COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1503 **Cir. Ct. No. 00-CV-899**

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

TODD A. HELMEID AND CHRISTINE HELMEID,

PLAINTIFFS-APPELLANTS,

PROGRESSIVE NORTHERN INSURANCE COMPANY AND MERCYCARE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFFS,

V.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, CHARLES I. VESPERMAN AND NANNETTE M. VESPERMAN N/K/A NANNETTE CHESSMORE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Reversed and cause remanded for further proceedings.*

Before Dykman, Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Todd and Christine Helmeid appeal a summary judgment which dismissed their personal injury claims against Charles and Nannette Vesperman and the Vespermans' insurer.[1] The trial court concluded that the Helmeids' claims were barred on public policy grounds because the Vespermans' act of letting their dog out was too remote from the injuries Todd eventually sustained while trying to rescue the dog. The Helmeids challenge the trial court's public policy determination, and also argue that the trial court erred by refusing to apply the rescue rule and by awarding the Vespermans photocopy costs. For the reasons discussed below, we agree that the trial court erred by dismissing the Helmeids' claims on public policy grounds and by taxing photocopy costs, but reject their argument with respect to the rescue rule. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 The relevant facts are undisputed. One of the Vespermans let their dog outside on a dark evening without restraint or supervision. The dog ran into a nearby street where it was hit by an unidentified vehicle which left the scene. Todd Helmeid saw the injured dog, stopped his car, got out, and tried to move the dog out of the road. In the process, however, Helmeid was bitten by the dog and then hit by a pickup truck. Helmeid sustained injuries which eventually led him to settle with the pickup driver and to sue the dog owners and their insurer.

[1] Several other insurers were included as involuntary plaintiffs because they had paid portions of Helmeid's medical bills.

STANDARD OF REVIEW

¶3 Our summary judgment methodology is well established. We first examine the pleadings to determine whether the complaint states a claim and the answer joins issue. WIS. STAT. § 802.08 (1999-2000);[2] ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). If we conclude that the pleadings are sufficient, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. ***Dunn***, 213 Wis. 2d at 368. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. ***Id***.

ANALYSIS

¶4 The complaint set forth theories of common law negligence and strict dog-owner liability under WIS. STAT. § 174.02. The answer denied causation and denied information sufficient to form a belief as to the extent of Helmeid's injuries. It also raised several affirmative defenses, including contributory negligence. The pleadings were thus sufficient to join issue, and we proceed to consider whether the materials presented by the parties established any material dispute requiring trial.

Negligence Claim

¶5 The elements of a negligence claim are: "(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

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

injury, and (4) actual loss or damage resulting from the injury." ***Gritzner v. Michael R.***, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906. A duty of care generally exists whenever it is foreseeable that a person's act or omission might cause harm to some other person. ***Id***. at ¶20.

¶6 In certain instances, however, a duty of care may be established by legislation, foreclosing the need to examine foreseeability. *See* ***Taft v. Derricks***, 2000 WI App 103, ¶11, 235 Wis. 2d 22, 613 N.W.2d 190.

> When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence [per se] to deviate.… When conduct is negligent per se, the legislature has substituted its judgment for that of the jury for purposes of determining the defendant's standard of care. Thus, the only issues are whether the statute has been violated, causation and damages.

Id. (citations omitted). A statute may be interpreted as establishing a standard of care in a particular case when the harm inflicted was the type the statute was designed to prevent; the person injured was in the class of persons sought to be protected; and there is some indication that the legislature intended the statute to form a basis for civil liability. ***Id.*** at ¶12.

¶7 At the time of the incident at issue here, Janesville City Ordinance 6.04.060 provided:

> No owner or possessor of any dog shall permit the same to run at large in the City at any time.… The owner or possessor shall be deemed to have "permitted" the dog or cat to run at large contrary to this chapter when the owner's or possessor's dog or cat is found off the owner's or possessor's principal place of residence.

