COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2007

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal No. 2006AP364 **Cir. Ct. No. 2005CV11**

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

SHANNON NICHOLS, LEE C. NICHOLS, BROOKE A. NICHOLS AND BRITTNEY M. NICHOLS,

PLAINTIFFS-APPELLANTS,

PEGGY A. LAUTENSCHLAGER, WISCONSIN LABORERS' HEALTH FUND AND UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS AUTHORITY,

PLAINTIFFS,

V.

PROGRESSIVE NORTHERN INSURANCE COMPANY, BETH C. CARR AND MICHAEL J. SCHUMATE,

DEFENDANTS,

EDWARD NIESEN, JULIE A. NIESEN, AND BERRY AND ROXBURY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Columbia County: RICHARD REHM, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Dykman, Deininger and Higginbotham, JJ.

¶1 DYKMAN, J. Shannon, Lee, Brooke, and Brittney Nichols (collectively "the Nichols") appeal from an order granting a motion to dismiss their negligence action against Edward and Julie Niesen (collectively "the Niesens"). The Nichols contend that their complaint states a claim for negligence because it alleges the Niesens knowingly permitted underage high school student Beth Carr to consume alcohol on their property and to drive away intoxicated, resulting in a car accident between Carr and the Nichols in which the Nichols were injured. Because we conclude that the Nichols have stated a claim for common law negligence, we reverse and remand for proceedings consistent with this opinion.

Background

¶2 The following facts are taken from the parties' pleadings.[1] On the evening of June 4, 2004, Edward and Julie Niesen allowed a large group of high school students to hold a party on their property. The Niesens knew that the underage party guests were consuming alcohol, and did not supervise or prevent alcohol consumption on their property. In Wisconsin, it is illegal for persons

[1] Because this appeal is taken from an order granting a motion to dismiss, alleged facts are assumed to be true. *See* ***Abbott v. Marker***, 2006 WI App 174, ¶5, _ Wis. 2d _, 722 N.W.2d 162.

under twenty-one years old to consume alcohol unless accompanied by a parent. WIS. STAT. §§ 125.02(8m), 125.02(20m) and 125.07(4) (2003-04).[2]

¶3 Beth Carr was one of the underage drinkers who attended the party. Sometime between the evening of June 4, 2004, and the early morning hours of June 5, 2004, an intoxicated Carr drove away from the Niesen property. She failed to control her vehicle and collided with the Nichols' vehicle, injuring the Nichols.

¶4 The Nichols sued Carr and her automobile insurance company, Progressive Northern Insurance Company, and the Niesens and their homeowners insurance company, Berry and Roxbury Mutual Insurance Company. Progressive settled for its policy limit. The Niesens moved to dismiss the Nichols' complaint for failure to state a claim. The trial court concluded that the Nichols' reliance on two statutes, WIS. STAT. §§ 125.07 and 125.035, was misplaced and that their complaint did not state a claim in common law negligence. It therefore dismissed the Nichols' complaint.

Standard of Review

¶5 We review an order granting a motion to dismiss de novo, without deference to the circuit court. ***Abbott v. Marker***, 2006 WI App 174, ¶5, _ Wis. 2d _, 722 N.W.2d 162. To decide whether dismissal was properly granted, "[w]e evaluate whether the allegations in the complaint, taken as true, are legally sufficient to state a claim for relief." ***Id.*** We consider the facts alleged in the

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

complaint and all reasonable inferences derived from those facts in deciding whether a claim has been stated. ***Gritzner v. Michael R.***, 2000 WI 68, ¶6, 235 Wis. 2d 781, 611 N.W.2d 906. "A claim should not be dismissed unless it appears to a certainty that no relief can be granted under any set of facts that plaintiff can prove in support of his [or her] allegations." ***Doe v. Archdiocese of Milwaukee***, 2005 WI 123, ¶20, 284 Wis. 2d 307, 700 N.W.2d 180 (citation omitted). Further, complaints "are to be liberally construed so as to do substantial justice." ***Id.***, ¶35 (citation omitted).

Discussion

¶6 The Nichols assert two arguments on appeal: WIS. STAT. §§ 125.07 and 125.035 do not provide the Niesens with immunity from civil liability, and their complaint states a common law negligence claim. We consider each argument in turn.

I. WISCONSIN STAT. §§ 125.07 and 125.035

¶7 The Nichols assert that the Niesens are not entitled to immunity under the Wisconsin Statutes because the statutory immunity conferred by WIS. STAT. § 125.035 does not apply to adults who allow minors to consume alcohol on their property. The Niesens frame the issue differently, asserting that the Nichols have failed to state a statutory claim because the Niesens were not negligent per se under § 125.07(1)(a)3. We agree with both contentions and conclude that §§ 125.035 and 125.07(1)(a)3. establish neither immunity from civil liability nor negligence per se on the facts in this case. This analysis requires our interpretation of statutes and their applications to the facts of this case, questions of law we review de novo. ***Bill's Distributing, Ltd. v. Cormican***, 2002 WI App 156, ¶6, 256 Wis. 2d 142, 647 N.W.2d 908.

