COURT OF APPEALS
DECISION
DATED AND RELEASED

May 22, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3689-FT

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

THOMAS A. REED,

PLAINTIFF-APPELLANT,

V.

BEAVER DAM COMMUNITY HOSPITALS, INC.,

DEFENDANT-RESPONDENT,

THE PRUDENTIAL INSURANCE CO. OF AMERICA, WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dodge County: DANIEL W. KLOSSNER, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Roggensack and Deininger, JJ.

PER CURIAM. Thomas Reed appeals from a summary judgment dismissing his personal injury complaint against Beaver Dam Community Hospitals, Inc. Reed sued after he fell from a second-story window at the facility. The trial court dismissed the action upon concluding that on undisputed facts Reed's negligence exceeded the hospital's as a matter of law. We disagree, and therefore reverse.[1]

The following facts are undisputed. Reed was involuntarily placed on the hospital's detoxification unit under the emergency detention procedures of ch. 51, STATS. On admittance he had a blood alcohol concentration of .27 percent. Over the next few hours, hospital personnel observed him exhibiting poor judgment and showing symptoms of depression, including suicidal ideation and crying. He reported a past pattern of self-destructive behavior. Later, he showed physical symptoms of withdrawal.

After several hours of sleep, Reed learned of his imminent court hearing on the ch. 51 proceedings, and appeared upset by the news.

Shortly afterward, he decided to escape. He found a kitchen knife in the unit lounge and, taking precautions to remain unobserved, used it to unscrew the security bars covering a window. He then opened the window, cut through a screen and climbed out. He jumped just after being spotted and just before someone could stop him. He received serious injuries upon landing. The accident occurred approximately eleven hours after he was admitted to the unit. His blood alcohol level at the time was .055 percent.

[1] This is an expedited appeal under RULE 809.17, STATS.

Summary judgment is appropriate if the dispute can be resolved as a matter of law on undisputed facts. ***Germanotta v. National Indemnity Co.***, 119 Wis.2d 293, 296, 349 N.W.2d 733, 735 (Ct. App. 1984). Where material facts are in dispute, or reasonable conflicting inferences available from undisputed facts, summary judgment is not appropriate. ***Preloznik v. City of Madison***, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983). We independently decide such issues without deference to the trial court. ***Schaller v. Marine Nat'l Bank***, 131 Wis.2d 389, 394, 388 N.W.2d 645, 648 (Ct. App. 1986).

A hospital must exercise such ordinary care as it knows or should know is required by the mental and physical condition of its patient. ***Kujawski v. Arbor View Health Care Ctr.***, 139 Wis.2d 455, 462-63, 407 N.W.2d 249, 252 (1987). The hospital could be found negligent under this standard for inadequately policing the lounge, for not maintaining close observation of Reed and for keeping a poorly secured window on a locked detoxification unit. However, in its summary judgment motion and in its response on the appeal, the hospital has relied on the principle that "where the evidence of the plaintiff's negligence is so clear and the quantum so great, and where it appears that the negligence of the plaintiff is, as a matter of law, equal or greater than that of the defendant, it is not only within the power of the court but it is the duty of the court to so hold." ***Johnson v. Grzadzielewski***, 159 Wis.2d 601, 608, 465 N.W.2d 503, 506 (Ct. App. 1990). Such has been the ruling where the plaintiff was joy riding on an elevator, ***id***.; where the plaintiff tried to pull a burning tree off power lines, ***Hertelendy v. Agway Ins. Co.***, 177 Wis.2d 329, 340, 501 N.W.2d 903, 908 (Ct. App. 1993); where plaintiff was injured trying to escape from police during a high-speed chase, ***Brunette v. Employers Mut. Liab. Ins. Co.***, 107 Wis.2d 361, 364, 320 N.W.2d 43, 44 (Ct. App. 1982); where plaintiff worked on farm

machinery with power take off engaged, ***Schuh v. Fox River Tractor Co.***, 63 Wis.2d 728, 744, 218 N.W.2d 279, 287 (1974); where plaintiff walked through a barricaded construction site, ***Rewolinski v. Harley-Davidson Motor Co.***, 32 Wis.2d 680, 684-85, 146 N.W.2d 485, 487 (1966); and where plaintiff failed to reduce speed while driving through dense fog, ***McNally v. Goodenough***, 5 Wis.2d 293, 304, 92 N.W.2d 890, 897 (1958).

The hospital has not shown Reed's negligence to be greater as a matter of law. From the facts now of record, a reasonable fact finder could find that the hospital was negligent in one or more respects, and that its negligence in those respects was substantial. A reasonable fact finder could also infer that Reed was not acting in a fully rational, and knowing and voluntary, manner when he attempted his escape. That factor separates this case from those cited above, and others like it, where the volitional nature of the plaintiff's dangerous acts was not in dispute. Reed's potentially reduced volition here is a circumstance that a reasonable fact finder could rely on, after determining the weight and credibility to be assigned Reed and hospital personnel, to assign the hospital the greater negligence. Because competing inferences remain reasonably available on that question, summary judgment cannot resolve the issue.

Reed also challenges an item of costs in the judgment. Our decision to reverse the judgment on the merits makes it unnecessary to address that issue.

By the Court.—Judgment reversed and cause remanded.

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