COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1051 **Cir. Ct. No. 2014CV116**

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

LUANN BRESLIN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CODY L. REINDAHL AND RICHARD L. REINDAHL,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN HEALTH CARE LIABILITY INSURANCE PLAN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed*.

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Luann Breslin's son, Cody Reindahl, committed suicide while in the care of Trempealeau County Health Care Center (TCHCC)

under a voluntary WIS. STAT. ch. 51 (2015-16)[1] commitment. Breslin sued TCHCC and its insurer, Wisconsin Health Care Liability Insurance Plan, alleging that TCHCC was negligent in caring for Reindahl, resulting in Reindahl's suicide. As an affirmative defense, TCHCC alleged that Reindahl was contributorily negligent for failing to avoid committing suicide although Reindahl appreciated the risk of doing so. The case was tried to a jury, and the jury returned a verdict finding TCHCC 20% negligent in caring for Reindahl and Reindahl 80% contributorily negligent.

¶2 This appeal involves two questions included in the special verdict. The sole issue on appeal is whether the court erroneously exercised its discretion by including the two questions on the special verdict relating to Reindahl's ability to appreciate the risk of harm from committing suicide and the duty to avoid taking his own life, and whether he was negligent with respect to his safety. Breslin argues that we should expunge these questions as a matter of law, which would result in TCHCC being the only negligent party in Reindahl's death. We conclude that under controlling law the court properly exercised its discretion in including those questions on the special verdict, and therefore, we affirm.

BACKGROUND

¶3 The following facts are taken from the record. This case involves changes in Reindahl's behavior beginning in July 2011 until he died several months later.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 While Reindahl was in high school and after he graduated from high school in 2005, Reindahl was highly accomplished in sports, he graduated from high school with honors, and he was generally known in the community as being a high-spirited, nice, and polite young man.

¶5 During the summer of 2011, however, Reindahl's mood and behavior changed significantly and within the next two months he twice attempted suicide. On August 26, 2011, Reindahl agreed to a WIS. STAT. ch. 51 commitment, and he was transferred to TCHCC. TCHCC is a facility that provides mental health care and treatment to help people suffering from mental health issues reintegrate in to the community.

¶6 Upon being placed at TCHCC Reindahl underwent an initial assessment to determine the mental health issues with which he presented. Based on the initial assessment, Reindahl was diagnosed as being psychotic and presenting a suicide risk. Reindahl was placed in the facility's most secure unit, in which patients are not allowed to have items that may be used to commit suicide, such as shoelaces. A week later, Reindahl was transferred to a less restrictive unit because his health care providers determined that his mental health had improved. While Reindahl was in the less restrictive unit, TCHCC staff conducted safety checks on Reindahl every fifteen minutes. Despite these safety checks, Reindahl committed suicide on September 10, 2011.

¶7 Reindahl's mother, Breslin, sued TCHCC and its liability insurer alleging medical negligence. TCHCC alleged the affirmative defense of contributory negligence on Reindahl's part. The case was tried to a jury. The jury was given a special verdict form, which asked seven questions. The first two

special verdict questions asked whether TCHCC was negligent and whether this negligence was a cause in Reindahl's death. The jury answered "yes" to both.

¶8 The third question asked: "Was Cody L. Reindahl totally unable to appreciate the risk of harm that led to his death and his duty to avoid that risk?" The jury answered "no" to Question 3. Question 4 asked: "Was Cody L. Reindahl negligent with respect to his own safety?" The jury answered "yes" to Question 4. Question 5 asked: "Was Cody L. Reindahl's negligence a cause of his own death?" The jury answered "yes" to Question 5.

¶9 At the conclusion of trial, Breslin moved for judgment notwithstanding the verdict asking the circuit court to strike the jury's answers to Questions 3 and 4. The court denied Breslin's motion and entered judgment on the verdict. Breslin appeals.

STANDARD OF REVIEW

¶10 A circuit court has "wide discretion" to determine special verdict questions, and its determination will not be disturbed on appeal "unless the court has erroneously exercised its discretion." ***Gumz v. Northern States Power Co.***, 2007 WI 135, ¶23, 305 Wis. 2d 263, 742 N.W.2d 271. An erroneous exercise of discretion occurs if the special verdict does not "cover all issues of fact" or if the questions are "inconsistent with the law." ***Id***. at ¶24. "Whether a special verdict reflects an accurate statement of the law applicable to the issues of fact in a given case presents a question of law," which we review de novo. ***Id.***

DISCUSSION

¶11 Breslin contends that the circuit court erroneously exercised its discretion in the formulation of the special verdict by including two questions

concerning Reindahl's contributory negligence, specifically Questions 3 and 4.[2] When designing the special verdict, the circuit court followed the legal principles outlined by the Wisconsin Supreme Court in ***Hofflander v. St. Catherine's Hosp., Inc.***, 2003 WI 77, 262 Wis. 2d 539, 664 N.W.2d 545. Breslin argues that ***Hofflander*** does not apply to the facts of this case. We pause to briefly discuss the pertinent legal principles established in ***Hofflander***.

¶12 ***Hofflander*** established a "custody and control" rule for apportioning negligence when a plaintiff with mental health issues suffers a self-inflicted injury while in the care of a defendant mental health care facility. ***Id.***, ¶35. The "custody and control" rule is an exception to the ordinary negligence standard, which "contemplates the possibility of a heightened duty of care for a defendant and a lowered duty of self-care for a plaintiff" if certain threshold facts establish a special custodial relationship between the plaintiff and defendant. ***Id.***, ¶¶46, 48. Important here, if the fact finder determines that the plaintiff "was totally unable to appreciate the risk of harm and the duty to avoid it" then the plaintiff's contributory negligence is expunged, but if not, "the finder of fact should compare the defendant's negligence to the plaintiff's contributory negligence using a subjective standard to evaluate the mentally disabled plaintiff's duty of self care." ***Id.***, ¶36.