¶8 WISCONSIN STAT. § 125.035(2) provides immunity from civil liability "arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person." As the Nichols correctly assert, the immunity of § 125.035 is inapplicable to this case because they did not allege that the Niesens sold, dispensed, or gave away alcohol. Additionally, this immunity is limited by § 125.035(4)(b), which provides that "[s]ubsection (2) does not apply if the provider knew or should have known that the underage person was under the legal drinking age and if the alcohol beverages provided to the underage person were a substantial factor in causing injury to a 3rd party." While this case involves underage persons, the Nichols did not allege that the Niesens provided alcohol during the party on their property. Thus, neither the statutory immunity nor the exception to that immunity applies here. We thus turn to the Niesens' argument that their conduct was not negligent per se under the statutes.

¶9 Violation of a safety statute is negligence per se "where the statutory purpose is to avoid or diminish the likelihood of harm that resulted." ***Miller v. Thomack***, 204 Wis. 2d 242, 252-53, 555 N.W.2d 130 (Ct. App. 1996), *abrogated on other grounds by* ***Meier v. Champ's Sport Bar & Grill, Inc.***, 2001 WI 20, 241 Wis. 2d 605, 623 N.W.2d 94. The Niesens contend they are not negligent per se for three reasons: WIS. STAT. § 125.07(1)(a)3. is not a safety statute; even if it is, a violation of that statute is not negligence per se; and the Niesens' property was not a "premises" as defined under ch. 125. We agree that the Niesens' property is

not a "premises" for purposes of § 125.07(1)(a)3. and thus does not establish negligence per se here.[3]

¶10 WISCONSIN STAT. § 125.07 establishes restrictions relating to alcohol and underage persons. Section 125.07(1)(a)3. states in part: "No adult may knowingly permit or fail to take action to prevent the illegal consumption of alcohol beverages by an underage person on premises owned by the adult or under the adult's control." "Premises" is defined in ch. 125 as "the area described in a license or permit." Section 125.02(14m). We are bound by this definition; "[i]f a word is specifically defined by statute, that meaning must be given effect." ***Smith v. Kappell***, 147 Wis. 2d 380, 385, 433 N.W.2d 588 (Ct. App. 1988). Because there is no allegation in the Nichols' complaint that the Niesen property was an "area described in a license or permit," it is not a "premises" under § 125.07(1)(a)3. Thus, the Niesens cannot be negligent per se.

II. Common Law Negligence

¶11 Whether the Nichols' complaint states a cause of action in negligence depends on whether it sufficiently alleges facts establishing the following four elements: "(1) the existence of a duty of care on the part of the defendant, (2) a breach of that duty of care, (3) a causal connection between the defendant's breach of the duty of care and the plaintiff's injury, and (4) actual loss or damage resulting from the breach." ***Hoida v. M&I Midstate Bank***, 2006 WI 69, ¶23, 291 Wis. 2d 283, 717 N.W.2d 17 (citation omitted). Thus, a claim for negligence must allege facts showing that the defendant was negligent by

[3] Because we conclude that the Niesens did not violate WIS. STAT. § 125.07(1)(a)3., we need not decide whether violation of that statute constitutes negligence per se.

breaching the duty of care he or she owed the plaintiff and that the defendant's negligence caused the plaintiff's injuries. ***Id.***, ¶22. However, even if all four elements of a negligence action are met, "Wisconsin courts have also reserved the right to deny the existence of a negligence claim based on public policy reasons[,]" because "negligence and liability are distinct concepts." ***Id.***, ¶¶24-25 (citation omitted). We begin with an analysis of whether the Nichols' complaint sufficiently alleged the four elements of a negligence action.

¶12 Wisconsin courts have long held that an analysis of the first element of a cause of action in negligence, duty of care, is an essential step in determining whether a claim for negligence has been stated. ***Id.***, ¶23 ("For decades, Wisconsin courts have engaged a four-element analysis to determine whether an actionable claim for negligence has been stated."); *see also* ***Szep v. Robinson***, 20 Wis. 2d 284, 293-94, 121 N.W.2d 753 (1963) (affirming circuit court's dismissal of negligence action against employer of babysitter because "[t]he complaint specifies no legal duty owed by the defendants to [the babysitter] that has been breached and no claim of negligence as alleged against the defendants can be recognized"). Thus, in Wisconsin, an analysis of the duty of care, a question of foreseeability of harm, is distinct from causation and public policy analyses. ***Hoida,*** 291 Wis. 2d 283, ¶29. ***A.E. Investment Corp. v. Link Builders, Inc.***, 62 Wis. 2d 479, 484, 214 N.W.2d 764 (1974), puts it this way: "The consistent analyses of this court reveal that the question of duty is not an element of the court's policy determination. It is, rather, an ingredient in the determination of negligence."

¶13 ***Butzow v. Wausau Mem'l Hosp.***, 51 Wis. 2d 281, 286-87, 187 N.W.2d 349 (1971), explains that "foreseeability" is an element of negligence and not of causation. Thus, "in order to find negligence, a court first must decide

whether the defendant owed a duty to the plaintiff," in that the defendant "should have foreseen that harm was likely to be caused to someone by reason of his [or her] act." ***Hoida***, 291 Wis. 2d 283, ¶¶27-28 (citation omitted).

¶14 In ***Hoida***, the supreme court reiterated the four-element test for negligence and explained that duty was an essential factor in determining whether a defendant was negligent. "[T]he duty of ordinary care is not a judicial public policy factor, but rather, it is 'an ingredient in the determination of negligence.'" ***Id.***, ¶29 (citing ***A.E. Investment Corp.***, 62 Wis. 2d at 484). The concept of duty is exemplified by a consideration of foreseeability. "[T]he test of negligence is whether the conduct foreseeably creates an unreasonable risk to others." ***Id.***, ¶22 (citation omitted).

