that the actor intended to bring about a result that will evade the interests of another in a way that the law will not sanction. *See* ***Pachucki v. Republic Ins. Co.***, 89 Wis. 2d 703, 711, 278 N.W.2d 898 (1979) (quoting PROSSER, LAW OF TORTS, (4th ed. 1971)). A defendant may be liable even though he or she meant nothing more than a practical joke. *See* ***id.*** Intent extends not only to consequences that are desired, but also those that the actor believes are substantially certain to follow from what he or she does. *See* ***id.***

¶5 Pederson cites several cases in which subjective intent was dispositive, and argues that summary judgment is not appropriate to determine a state of mind. Mandy's subjective intent is not a dispositive issue in this case. Intent to cause injury is not necessarily dependent on the actor's subjective state of

mind. It can also be established when injury is substantially likely to occur from the actor's conduct. *See* ***Gouger v. Hardtke***, 167 Wis. 2d 504, 512, 482 N.W.2d 84 (1992). It can be inferred as a matter of law when a person does a deliberate act knowing with substantial certainty that it will injure another. *See* ***id.*** at 514. The trial court appropriately concluded as a matter of law that Mandy intentionally opened the cages knowing that the owner would be harmed.

¶6 The trial court also correctly concluded that the policy did not cover Mandy's mother for liability she incurred under WIS. STAT. § 895.035.[2] The insurance policy covers "an occurrence" which is defined in the policy as "an accident." An accident is an unexpected, undesirable event, or an unforeseen incident characterized by lack of intention. *See* ***Doyle v. Engelke***, 219 Wis. 2d 277, 289, 580 N.W.2d 245 (1998). It is an event or change occurring without intent or volition through carelessness, unawareness, ignorance or a combination of causes producing an unfortunate result. *See* ***Kalchthaler v. Keller Const. Co.***, 224 Wis. 2d 387, 397, 591 N.W.2d 169 (Ct. App. 1999). Neither Mandy's actions nor her mother's liability under § 895.035 can be characterized as an accident. Mandy's mother's liability under WIS. STAT. § 895.035(2) arises only if Mandy's act was "willful, malicious or wanton."[3] The liability imposed on a parent under the statute for a child's willful, malicious or wanton act is not "an accident," as

[2] Mandy's mother's liability depends solely on the parental responsibility statute. At trial, she was found not negligent with regard to her supervision of Mandy. That finding is not challenged on appeal.

[3] Pederson argues that the language "attributable to a willful, malicious or wanton act" applies only to personal injury and not to property damage. We conclude that the language applies to all of the types of liability described in WIS. STAT. § 895.035(2). *See, e.g.,* ***First Bank Southeast v. Bentkowski***, 138 Wis. 2d 283, 405 N.W.2d 764 (Ct. App. 1987) (parental liability for a child's forgery).

contemplated by the policy. Therefore, the policy provided no coverage for Mandy's mother's liability under WIS. STAT. § 895.035.[4]

¶7 Finally, the evidence supports the trial court's finding that Mandy's release of the mink constituted only one act under WIS. STAT. § 895.035(4), rejecting Pederson's argument that he is entitled to 398 times the $4,000 maximum for each act. The number of acts is determined by considering the surrounding circumstances of each case. *See* ***N.E.M. v. Strigel***, 208 Wis. 2d 1, 10, 559 N.W.2d 256 (1997). Pederson has not provided this court with a complete transcript of the trial. Therefore, we assume that every fact essential to the trial court's decision is supported by the record. *See* ***T.W.S., Inc. v. Nelson***, 150 Wis. 2d 251, 254-55, 440 N.W.2d 833 (Ct. App. 1989). In addition, the record before this court suggests that the evidence strongly supports the trial court's finding. Three significant factors are (1) whether a sufficient period of time separates the conduct; (2) whether the conduct occurred at different locations; and (3) whether there is a distinct difference in the nature of the conduct. *See* ***N.E.M.***, at 208 Wis. 2d 10-11. Mandy's release of the mink appears to have occurred in a brief, uninterrupted period of time, at the same location, involving the same specific conduct. Therefore, the court correctly granted judgment against Mandy's mother for $4,000, the maximum allowed under § 895.035(4).

[4] Pederson cites cases that draw a distinction between "an insured" and "any insured" in their exclusionary provisions. *See, e.g.*, ***Taryn E.F. v. Joshua M.C.***, 178 Wis. 2d 719, 724, 505 N.W.2d 418 (Ct. App. 1993); ***Northwestern Nat'l Ins. Co. v. Nemetz***, 135 Wis. 2d 245, 256, 400 N.W.2d 33 (Ct. App. 1986). Those cases provide no guidance because they refer to the language in an exclusionary clause. Here, there was no coverage under the policy for liability under WIS. STAT. § 895.035 without considering the exclusionary clause.

By the Court.—Judgment affirmed.

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