¶13 Breslin argues that the two special verdict questions should not have been submitted to the jury because the "custody and control" rule enunciated in

[2] Breslin mentions that the circuit court erred in formulating the jury instructions pertaining to the challenged special verdict questions. However, Breslin does not develop an argument that focuses on the jury instructions. Thus, we will not consider this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals may decline to address inadequately developed arguments).

Hofflander is dictum, or alternatively, because ***Hofflander*** does not apply to the facts of this case such that the special verdict questions should not have been asked as a matter of law. We reject Breslin's arguments.

¶14 Breslin first argues that the "custody and control" rule established by ***Hofflander*** is "dictum" to the extent it "goes beyond the holding necessary to decide the particular case." This argument fails on its face because the court of appeals cannot dismiss a statement from an opinion by the supreme court on the ground that the statement is dictum. *See* ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682. The supreme court in ***Zarder*** explained that by doing so "the court of appeals necessarily withdraws or modifies language from that opinion, contrary to our directive in [***Cook v.***] ***Cook***."[3] ***Id.***, ¶57.

¶15 In the alternative, Breslin argues that the ***Hofflander*** rule should not be applied here because the rule "makes no sense on the facts of Cody Reindahl's case."

¶16 Breslin is correct that there are obvious factual differences between ***Hofflander*** and the instant case. The plaintiff in ***Hofflander*** was diagnosed with depression and borderline personality disorder and was injured while attempting to escape from a third-floor window. *See* ***Hofflander***, 262 Wis. 2d 539, ¶¶12, 22. According to Breslin, the ***Hofflander*** plaintiff's mental illnesses "d[id] not involve [the] loss of contact with reality." Thus, according to Breslin, it could reasonably be found that the plaintiff had some ability to exercise reasonable care for her own

[3] ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

safety with respect to the risk of harm from trying to escape from a third-floor window. Here, Reindahl was diagnosed with psychosis, and he died when he committed suicide. Breslin argues that "[t]here is no such thing as a reasonable psychotic person," and therefore, unlike the plaintiff in ***Hofflander***, Reindahl could not exercise reasonable care for his own safety with respect to the risk of harm from committing suicide.

¶17 What Breslin fails to understand is that ***Hofflander*** explicitly applies to any "mentally disabled person" who is injured while under the care of a mental health care facility, which includes Reindahl. ***Id.***, ¶35. Under ***Hofflander***, whether a mentally disabled person is "totally unable" to appreciate a risk and whether that person was negligent are questions of fact. ***Id.***, ¶36. Breslin points to nothing in ***Hofflander*** that limits its holding to certain diagnoses or certain acts.

¶18 Instead, Breslin asks this court to determine that, as a matter of law, a person such as Reindahl who has a psychosis diagnosis and clearly exhibits suicidal ideation, is, to use the words of the last element of the "custody and control" rule, "totally unable to appreciate the risk of harm and the duty to avoid it." *See* ***id.***, ¶36. But Breslin fails to support her argument by citation to case law, and nothing in ***Hofflander*** suggests this limitation of its holding. Not only does ***Hofflander*** apply to all mentally ill plaintiffs, but the ***Hofflander*** court also used an illustration of a mentally disabled person with suicidal ideation as an example in explaining the foreseeability element in the "custody and control" rule. ***Id.***, ¶53. Logically speaking, if the court in ***Hofflander*** intended for the "custody and control" rule to not apply to circumstances where a mentally disabled person in the care of a mental health care facility exhibits suicidal ideation, the court would not have used the above illustration to explain the foreseeable element of the rule.

¶19 Breslin's argument is really about her disagreement with the jury's findings, based on the evidence that it heard, that Reindahl was able to understand the risk of harm and that he was negligent in failing to care for his own safety. The record establishes sufficient facts to support giving Question 3 in the special verdict, and Breslin does not argue otherwise.

¶20 The defense presented expert testimony that Reindahl was able to appreciate the risk of harm from committing suicide and had the mental capacity to understand that a reasonable person with his diagnosis should avoid attempting to commit suicide. Dr. Gregory VanRybroek, the director of Mendota Mental Health Institute, testified that Reindahl was psychotic, but that Reindahl was not "totally unable to appreciate the risk of harm to himself" by committing suicide. While Breslin presented her own expert testimony to the contrary, a circuit court properly exercises its discretion in formulating a special verdict where the record contains facts that necessitate particular verdict questions. *See* ***Gumz***, 305 Wis. 2d 263, ¶24. To clarify, because Dr. VanRybroek opined, based on his training and experience, that Reindahl was able to appreciate the risk of harm from committing suicide, under the rule established in ***Hofflander***, the court was left with no discretion but to include the contributory negligent questions in the special verdict.

¶21 Essentially, Breslin's argument boils down to a disagreement with the rule established in ***Hofflander*** and with the jury's answers to the special verdict questions, which were presented to it pursuant to the ***Hofflander*** rule based on the evidence presented at trial. We lack authority to deviate from the ***Hofflander*** rule, and the evidence presented at trial both warrants the special verdict questions and supports the jury's findings.

¶22 In sum, based on the evidence presented at trial, the circuit court was obligated by the ***Hofflander*** "custody and control" rule to present the disputed special verdict questions to the jury. The special verdict questions communicated an accurate statement of the law and covered all issues of fact, and thus, the circuit court appropriately exercised its discretion. Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited except as provided under RULE 809.23(3).