¶15 The first step in our analysis of whether the Nichols have stated a negligence claim is to determine whether the Nichols' complaint alleges a duty of care owed them by the Niesens. To do so, we must determine what reasonable persons in the Niesens' position would be obligated to do in a similar situation. We begin with the undisputed, and, in Wisconsin, unremarkable proposition that everyone has a duty to exercise ordinary care under the circumstances. ***Id.***, ¶30. The duty to exercise ordinary care under the circumstances requires a person to refrain from acting or failing to act in a way "that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property …." ***Id.*** Thus, the Niesens owed the Nichols a duty "to refrain from any act which [would] cause foreseeable harm" to anyone. *See* ***Rockweit v. Senecal***, 197 Wis. 2d 409, 419-20, 541 N.W.2d 742 (1995) (citation omitted). To allege a duty of care, the Nichols' complaint must "state general facts setting forth that the defendant had knowledge or should have had knowledge of a potential and

unreasonable risk." *See* ***Archdiocese of Milwaukee***, 284 Wis. 2d 307, ¶36 (citation omitted).

¶16 The Nichols contend that their complaint alleges the Niesens' duty to refrain from knowingly permitting unsupervised, underage persons to consume alcohol on their property because it was foreseeable that such an act or omission would cause some harm to someone. The Niesens contend that the Nichols have not alleged that the Niesens were aware Carr was consuming alcohol on their property, that the Niesens knew or should have known Carr was intoxicated, or that the Niesens knew or should have known Carr was not able to operate her vehicle at the time of the accident. This is too narrow a view. We need only look for facts showing that with the information the Niesens possessed, a reasonable person would foresee some injury of some kind to some person or some property, not that the Niesens would foresee that Carr would injure the Nichols. *See* ***Hoida***, 291 Wis. 2d 283, ¶22.

¶17 The Nichols' complaint alleges the following: "During the evening of June 4, 2004, and the early morning hours of June 5, 2004, a large gathering of underage high school students gathered at the premises controlled by defendants Edward and Julie Niesen …."; "[d]efendants Edward and Julie Niesen knowingly permitted and failed to take action to prevent the illegal consumption of alcoholic beverages by underage persons, including defendant Beth Carr on premises under their control …."; and "[t]he Niesens … failed to take reasonable steps to supervise and monitor the activities on their property, which … included a large group of minors consuming alcohol [and] the Niesens were aware that the minors on their property were consuming alcohol."

¶18 Thus, the Nichols have alleged that the Niesens knowingly permitted underage persons to drink alcohol on their property prior to the accident between Carr and the Nichols. A reasonable inference from the allegation that the Niesens knew high school students were drinking alcohol on their property is that they knew some of those underage students would drive away from their property after consuming alcohol. Further, an inference from the allegation that the Niesens knew that minors were drinking alcohol and "failed to take reasonable steps to supervise and monitor the activities on their property" is that though they owned the property, they failed to prevent minors from using their property to consume alcohol, become intoxicated and drive away from their property in an intoxicated state. The issue, then, is whether the Niesens owed a duty to refrain from knowingly permitting minors to consume alcohol on their property, thus enabling them, including Carr, to drive away from their property while intoxicated.

¶19 Some pre-***Hoida*** Wisconsin cases have held that limiting liability based on duty is "incorrect under Wisconsin law." *See, e.g.*, ***Alvarado v. Sersch***, 2003 WI 55, ¶16 n.2, 262 Wis. 2d 74, 662 N.W.2d 350 (quoting ***Gritzner***, 235 Wis. 2d 781, ¶24 n.4). Recently, however, the supreme court explained in ***Hoida***, 291 Wis. 2d 283, ¶29, that Wisconsin law allows a court to limit recovery for a harmful act based on the absence of a duty of care owed by the defendant to the plaintiff.

¶20 Those pre-***Hoida*** cases have as their genesis a sentence found in ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 644, 517 N.W.2d 432 (1994): "In Wisconsin, the doctrine of public policy, not the doctrine of duty, limits the scope of the defendant's liability." This sentence could conflict with the four-element test to determine liability in negligence cases: (1) duty, (2) breach, (3) causation, and (4) damages. *See* ***Baumeister v. Automated Prods., Inc.***, 2004

WI 148, ¶13 n.5, 277 Wis. 2d 21, 690 N.W.2d 1. If duty is one of the elements necessary to determine negligence, how can duty not sometimes delimit negligence? If duty is absent, negligence cannot follow. The court's analysis in ***Bowen*** clarifies the apparent contradiction. ***Bowen*** was a negligent infliction of emotional distress case. ***Waube v. Warrington***, 216 Wis. 603, 258 N.W. 497 (1935), and ***Klassa v. Milwaukee Gas Light Co.***, 273 Wis. 176, 77 N.W.2d 397 (1956), were also negligent infliction of emotional distress cases. The ***Bowen*** court discussed the contradiction between ***Waube***'s "zone of danger" or "no duty" approach and ***Klassa***'s "public policy" approach to negligent infliction of emotional distress cases. ***Bowen***, 183 Wis. 2d at 642-45. In the context of that type of case, and considering the history of each case, the court said: "In Wisconsin, the doctrine of public policy, not the doctrine of duty, limits the scope of the defendant's liability." ***Id.*** at 644. That is true when the context is the choice between the ***Waube*** and ***Klassa*** approaches to delimiting liability in negligence cases. But it is not correct when the context changes to all negligence cases generally.

