COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1318 **Cir. Ct. No. 00-CV-65**

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

DONALD P. MUELLER,

PLAINTIFF-RESPONDENT,

HUMANA AND EMPLOYERS HEALTH INSURANCE AND MADISON NATIONAL LIFE INSURANCE CO. INC.,

INVOLUNTARY-PLAINTIFFS,

V.

SENTRY INSURANCE, A MUTUAL COMPANY, AND STEPHEN L. WENDER,

DEFENDANTS-APPELLANTS,

AMERICAN FAMILY MUTUAL INSURANCE CO.,

DEFENDANT,

SUSAN K. MUELLER,

THIRD-PARTY DEFENDANT,

HELENA MENDROK,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 SNYDER, J. Stephen L. Wender and Sentry Insurance, defendants and third-party plaintiffs in the circuit court, appeal from an order granting summary judgment to the third-party defendant, Helena Mendrok, and dismissing Wender's third-party complaint against her. Wender and Sentry argue that summary judgment was inappropriate because a jury could find that Mendrok's negligence was a cause of plaintiff Donald P. Mueller's injuries, and that Mendrok owed a duty to Mueller, and her failure to act constitutes negligence. We disagree with these contentions and affirm the order of the trial court.

FACTS[1]

[1] Neither party has provided in the briefs on appeal consistent or consistently accurate, specific citations to the record to corroborate the facts set out in those briefs. Such failure is a violation of WIS. STAT. RULE 809.19(1)(d) (1999-2000) of the rules of appellate procedure which requires parties to set out facts "relevant to the issues presented for review with appropriate references to the record." An appellate court is improperly burdened where the briefs fail to properly cite to the record. *See* ***Meyer v. Fronimades***, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957). This court may impose an appropriate penalty upon a party or counsel for a rule violation. WIS. STAT. RULE 809.83(2). We therefore hold the parties to those facts set forth in their briefs. The parties will not be heard on reconsideration to challenge facts that this court properly gleaned from their briefs.

All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶2 On March 7, 1997, at approximately 11:50 p.m., Mendrok was driving her vehicle in the westbound lane of County Highway C in Silver Cliff, Wisconsin. Mendrok hit a patch of ice and her car went off the roadway, hitting a tree. Mendrok has conceded that she was negligent in this respect. Mendrok exited her vehicle and flagged down Donald P. and Susan K. Mueller, who were traveling eastbound on the highway. With Susan behind the wheel, the Mueller vehicle was moved into position while Donald attached chains from his vehicle to the rear of Mendrok's vehicle.

¶3 The Muellers were unsuccessful in their attempts to get Mendrok's vehicle back on the roadway so they removed the chains and Susan moved the Mueller vehicle to the north side of the road. Although Susan stated that she parked her vehicle on the shoulder of the road, other witnesses indicated that she parked her vehicle in the westbound lane of traffic, facing east, with her headlights on and remained seated in the driver's seat of the vehicle. The Muellers then used their cell phone to call for assistance. Mendrok stood outside the Mueller vehicle and chatted with Susan while Donald stood on the side of the road while waiting for assistance.

¶4 Approximately fifteen to twenty minutes later, Wender approached the scene in his vehicle, traveling westbound; he observed the headlights of the Mueller vehicle in his lane of travel. Wender's vehicle began to slide, and in an effort to avoid the Mueller vehicle and to avoid crossing the center line into oncoming traffic, Wender swerved to the right shoulder of the road and his vehicle went off the roadway. Wender's vehicle clipped the driver's side of the Mueller vehicle, struck Donald and then struck the Mendrok vehicle. Donald's injuries included a right tibia fracture, a left shoulder injury, a lower back injury, left lower

abdominal wall contusion, posttraumatic hematuria, renal contusion, and numerous contusions, abrasions and bruises.

¶5 Donald sued Wender, Wender's automobile insurer, Sentry Insurance, and American Family Mutual Insurance Co., Susan's automobile liability insurer; Donald sued American Family only for subrogation. Wender and Sentry then filed a third-party complaint against Susan and Mendrok, cross-claiming against American Family for Susan's and Mendrok's negligence.[2]

¶6 On December 29, 2000, Mendrok filed for summary judgment. The trial court granted Mendrok's summary judgment motion, holding that as a matter of law Mendrok's negligence could not have been a cause of Donald's injuries. In addition, the trial court held that Mendrok did not owe the Muellers a duty to warn Susan about the danger her vehicle presented to oncoming traffic. Wender and Sentry appeal the trial court's decision.

DISCUSSION

¶7 We review the circuit court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). That methodology is well known and need not be repeated here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***; WIS. STAT. § 802.08(2). Because there are no material facts at issue in this case, we must determine which party is

[2] Coincidentally, American Family is the automobile insurer for both Susan Mueller and Mendrok.

entitled to judgment as a matter of law. ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 501-02, 577 N.W.2d 617 (1998).