The Respondents do not contest the Appellants' assertion that this ordinance provided a standard of care, the violation of which could lead to negligence *per se* regardless of foreseeability. Nor do they deny that there are material facts in dispute on the issue of damages. Rather, they claim that the facts presented are insufficient, as a matter of law, to establish causation.

¶8 The test for causation in Wisconsin is whether the conduct at issue was "a substantial factor" in producing the plaintiff's injury. ***Estate of Cavanaugh v. Andrade***, 202 Wis. 2d 290, 306, 550 N.W.2d 103 (1996). There may be more than one cause of an injury. ***Ehlinger v. Sipes***, 155 Wis. 2d 1, 13, 454 N.W.2d 754 (1990). The question of causation is for the jury, so long as "reasonable men might differ—which will include all but a few of the cases." ***Wills v. Regan***, 58 Wis. 2d 328, 340, 206 N.W.2d 398 (1973) (citation omitted).

¶9 We are satisfied that reasonable men could differ about whether the Vespermans' conduct was a substantial factor in producing Helmeid's injuries. While being hit by the pickup truck may have been the most immediate cause of Helmeid's most serious injuries, Helmeid would not have been in the road had not one of the Vespermans earlier let their dog out without supervision. In other words, letting the dog out could be considered the first link in a chain of causation. The determination of whether that link was a "substantial" factor sufficient to establish causation for negligence *per se* is properly a jury question.

Strict Liability Claim

¶10 WISCONSIN STAT. § 174.02(1)(a) provides that, subject to contributory negligence, "the owner of a dog is liable for the full amount of damages caused by the dog injuring or causing injury to a person, domestic animal or property." This statute, like its predecessors, has been interpreted to impose

strict liability upon dog owners, without any requirement of mischief on the part of the dog or scienter on the part of the dog owner. ***Alwin v. State Farm Fire & Cas. Co.***, 2000 WI App 92, ¶6, 234 Wis. 2d 441, 610 N.W.2d 218; ***Becker v. State Farm Mut. Auto. Ins. Co.***, 141 Wis. 2d 804, 816, 416 N.W.2d 906 (Ct. App. 1987). It has been noted, however, that the potential harshness of this rule is tempered by the rules of causation, the rules of contributory negligence, and public policy considerations.[3] ***Alwin***, 2000 WI App 92 at ¶11.

¶11 The Vespermans have argued that they are entitled to summary judgment on the WIS. STAT. § 174.02 claim based on all three of the potential limiting factors: causation, contributory negligence, and public policy. We conclude that the issue of causation with regard to the strict liability claim is properly a jury question for the same reasons discussed in our negligence analysis above. We discuss the remaining two factors below.

Contributory Negligence and the Rescue Rule

¶12 The Vespermans argued to the trial court that Helmeid acted negligently by going out onto a busy road on a dark night to help the dog, and that his negligence exceeded any negligence of the Vespermans as a matter of law. Helmeid responded that he should be excused from any contributory negligence pursuant to the "rescue rule" articulated in ***Cords v. Anderson***, 80 Wis. 2d 525, 259 N.W.2d 672 (1977). Under the rescue rule, "a rescuer is not negligent where

[3] Because the parties do not address it, we do not consider any theoretical problems that may arise from applying court-created public policy factors to deny recovery under WIS. STAT. § 174.02(1)(a), which has been interpreted to impose strict liability on dog owners for injuries caused by their dogs, subject to the contributory negligence statute, in accordance with a legislative judgment regarding who should bear the loss for injuries caused by dogs.

the rescue, although dangerous, is not unreasonable or unreasonably carried out." ***Id.*** at 548.

¶13 The issue the parties present on this appeal is whether the rescue rule applies when the object of the rescue is a dog, rather than a human. We are persuaded that it does not. Helmeid has cited no case which has applied the rule to the rescue of an animal, either in Wisconsin or in any other jurisdiction. We conclude that the issue of contributory negligence should be submitted to the jury, and that the jury should not be instructed on the rescue rule. The jury may consider the reasonableness of Helmeid's attempt to rescue the dog under the usual standard of care framework.