¶21 The cases the ***Bowen*** court cites for the sentence in question reveal the court's meaning. Neither ***Osborne v. Montgomery***, 203 Wis. 223, 234 N.W. 372 (1931), the dissent in ***Palsgraf v. Long Island R. Co.***, 162 N.E. 99 (1928), ***Schilling v. Stockel***, 26 Wis. 2d 525, 133 N.W.2d 335 (1965), or ***Pfeifer v. Standard Gateway Theater, Inc.***, 262 Wis. 229, 55 N.W.2d 29 (1952), prohibit the use of duty to delimit liability if no duty exists. Those cases explain that instead of delimiting liability in all negligence cases by concluding that a defendant had no duty to the plaintiff, as the ***Palsgraf*** majority concluded, liability is most often delimited by a consideration of public policy factors. This is what Professor Richard V. Campbell meant when he wrote:

> Most of the confusion in administering "proximate cause" has arisen in connection with actions based on negligence. The explanation for this is not as obscure as we are often led to believe. This confusion exists because the policy considerations controlling responsibility and the extent of responsibility for consequences are in many respects similar to those involved in deciding the general negligence issue. *It has frequently been noted that "foreseeability" has been used in a double role. It is a factor in the issue of negligence, and is often stated as the test of "proximate cause". Although this has been criticized to some extent, it is submitted that it is not as illogical as it may look on the surface. It is not a useless duplication of the same point. In dealing with the negligence issue it means foreseeability of some harm to some person. As a test of "proximate cause", it means a foreseeability much more closely identified with the particular plaintiff or the class of which he is a member and the interest of the plaintiff which is actually invaded.*

Richard V. Campbell, *Duty, Fault, and Legal Cause*, 1938 WIS. L. REV. 402, 408-09 (1938) (emphasis added).[4]

¶22 Finally, there would be no purpose in changing Wisconsin law so significantly in one sentence with no apparent need to do so. Duty, though defined extremely broadly, is like any other legal concept. When facts are found or undisputed, presence or absence of duty can be answered by a court as a matter of law. In the usual case, however, we leave duty, a concept inseparable from foreseeability or recognition, to a jury. *See* WIS JI—CIVIL 1005 (substituting the word "recognize" for the word "foresee").[5] Duty has not become just another

[4] Later, Professor Campbell concluded that the phrase "proximate cause" was a term he selected for the firing squad. Richard V. Campbell, *Wisconsin Law Covering Automobile Accidents—Part 1*, 1962 WIS. L. REV. 240, 266-67 (1962). Wisconsin no longer uses that phrase, but instead substitutes "policy factors" or "X factors." *See* ***Fandrey v. American Family Mut. Ins. Co.***, 2004 WI 62, ¶22, 272 Wis. 2d 46, 680 N.W.2d 345; ***Hicks v. Nunnery***, 2002 WI App 87, ¶49, 253 Wis. 2d 721, 643 N.W.2d 809.

[5] WIS JI—CIVIL 1005 provides:

(continued)

policy factor. That is what ***Hoida*** recognizes. In a nutshell, ***Hoida*** returned Wisconsin negligence law to its pre-***Bowen*** analysis, where it had been—with some backtracking—since ***Osborn*** was decided in 1931. The irony of this is that although ***Bowen*** did not set out to change basic negligence law, later cases treated it as having done so. *See* ***Madison Newspapers, Inc. v. Pinkerton's Inc.***, 200 Wis. 2d 468, 480-90, 545 N.W.2d 843 (Ct. App. 1996) (Dykman, J., concurring in part and dissenting in part).

¶23 Wisconsin courts rarely limit liability based on the absence of duty. *See* ***Gritzner***, 235 Wis. 2d 781, ¶24 n.4. We conclude that it was reasonably foreseeable that permitting underage high school students to illegally drink alcohol on the Niesens' property would result in harm to some person or something. Thus, the Nichols have alleged the Niesens had a duty to refrain from knowingly permitting underage high school students to engage in illegal alcohol consumption on their property.

¶24 "Once what is required by the duty of ordinary care under the circumstances is established, the second element of actionable negligence, whether a breach of that duty has occurred, can be ascertained." ***Hoida***, 291 Wis. 2d 283, ¶46. Because the Nichols' complaint alleges the Niesens knowingly permitted and failed to supervise underage alcohol consumption on their property, it alleges "a breach of their duty to exercise ordinary care. Their complaint also alleges a

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> A person is negligent when (he) (she) fails to exercise ordinary care. Ordinary care is the care which a reasonable person would use in similar circumstances. 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.

causal connection between the defendant's breach of the duty of care and the plaintiff's injury …." *See* ***id.***, ¶23. "[I]n Wisconsin, a defendant's negligence need not be the only, or even the primary, cause of a plaintiff's injury in order for the plaintiff to recover damages. Rather, a plaintiff may recover if the defendant's negligence was a substantial factor in producing the injury." ***Hicks v. Nunnery***, 2002 WI App 87, ¶34, 253 Wis. 2d 721, 643 N.W.2d 809 (citation omitted).

¶25 The Nichols have sufficiently alleged that the Niesens' permitting underage alcohol consumption on their property was a substantial factor in causing the automobile accident that resulted in their injuries. Finally, they have alleged "actual loss or damage resulting from the breach," *see* ***Hoida***, 291 Wis. 2d 283, ¶23, by claiming they were injured in the automobile accident with Carr. Thus, because all the elements of a negligence claim are alleged in the Nichols' complaint, we turn to whether public policy factors preclude liability in this case. *See* ***id.***, ¶41. We begin our public policy analysis with a review of the development of liability in connection with underage alcohol consumption under Wisconsin case law.