¶8 In order to constitute a cause of action for negligence, there must exist (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the plaintiff's injury; and (4) an actual loss or damage as a result of injury. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶28, 241 Wis. 2d 804, 623 N.W.2d 751. In the case at hand, Mendrok conceded negligence in allowing her vehicle to slide off the road but denied causation of Donald's injuries.

¶9 Negligence and causation are separate inquiries; a finding of cause will not automatically flow from a finding of negligence. ***Fondell v. Lucky Stores, Inc.***, 85 Wis. 2d 220, 227, 270 N.W.2d 205 (1978). Causation is a question of whether the breach of duty is a substantial factor in causing the harm from which damages are claimed. ***Id.***

¶10 Here, the trial court ruled that, as a matter of law, Mendrok's negligence was not the cause of Donald's injuries. Wender and Sentry argue that summary judgment was inappropriate because causation is a jury issue and a jury could find that Mendrok's negligence was a cause of Donald's injuries. We disagree.

¶11 Admittedly, negligence is ordinarily an issue for the fact-finding jury and not for summary judgment. ***Lambrecht***, 2001 WI 25 at ¶2. Because of the "peculiarly elusive nature" of negligence and the necessity that the trier of fact pass upon the reasonableness of the conduct in determining whether it constitutes negligence, "it is the rare personal injury case which can be disposed of by

summary judgment, even where historical facts are concededly undisputed." ***Id***. (citation omitted).

¶12 If a defendant seeks summary judgment in a negligence action, he or she must produce evidence that will eradicate any reasonable inference of negligence or so completely contradict it that reasonable persons could no longer accept it. ***Id.*** at ¶78. When a defendant moving for summary judgment offers exculpatory evidence so strong that reasonable minds can no longer draw an inference of negligence, a judgment for the defendant as a matter of law is appropriate. ***Id***.

¶13 If a defendant is negligent, then he or she is liable for all the foreseeable consequences that flow therefrom, either immediately or thereafter. ***Johnson v. Heintz***, 61 Wis. 2d 585, 601, 213 N.W.2d 85 (1973). Foreseeability is a fundamental element of negligence; negligence must be determined by ascertaining whether the defendant's exercise of care foreseeably created an unreasonable risk to others. ***Coffey v. City of Milwaukee***, 74 Wis. 2d 526, 537, 247 N.W.2d 132 (1976).

¶14 Foreseeability is not all inclusive but is tempered by what can reasonably be foreseen by the defendant. ***Kramschuster v. Shawn E.***, 211 Wis. 2d 699, 705, 565 N.W.2d 581 (Ct. App. 1997). We find WIS JI—CIVIL 1501 to be particularly instructive here; WIS JI—CIVIL 1501 states:

> If a person's negligence creates a situation that triggers an act by (another person)(an animal) which is a normal response to the situation created by the negligence, you may find that any injuries that result from the responsive act were caused by the original negligence.

Stated another way, if a person's negligence triggers an abnormal unforeseeable response to the situation, the injuries from the abnormal responsive act were not caused by the original negligence.

¶15 We conclude that summary judgment is appropriate here as no reasonable person could conclude that the accident between Wender and Donald Mueller was a foreseeable consequence of Mendrok's sliding off the road. Again, the test of whether negligence is causal is whether the conduct foreseeably creates an unreasonable risk to others. ***Coffey***, 74 Wis. 2d at 537. Mendrok went off the road and flagged down the Muellers for assistance. Mendrok could not, nor could any reasonable person, foresee that after unsuccessfully attempting to extricate Mendrok's vehicle, Susan Mueller would park her vehicle on the opposite side of the road, facing oncoming traffic, with her headlights on. Susan's act of parking her vehicle on the opposite side of the road, facing oncoming traffic with her headlights on, was not a normal response to Mendrok's original act of negligence. Mendrok's negligence did not cause the accident between Wender and Donald.

¶16 Wender and Sentry proffer their arguments as if the trial court found no causation based upon the passage of time between Mendrok's negligence and the accident between Wender and Donald. However, none of the trial court's remarks, in either the oral or written decision, specifically refer to the passage of time as a reason for lack of causation. The trial court found that Susan's response was, factually speaking, "too far removed" from Mendrok's negligence. We agree with the trial court that if after unsuccessfully attempting to pull Mendrok's vehicle out of the snow Susan had pulled her vehicle back on the road and parked it facing the correct direction, with her taillights facing oncoming traffic or her emergency flashers activated, Mendrok might have been found to have caused the accident. However, Susan's reaction of parking her vehicle on the opposite side of

the road, facing oncoming traffic with her headlights on, was not a normal response and hence not foreseeable.