Public Policy

¶14 There are instances in which public policy may preclude liability notwithstanding the presence of all the elements of a negligence or strict liability claim. ***Alwin***, 2000 WI App 92 at ¶12. The factors to consider on a case-by-case basis are whether: (1) the injury is too remote from the negligence; (2) the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) in retrospect, it appears too highly extraordinary that the negligence should have brought about the harm; (4) recovery would place too unreasonable a burden on the negligent tortfeasor; (5) allowing recovery would be too likely to open the way for fraudulent claims; or (6) allowing recovery would open a field having no sensible or just stopping point. ***Id.***

¶15 The Vespermans first argue that Helmeid's injury was too remote to form the basis for liability because it was several steps removed from their act of letting the dog out. This argument overlooks two important points.

¶16 First, while the act of letting the dog out unsupervised may be the trigger for the negligence *per se* claim, the strict liability claim arises from any injury caused by the dog at any time. Thus, the act of causation for the strict liability claim need not be letting the dog out. It could be any action of the dog which the jury might find to have been a substantial factor in causing the ultimate injury, including running out into the street where it was hit, or biting (and perhaps thereby distracting) its would-be rescuer. *See*, *e.g.*, ***Meunier v. Ogurek***, 140 Wis. 2d 782, 784-87, 412 N.W.2d 155 (Ct. App. 1987) (imposing strict liability when dog ran under tractor, startling the tractor operator into losing control). It is therefore uncertain how many "links" the jury might find between the injury and an act of causation on the strict liability claim.

¶17 Second, even going back to the act of letting the dog out under the negligence *per se* theory, we are not persuaded that it is too remote to imagine that a dog running at large might run into a street, leading to a chain of events resulting in injury to a person or property. The fact that this particular scenario involved multiple steps does not make the release of the dog too remote as a matter of public policy.

¶18 The Vespermans next argue that allowing recovery would enter a field with no sensible and just stopping point, because "the dog was a passive instrumentality" leading to the injury. Again, this argument ignores the facts that the dog ran out into the road and bit its would-be rescuer.

¶19 The Vespermans also contend that allowing recovery would open the floodgates to claims "which bear little if no relation to the owner's negligence or the dog." We note, however, that in order to recover, Helmeid must first convince a jury that the owner's act of letting the dog out or some subsequent action of the

dog was a substantial cause of his injuries. Thus, there will be no recovery if the jury agrees with the Vespermans that the dog's acts bear little or no relation to Helmeid's injuries. Moreover, by its very nature, WIS. STAT. § 174.02 evinces a public policy that dog owners *should* be liable for injuries caused by their dog, regardless of any culpability or negligence on their part. The Vespermans have not persuaded us that allowing recovery on the strict liability claim would open the floodgates to litigation any wider than the legislature has already done.

¶20 Finally, the Vespermans assert that it is too highly extraordinary that letting a dog out would result in a person being struck by a vehicle. Again, however, the Vespermans focus too narrowly on the initial act of the owner under the negligence claim, disregarding subsequent acts by the dog which could form the basis for the strict liability claim.

¶21 In sum, we conclude that public policy does not bar recovery on the negligence claim for injuries which Helmeid sustained, and does not bar recovery on the strict liability claim for any of Helmeid's injuries. We are satisfied that the requisite jury determinations on causation and contributory negligence will be sufficient in this case to ensure a proper relationship between the injury and any act of causation. Accordingly, we remand the matter for trial on both the negligence and strict liability claims. We also note the general tort rule that a "claimant may not twice recover compensation for the same injury," ***Greene v. Waters***, 260 Wis. 40, 46, 49 N.W.2d 919 (1951), in the event that Helmeid prevails upon both theories.

¶22 Our decision renders the issue about photocopy costs moot. Nonetheless, because the issue will likely recur, we briefly observe that such costs

are not taxable. *See* ***Kleinke v. Farmer's Coop. Supply & Shipping***, 202 Wis. 2d 138, 148-49, 549 N.W.2d 714 (1996).

By the Court.—Judgment reversed and cause remanded for further proceedings.

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