¶26 Under early Wisconsin common law, "it [was] not an actionable wrong either to sell or to give intoxicating liquors to an able-bodied [person]" because that act was considered "too remote" from an injury caused by the intoxicated person. ***Seibel v. Leach***, 233 Wis. 66, 67-68, 288 N.W. 774 (1939). Several decades later, the supreme court modified ***Siebel***'s holding by expressly limiting liability for the negligent sale of alcohol on public policy grounds, explaining that "[t]he controlling consideration is one of public policy, and … reasons of public policy dictate liability not be extended as proposed by plaintiff." ***Garcia v. Hargrove***, 46 Wis. 2d 724, 732-33, 176 N.W.2d 566 (1970). The same rule was reiterated by the majority in ***Olsen v. Copeland***, 90 Wis. 2d 483, 488, 280

N.W.2d 178 (1979) ("The public policy factors which militated against this cause of action in the past are as persuasive today.").

¶27 The common law rule precluding liability for suppliers of alcohol was abrogated in 1984 when the supreme court decided ***Sorensen v. Jarvis***, 119 Wis. 2d 627, 350 N.W.2d 108 (1984). In ***Sorensen***, the supreme court concluded that a third party injured by an intoxicated minor could state a claim in negligence against a vendor who negligently sold alcohol to the minor. ***Id.*** at 629-30. The court explained that where negligence is established, public policy factors do not preclude liability for a vendor who sold alcohol to the minor, adopting the dissenting opinions in ***Garcia***[6] and ***Olsen***.[7] ***Id.*** at 645-46. The following term, the

[6] Chief Justice Hallows wrote for the minority in ***Garcia v. Hargrove***, 46 Wis. 2d 724, 737-38, 176 N.W.2d 566 (1970) (Hallows, J., dissenting):

> The denial of recovery in this area of torts has been traditionally premised upon four basic grounds: (1) No duty existed because it was the drinking, not the selling, of the liquor which was the cause; and harm to a third person could not be foreseen from the selling of the liquor; (2) that the legislature has preempted the field by the passage of a Dram Shop Act; (3) that the change in the common law is the exclusive prerogative of the legislature; and (4) creating liability would open the door to a flood of unfounded cases.
>
> The majority opinion recognizes the selling of liquor to a drunk [person] is negligence and a substantial factor contributing to the cause of a foreseeable injury to third persons…. The majority opinion rests its decision against liability, although it recognizes negligence at common law and causation, solely upon what it considers to be public-policy factors. This is the point of our departure.

[7] Similarly, Justice Day's dissent in ***Olsen v. Copeland***, 90 Wis. 2d 483, 496-97, 280 N.W.2d 178 (1979) (Day, J., dissenting), rejected the use of public policy factors to preclude liability for the negligent sale of alcohol:

> I see no reason not to apply normal principles of tort liability instead of making a special exception for the vendors of alcohol….

(continued)

supreme court decided ***Koback v. Crook***, 123 Wis. 2d 259, 366 N.W.2d 857 (1985), which extended the rule in ***Sorensen*** to social hosts who serve alcohol to minors.[8] The ***Koback*** court explained that "where a minor is concerned, there is no persuasive reason to distinguish between the negligent social host and the negligent vendor. Neither occupies a status that, viewed in terms of public policy, warrants immunization from liability once negligent conduct has been proved to be a cause of injury."[9] ***Id.*** at 269.

> The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act.
>
> A defendant's duty is established when it can be said that it was foreseeable that his [or her] act or omission to act may cause harm to someone. A party is negligent when he [or she] commits an act when some harm to someone is foreseeable. Once negligence is established, the defendant is liable for unforeseen consequences as well as foreseeable ones. In addition, he [or she] is liable to unforeseen plaintiffs.
>
> To call remote the link between a fatal automobile accident and the serving of alcohol to an intoxicated person is to ignore reality.

(Citations omitted.)

[8] Both ***Koback v. Crook***, 123 Wis. 2d 259, 366 N.W.2d 857 (1985), and ***Sorensen v. Jarvis***, 119 Wis. 2d 627, 350 N.W.2d 108 (1984), concluded the defendants were negligent per se and thus limited their discussion to whether liability was precluded by public policy factors. The ***Koback*** court explained that "[i]n liquor cases that involve minors the statute supplies the standard of what is negligence, the selling or furnishing of alcoholic beverages—although there may be other acts of negligence that could also lead to liability." ***Koback***, 123 Wis. 2d at 268. We conclude that such an "other act of negligence" is present in this case, and thus common law liability follows, assuming that public policy does not delimit recovery.

[9] WISCONSIN STAT. § 125.035 subsequently codified ***Koback*** and ***Sorenson***. ***Anderson v. American Family Mut. Ins. Co***., 2003 WI 148, ¶¶30-31, 267 Wis. 2d 121, 671 N.W.2d 651.