¶17 Furthermore, Wender's position on appeal is inconsistent with his own deposition testimony that Mendrok did nothing to cause the accident between him and Donald. If by Wender's own testimony Mendrok did nothing to cause the accident, no reasonable jury could find otherwise. Summary judgment on the issue of causation was appropriate here.

¶18 Wender and Sentry further argue that Mendrok owed a duty to Mueller and her failure to act constitutes negligence. We disagree.

¶19 Where the facts alleged to give rise to a duty are agreed upon, the question of the existence of a duty is one of law. ***Rockweit v. Senecal***, 197 Wis. 2d 409, 419, 541 N.W.2d 742 (1995). All persons are held to a standard of ordinary care in all activities. ***Id***. The duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others. ***Id***.

¶20 Wender and Sentry rely on ***Rockweit*** in support of their contention that Mendrok's failure to act constitutes a breach of duty. However, ***Rockweit*** does not establish the existence of a special relationship, but merely states that the duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others. ***Id***.

¶21 Here, the trial court stated:

> I don't believe in this case that such a duty existed.… [T]he Court hasn't been cited to anything, any type of special relationship that would create a duty on Mendrok's part to avoid Mueller's alleged negligence in this case.
>
> … I don't think that there was any relationship between Mendrok and Mueller which gave Mendrok the power to

> tell Mueller to move her truck. And the Court is simply unaware of any special duty that she would have had that would make her responsible for Mueller's alleged negligence in this case.

We agree. Wender and Sentry have failed to cite to any case law to support the proposition that a special duty existed. Mendrok's only duty was to use ordinary care.

¶22 Generally, a person does not breach his or her duty of exercising reasonable care simply by being present at the scene of an accident. ***McNeese v. Pier***, 174 Wis. 2d 624, 632, 497 N.W.2d 124 (1993). Wisconsin does not impose a duty upon persons to protect others from hazardous situations. ***Id***. ***Rockweit*** does state that

> [a] person fails to exercise ordinary care when, without intending to do any wrong, he does an act or omits a precaution under circumstances in which a person of ordinary intelligence and prudence ought reasonably to foresee that such act or omission will subject him or his property, or the person or property of another, to an unreasonable risk of injury or damage.

Rockweit, 197 Wis. 2d at 424 (quoting ***Shannon v. Shannon***, 150 Wis. 2d 434, 443-44, 442 N.W.2d 25 (1989)). Wender and Sentry argue that "Mendrok clearly breached her duty to exercise ordinary care because she failed to do anything to minimize the obvious hazard presented to oncoming traffic." However, Susan Mueller also owed Wender a duty of ordinary care. If the placement of the vehicle was such an "obvious hazard" then, as the person who created this obvious hazard by parking her vehicle in such a "dangerous condition," Susan failed to exercise ordinary care. Mendrok's duty as an observer of the obvious hazard cannot be greater than that of the person who created the obvious hazard.

¶23 We decline to hold that ordinary care included Mendrok instructing Susan to park her vehicle in a specific place and manner and that Mendrok had an affirmative duty to warn Susan of the hazards of her actions. Further, ***Rockweit*** instructs that even if a negligent act has been committed and the act is a substantial factor in causing the harm, the question of duty is irrelevant if a finding of nonliability can be found in terms of public policy. ***Id.*** at 425. While some cases have held that an actor has no duty to an injured party, a determination to deny liability is essentially one of public policy rather than of duty or causation. ***Id***.

¶24 There are a number of factors we must consider in determining whether to limit liability as a matter of public policy. ***Id***. at 426. Recovery may sometimes be denied because the injury is too remote from the negligence or too wholly out of proportion to the culpability of the actor, or in retrospect it appears too highly extraordinary that the negligence should have brought about the harm, or because allowance of recovery would place too unreasonable a burden upon the actor or be too likely to open the door to fraudulent claims, or would enter a field that has no sensible or just stopping point. ***Id***.

¶25 We conclude that public policy requires that Mendrok not be held responsible for Donald Mueller's injuries. No facts were presented indicating active negligence on behalf of Mendrok and no facts were presented that Mendrok directed the operation of the Mueller vehicle. Mendrok had nothing to do with the parking of the Mueller vehicle and we conclude that it is too much of a reach to allow a finding of liability on the part of Mendrok. We are loath to find Mendrok potentially liable as an observer of Susan's responsive act.

CONCLUSION

¶26 Summary judgment was appropriate because, as a matter of law, Mendrok's negligence did not cause the accident between Wender and Donald Mueller. Susan's reaction was not a normal response and hence not foreseeable and no reasonable jury could find that Mendrok caused this accident. In addition, we cannot conclude that Mendrok owed a duty to Susan to warn her of the dangers of her action; even if a duty were to exist, public policy dictates a finding of nonliability. We therefore affirm the order of the trial court.

By the Court.—Order affirmed.

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