COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2159 **Cir. Ct. No. 2004CV456**

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

TRISHA M. LIETHEN AND JEFFREY W. LIETHEN,

PLAINTIFFS-APPELLANTS,

V.

STEPHEN W. ALLEN, ANITA N. BELGER, AMERICAN FAMILY MUTUAL INSURANCE CO., AND WINNEBAGO COUNTY,

DEFENDANTS-RESPONDENTS,

SECURA INSURANCE,

DEFENDANT.

APPEAL from an order of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed*.

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

¶1 PER CURIAM. Trisha Liethen and Jeffrey Liethen appeal from an order granting summary judgment to Stephen Allen, Anita Belger, and their insurance companies. The issue on appeal is whether the circuit court properly found that the Liethens' negligence claims against Allen and Berger were precluded by public policy. We agree with the circuit court's conclusion, and affirm.

¶2 The underlying case is a personal injury action brought by the Liethens for injuries Trisha sustained as a result of a series of events. The events leading to Trisha's injuries began when Allen did not properly secure a doghouse to the bed of his pickup truck. While Allen was driving on a highway, the doghouse fell off. He went to look for the doghouse on the highway but could not find it. Another driver later hit the doghouse, and law enforcement personnel came to clean up the debris. One of them, Deputy Day, was removing debris from the road when he was struck by a car driven by Belger. Trisha, who was at the time a patrol sergeant for the sheriff's department, was then called to the scene. She came to aid Day who was lying, severely injured and upset, next to a concrete median. As she attempted to get closer to Day's head, Trisha jumped over the concrete barrier. The barrier had a gap in it, and Trisha fell thirty-five to forty feet to the railroad tracks below the road and was injured.

¶3 The Liethens sued Belger and Allen for damages caused by her injuries. They claimed that Belger knew of the gap on the other side of the barrier and had a duty to warn her of it. Belger and Allen then moved for summary judgment, asserting that their negligence was too remote from the injuries, and that allowing such a claim would open the floodgates of litigation with no sensible stopping point. The circuit court granted their motion. We agree and affirm.

¶4 Our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. ***M&I First Nat'l Bank v. Episcopal Home Mgmt., Inc.***, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995).

> We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins an issue of material fact or law. If we determine that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. If the movant has carried his [or her] initial burden, we then look to the opposing party's affidavits to determine whether any material facts are in dispute that entitle the opposing party to a trial.

Schurmann v. Neau, 2001 WI App 4, ¶6, 240 Wis. 2d 719, 624 N.W.2d 157 (citations omitted). In our review, we are limited to consideration of the pleadings and evidentiary facts submitted in support and opposition to the motion. *See* ***Super Valu Stores, Inc. v. D-Mart Stores, Inc.***, 146 Wis. 2d 568, 573, 431 N.W.2d 721 (Ct. App. 1988).

¶5 The Liethens argue that the circuit erred by applying an incorrect standard, and by concluding that their claims are barred by public policy. The Liethens first argue that summary judgment was inappropriate because the "better practice is to submit the case to the jury before determining whether the public policy considerations preclude liability." *See* ***Alvarado v. Sersch***, 2003 WI 55, ¶18, 262 Wis. 2d 74, 662 N.W.2d 350. When the facts are clear, however, and the public policy considerations are fully developed by the complaint and the summary judgment motion, a court may make a public policy determination before trial. ***Smaxwell v. Bayard***, 2004 WI 101, ¶41, 274 Wis. 2d 278, 682 N.W.2d 923. The public policy analysis is separate and distinct from the

determination of whether negligence exists. *See* ***Id.***, ¶40. Public policy may preclude recovery from a negligent tortfeasor if the court determines that

> (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, or (6) allowing recovery would enter a field that has no sensible or just stopping point.

Cefalu v. Continental Western Ins. Co., 2005 WI App 187, ¶12, 285 Wis. 2d 766, 703 N.W.2d 743, *review denied,* 2005 WI 150, 286 Wis. 2d 100, 705 N.W.2d 661 (citations omitted). We conclude that public policy precludes liability in this case and, consequently, the circuit court did not improperly decide this case on summary judgment.

¶6 The first public policy consideration precludes recovery when the injury is too remote from the negligence. ***Id.*** "A finding that a defendant's negligence is too remote from the injury is essentially just a determination that a superseding cause should relieve the defendant of liability." ***Id.***, ¶21. An intervening act is not a superseding cause if it is a normal consequence of the situation. *See* ***id.*** In this case, we agree with the circuit court that the injury to Leithen was not a normal consequence of either Allen's or Belger's alleged negligence. Allen's alleged negligent act was failing to properly secure a doghouse to a truck bed. Belger was allegedly negligent when she hit Officer Day with her car. It is not a foreseeable consequence of either act that Liethen would jump over a concrete median in the middle of a highway and fall thirty-five to forty feet below. The circuit court properly determined that Liethen's injury was too remote.

¶7 We also agree that to allow such a claim would have no sensible or just stopping point. When addressing this issue at the summary judgment hearing, the court asked the plaintiffs' counsel if Officer Liethen would have a cause of action against Allen and Belger if she had been having a cup of coffee when she received the call that an officer had been hit, and tripped on an uneven doorway, or got hit by a car as she pulled out of the parking lot. Counsel responded that it was "very possible." Neither of these hypothetical situations has any logical connection to Belger's or Allen's alleged negligence. We again agree with the circuit court that the injury was simply too remote from Allen's or Belger's alleged negligence, and to hold otherwise would open the floodgates of litigation with no sensible or just stopping point for liability.[1]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

[1] We also conclude that the appellants did not establish that Belger breached a duty to warn and affirm on that issue as well.