¶28 Several years later, we decided ***Smith***, 147 Wis. 2d 380. There, we affirmed the circuit court's summary judgment order dismissing Smith's claim against a minor who allowed another minor to consume alcohol in her parents' home. ***Id***. at 387-88. We first concluded that the defendant was not negligent per se under the statutes. ***Id.*** Then, we declined to extend common-law negligence to the facts at hand, explaining: "We conclude that extension of liability to cover [the defendant's] conduct based upon common-law negligence would go beyond prior decisions of our Wisconsin Supreme Court. The court of appeals is primarily an error-correcting court, and the supreme court oversees statewide development of the law." ***Id.*** at 388. We thus declined to analyze whether public policy factors did or did not preclude liability, leaving that analysis to the supreme court.

¶29 Several years after we decided ***Smith***, the supreme court reversed our decision in ***Paskiet v. Quality State Oil Co., Inc.***, 158 Wis. 2d 219, 462 N.W. 2d 243 (Ct. App. 1990). In ***Paskiet***, as in Smith, we declined to analyze public policy factors to determine whether common law tort liability applied to a new fact scenario involving alcohol and minors. *See* ***id.*** at 224 ("We decline to rule on a public policy matter, as that is more appropriately left to the supreme court."). In reversing that opinion, the supreme court explained that, following the abrogation of the common law immunity for those who negligently supply alcohol to minors,

> the negligent conduct of a supplier of liquor [i]s to be treated in the common law of torts in the same manner as the negligent conduct of any other person. If conduct is of a nature that will foreseeably cause harm to anyone, it is negligent. If the conduct is the violation of a safety statute whose purpose is to avoid or diminish the likelihood of the harm that resulted, the conduct is considered to be negligent per se. If that negligence is a substantial factor—a cause in fact—in respect to an injury, liability will follow unless in the particular case, as a matter of policy to be determined by the court, the results are so unusual, remote,

> or unexpected that, in justice, liability ought not be imposed.

Paskiet v. Quality State Oil Co., Inc., 164 Wis. 2d 800, 806-07, 476 N.W.2d 871 (1991) (citation omitted).

¶30 Thus, ***Paskiet*** overruled our statement in ***Smith*** that we could not analyze public policy factors in cases that would "go beyond prior decisions of our Wisconsin Supreme Court" and instructed that Wisconsin courts analyze alcohol cases with the standard analysis we use in any negligence action. ***Paskiet***, 164 Wis. 2d at 806 ("[T]he negligent conduct of a supplier of liquor [i]s to be treated in the common law of torts in the same manner as the negligent conduct of any other person."). ***Hoida*** recently confirmed that methodology: "For decades, Wisconsin courts have engaged a four-element analysis to determine whether an actionable claim for negligence has been stated." ***Hoida***, 291 Wis. 2d 283, ¶23. ***Hoida*** also explained that "Wisconsin courts have also reserved the right to deny the existence of a negligence claim based on public policy reasons …." ***Id.***, ¶24.

¶31 We recognize that ***Paskiet*** involved the direct supply of alcohol to a minor, while here the Nichols have alleged that the Niesens enabled underage alcohol consumption. But we see no reason why a principled analysis of alcohol-related negligence actions would require one methodology for the direct supply of alcohol to minors and another for facilitating alcohol consumption by minors. Both present negligence claims, and ***Hoida*** has reaffirmed the methodology we are to use in negligence cases.[10] Part of that analysis is applying public policy factors to the specific facts presented.

[10] The dissent adheres to that methodology as well, using it as one way to arrive at its conclusion that the Niesens are not liable to the Nichols.

¶32 The supreme court has advised that, "[g]enerally, the application of public policy factors proceeds on a case-by-case basis because claim-specific facts are often relevant to the analysis." ***Cole v. Hubanks***, 2004 WI 74, ¶8, 272 Wis. 2d 539, 681 N.W.2d 147; *see also* Richard V. Campbell, *Duty, Fault, and Legal Cause*, 1938 WIS. L. REV. 402, 408-09 (1938). Additionally, the supreme court has stated that the better practice is to submit negligence cases to the jury rather than to initially preclude recovery on public policy grounds. ***Bowen***, 183 Wis. 2d at 654. This is especially true "when the issues are complex or the factual connections attenuated …." ***Id.*** at 655.[11] With these principles in mind, we consider whether liability is precluded in this case by public policy factors.[12]

¶33 There are six non-exclusive public policy factors traditionally used by Wisconsin courts to prevent liability in negligence claims:

> (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 resulted in the harm; (4) allowing recovery would place too unreasonable a burden on the tortfeasor; (5) allowing recovery would be too likely to open the way for fraudulent claims; and (6) allowing recovery would enter a field that has no sensible or just stopping point.

Hoida, Inc. v. M&I Midstate Bank, 2004 WI App 191, ¶18 n.5, 276 Wis. 2d 705, 688 N.W.2d 691 (citation omitted). "[W]hether public policy considerations

[11] In accord with the better practice, this case should be submitted to a jury to determine the issue of negligence. It is usually not a good practice to preclude recovery on public policy factors on the slim record produced on a motion to dismiss.

[12] Neither party directs us to, nor have we discovered, any Wisconsin case guiding the application of the enumerated public policy factors for precluding negligence liability on facts similar to this case. While both parties discuss cases from other jurisdictions dealing with this issue, those cases are not controlling in Wisconsin and we therefore decline to address them.

preclude liability is a question of law that this court determines without deference to any other court." ***Gritzner***, 235 Wis. 2d 781, ¶27. "The assessment of public policy does not necessarily require a full factual resolution of the cause of action by trial." ***Stephenson v. Universal Metrics, Inc.***, 2002 WI 30, ¶42, 251 Wis. 2d 171, 641 N.W.2d 158. But, "[i]f one or more of these factors so dictates, the court may refuse to impose liability in a case." ***Id.***, ¶43. The facts alleged here are uncomplicated, and though disputed, are unlikely to change.[13] We will consider public policy factors now.[14] We conclude that none of the factors precludes liability.

¶34 First, the injuries in this case are not too remote from the negligence to allow recovery. The Nichols were injured in an automobile accident they claim was negligently caused by Carr, who was driving away from the Niesens' property in an intoxicated state. The injuries that the Nichols suffered were directly connected to Carr's intoxication. An underage person has the opportunity to become intoxicated if permitted to do so in an unsupervised location that the underage person may not otherwise have. More so, allowing students to congregate on one's property to consume alcohol is directly related to a resulting automobile accident.

¶35 Second, the Nichols' injury is not wholly out of proportion to the Niesens' liability. Adults who allow underage persons to gather on their property

[13] We recognize that a jury could accept the Niesens' assertion that they knew nothing about the party, in which case the issue here would be decided on a factual, not a legal, basis.

[14] As previously noted, the dissent accepts the methodology we use here. Thus, we differ with the dissent on the public policy issue only because we conclude that public policy factors do not delimit liability, while the dissent concludes that one public policy factor does delimit liability.

to consume alcohol may foresee an automobile accident when one of those persons drives away from their property. This occurs with unfortunate regularity. Third, the injuries caused to the Nichols by the resulting accident are not "highly extraordinary" in this case. On the contrary, they are precisely the type of injuries that would be expected when an underage, intoxicated person operates an automobile. Fourth, recovery will not place too unreasonable a burden on the Niesens. Adults who allow underage drinking on their property should expect to be held accountable for the injuries that result, and doing so will discourage adults from allowing this behavior to take place. Fifth, recovery is not too likely to open the way to fraudulent claims. Cases such as this are not susceptible to fraud. There will be many witnesses to what happened, and a jury will be able to assess the credibility of the Niesens. Finally, recovery will not enter a field with no sensible or just stopping point. The facts of this case limit its application. If adults do not knowingly permit underage drinking on their property, they will not become liable for the injuries resulting from underage intoxication. Thus, we do not conclude, as a matter of public policy, that allowing underage high school students to become intoxicated on one's property is conduct shielded from liability by public policy considerations. Accordingly, we reverse and remand for proceedings consistent with this opinion.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Recommended for publication in the official reports.

¶36 DEININGER, J. (*dissenting*). I would affirm the dismissal of the Nichols' claims against the Niesens. Neither the legislature nor the supreme court has yet concluded that owners of premises on which an underage person happens to consume alcohol may be held liable for injuries to a third party caused by the underage person, when the property owners did not themselves procure, furnish or dispense the alcohol beverages consumed by the underage person. I therefore conclude that our analysis in ***Smith v. Kappell***, 147 Wis. 2d 380, 433 N.W.2d 588 (Ct. App. 1988), is still good law and should govern the present facts.

¶37 Our conclusion in ***Kappell*** to affirm the dismissal of the claims against the defendant in whose home underage consumption of alcohol occurred rested on the fact that nothing in WIS. STAT. ch. 125 rendered the defendant's conduct unlawful, and we were reluctant to extend liability to conduct beyond that addressed by the statute or existing supreme court precedent. We should reach the same conclusion on the present facts. The majority concludes in Part I of its opinion, and I agree, that nothing in WIS. STAT. ch. 125 renders unlawful the failure to prevent underage consumption on premises other than those that are "described in a license or permit." *See* Majority, ¶10.[1] In refusing to extend liability to the defendant in ***Kappell*** who permitted underage persons to consume

[1] I have no quarrel with Part I of the majority opinion where the majority rejects the statutory arguments made by both parties. I agree with the majority that the cited provisions of WIS. STAT. ch. 125 have no relevance to this case and that the question of whether the Nichols have stated a claim against the Niesens turns on the present state of the common law in Wisconsin regarding who may be held liable for injuries caused by an intoxicated underage person.

alcohol in her home, but who had not purchased or dispensed the alcohol, we said this:

> We conclude that extension of liability to cover Sager's conduct based upon common-law negligence would go beyond prior decisions of our Wisconsin Supreme Court. The court of appeals is primarily an error-correcting court, and the supreme court oversees statewide development of the law.

Kappell, 147 Wis. 2d at 388.

¶38 As with past departures from Wisconsin's common law tradition of refusing to permit a recovery for injuries caused by the consumer of alcohol beverages from those who facilitated the consumption, *see* ***Paskiet v. Quality State Oil Co.***, 164 Wis. 2d 800, 805-08, 476 N.W.2d 871 (1991), if the Nichols' claims against the Niesens are to be allowed to proceed on the present facts, I believe that decision should come from the supreme court, not this one. The majority concludes that the supreme court directed Wisconsin courts in ***Paskiet*** to "analyze alcohol cases with the standard analysis we use in any negligence action." Majority, ¶30. The majority acknowledges, however, that ***Paskiet*** dealt with the liability of a supplier of alcohol to an underage person, not of a property owner on whose property the consumption occurred. Majority, ¶31; *see* ***Paskiet***, 164 Wis. 2d at 806-07 ("[T]he negligent conduct of *a supplier of liquor* [i]s to be treated in the common law of torts in the same manner as the negligent conduct of any other person." (Emphasis added.)).

¶39 The majority claims that this distinction presents no obstacle to our abandoning our conclusions in ***Kappell,*** but I conclude otherwise. By permitting a recovery against property owners who were not suppliers of alcohol to underage persons, the majority opinion extends civil liability for injuries caused by

intoxicated underage persons well beyond what is allowed under existing statutes and supreme court precedents. Until now, this error-correcting court has left the significant expansion of tort liability in this area to the legislature and the supreme court, and I see nothing in ***Paskiet*** or elsewhere justifying a departure from that practice in this case.

¶40 In addition to contravening what I conclude is controlling precedent, permitting a recovery on the present facts will, in my view, put Wisconsin tort law on a path that "would have no sensible or just stopping point." *See* ***Stephenson v. Universal Metrics, Inc.***, 2002 WI 30, ¶43, 251 Wis. 2d 171, 641 N.W.2d 158. The supreme court refused in ***Stephenson***, on public policy grounds, to permit a recovery for injuries caused by an intoxicated driver against a defendant who failed to prevent the intoxicated driver from getting behind the wheel. *See* ***id.***, ¶¶41-51. The court concluded the defendant had breached a duty owed to the injured plaintiff by failing to follow through on a promise to drive the intoxicated person home. ***Id.***, ¶24. The court nonetheless dismissed the claim because, among other things, to find the defendant "liable under these circumstances, the possibilities for expanding liability would simply have too much potential to grow out of control, and would also threaten to run counter to the legislative enactments regarding immunity." ***Id.***, ¶50. I conclude the same is true under the majority's holding in this case.

¶41 The majority asserts that "[i]f adults do not knowingly permit underage drinking on their property, they will not become liable for the injuries resulting from underage intoxication." Majority, ¶35. I acknowledge that the Nichols' complaint alleges "on information and belief" that "the Niesens were aware that the minors on their property were consuming alcohol." The Nichols also claim that the Niesens "knowingly permitted … the illegal consumption of

alcoholic beverages by underage persons … on premises under their control." That claim, however, rests on an alleged violation of WIS. STAT. § 125.07(1)(a)3., a statute which, as I have noted, the majority correctly concludes does not apply to the Niesens' property. *See* Majority, ¶10.

¶42 The common law claim that the majority permits to proceed, and the one that I conclude raises significant public policy concerns, rests on allegations that "[t]he Niesens were negligent in that they failed to take reasonable steps to supervise and monitor the activities on their property." Liability for injuries caused by an intoxicated underage person have, at least until now, been premised on affirmative acts—the procuring, furnishing or dispensing of alcohol beverages to an underage person—not for passive conduct, such as the failures the Nichols allege. If this cause of action is permitted to proceed, I fail to see why a claim should not also be permitted against parents who "should have known"[2] what was going on in their home while they were absent, based perhaps on past occurrences or even on "common knowledge" of the proclivities of teenagers in the community. And, if parents "should know" what their teenage children are up to, a reasonable proposition that would seem to always be true, permitting a recovery in this case is, I fear, only a short step away from imposing strict liability on those who own or control property on which underage drinking occurs for any injuries that might befall or be caused by an underage drinker.

[2] *See, e.g.*, WIS. STAT. § 125.075(1)(imposing criminal penalties for procuring alcohol beverages for a minor who dies or suffers great bodily harm as a result of consuming the beverages, if the defendant "knew *or should have known* that the underage person was under the legal drinking age" (emphasis added)).

¶43 The supreme court also concluded in ***Stephenson*** that extending liability to the defendant for his failure to act to prevent intoxicated driving would impose an "unreasonable" and "unrealistic" burden on the alleged tortfeasor. ***Id***., ¶46. I believe that the same thing may be said here. No matter how consistent a parent's message in disapproving underage alcohol consumption might be, or how vigilant the parent might be of his or her teenage children's activities, the sad fact remains that adolescents will, from time to time, engage in risky and unlawful behavior. Having parented three children through adolescence and early adulthood, I question whether it is reasonable to impose liability premised simply on a parent's failure "to take reasonable steps to supervise and monitor the activities on their property," which is the claim the majority allows to proceed in this case.

¶44 To be sure, I have little sympathy for parents or property owners who actively facilitate or expressly condone underage drinking in their homes or on their properties. I view such affirmative conduct as being akin to the procuring, furnishing or dispensing of alcohol beverages to underage persons that already subjects a person to civil liability and possibly criminal penalties. *See, e.g.*, WIS. STAT. §§ 125.035; 125.075. I would not dissent if I believed that the only result of permitting the Nichols' claims to proceed would be to extend potential civil liability to reach knowing and intentional wrongful conduct on the part of parents and property owners. My fear, however, is that if liability is permitted to extend to parents and property owners who fail to "supervise and monitor the activities on their property," then parents or other owners of property occupied by sixteen- to twenty-year-olds will be well-advised to never leave home, or if they must, to ensure that all underage persons go elsewhere as well. I conclude the potential

burdens imposed by permitting a recovery on the facts alleged in this case are, as in ***Stephenson***, unreasonable and unrealistic.

¶45 Finally, I acknowledge that language could be fashioned that would permit civil recoveries against those who actively facilitate the consumption of alcohol by underage persons on property they own or control, without ensnaring parents and property owners who simply fail to prevent that activity from occurring. The majority holding does not accomplish this task, however, and it is one that I conclude is best left to the legislature. Therefore, in addition to disagreeing with the majority's legal conclusions, I respectfully dissent as well on the basis of these public policy considerations.