COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1561 **Cir. Ct. No. 2007CV552**

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

MICHAEL GLENNON AND KEO M. GLENNON,

PLAINTIFFS-APPELLANTS,

WISCONSIN MUNICIPAL MUTUAL INSURANCE COMPANY,

SUBROGATED-PLAINTIFF,

V.

ROSS HANSEN AND AMERICAN FAMILY INSURANCE GROUP,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Eau Claire Police Officer Michael Glennon and his wife, Keo Glennon, appeal a summary judgment dismissing their negligence action against Ross Hansen, and Hansen's mother's insurer, American Family Insurance Group, for knee injuries Michael Glennon sustained while apprehending Hansen. The Glennons argue the trial court erred by concluding public policy considerations precluded their action as a matter of law. We agree. We therefore reverse and remand for further proceedings.

Background

¶2 In the fall of 2004, Hansen, then eighteen years old, in his words, "kind of invited [himself]" to the University of Wisconsin—Eau Claire's homecoming, where he spent the morning and early afternoon drinking at a house party. Officer Glennon and his partner, officer Donn Adams, encountered Hansen around 2 p.m. as Hansen was walking down Water Street with what appeared to be a cup of beer. The officers stopped Hansen and asked him to identify himself. Hansen first identified himself as "Brown," but then provided the officers with his billfold, which contained cards identifying him as Ross Hansen.

¶3 When Glennon pulled out his handcuffs to encourage Hansen to tell the truth, Hansen took off running. The officers pursued him and tackled him from behind. They attempted to hold Hansen down, but he continued to struggle. Adams then sprayed Hansen with pepper spray, but Hansen managed to get back to his feet.

¶4 Two witnesses said they saw Hansen kick or punch Glennon before attempting to escape again. The first witness stated he saw Hansen "swinging his fists … and kicking with his leg at [Glennon]" and that "Hansen hit [Glennon] with his fist or with his feet while kicking." The witness claimed he "immediately

heard [Glennon] cry out in pain [after Hansen kicked or punched Glennon]." A second witness also claimed to have seen Hansen "hit one officer."

¶5 Glennon, however, characterized Hansen's swinging as flailing to try to get away. He testified that he was not injured by Hansen punching, kicking, or swinging at his knee. Rather, Glennon claims he was injured when he grabbed Hansen by the shoulders and started to pull him back to the ground. According to Glennon, Hansen landed on Glennon's knee, bending it backward. Hansen testified that he does not recall either swinging at the officers or injuring Glennon. He stated he would not deny swinging at the officers, but that the purpose of his struggling was to escape.

¶6 Hansen was charged with disorderly conduct, resisting an officer, and battery to a law enforcement officer, all of which were ultimately dismissed. The Glennons brought a negligence action, alleging Hansen caused the injury to Glennon's knee. He joined as a defendant American Family, Hansen's mother's insurer.

¶7 American Family moved for summary judgment arguing—among other things—that the policy's intentional act exclusion and the principle of fortuity precluded coverage. It also argued public policy considerations barred liability as a matter of law because allowing Glennon to recover would enter a field where there is no reasonable or just stopping point. Alternatively, American Family argued Glennon was more causally negligent than Hansen as a matter of law. The court found there was a disputed issue of material fact as to whether Hansen intended to injure Glennon, and denied summary judgment based on the intentional acts exclusion and the principle of fortuity. It also rejected the argument that Glennon's negligence exceeded Hansen's as a matter of law. It

agreed, however, that public policy considerations warranted barring liability as a matter of law.

Discussion

¶8 Whether summary judgment is appropriate is a question of law that we review independently. ***City of Janesville v. CC Midwest, Inc.***, 2007 WI 93, ¶13, 302 Wis. 2d 599, 734 N.W.2d 428. We will uphold summary judgments only if "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2005-06). Likewise, whether public policy considerations preclude liability in a particular instance presents a question of law that we review independently of the circuit court. ***Gould v. American Fam. Mut. Ins. Co.***, 198 Wis. 2d 450, 461, 543 N.W.2d 282 (1996).

1. Public Policy Considerations

¶9 Even when negligence is present, courts may bar liability because of public policy considerations.[1] ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis. 2d 723, 737, 275 N.W.2d 660 (1979). The circuit court held one such consideration applied here. The court stated that allowing liability would enter a

[1] The six public policy considerations that may bar liability in Wisconsin are: (1) The injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor; (3) in retrospect it appears too highly extraordinary that the negligence should have resulted in harm; (4) because allowance of recovery would place too unreasonable a burden on the tortfeasor; (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point. ***Cole v. Hubanks***, 2004 WI 74, ¶8, 272 Wis. 2d 539, 681 N.W.2d 147.

field that has no sensible or just stopping point. The court observed: "I think [this] is very consistent with [***Gritzner v. Michael R***., 2000 WI 68, 235 Wis. 2d 781, 611 N.W.2d 906] which [Glennon] cites [for a different proposition] … I think this is exactly the same." However, ***Gritzner*** reversed a circuit court's decision to bar liability on public policy grounds, holding that the court should have applied the public policy factors only after a full factual resolution.[2] ***Gritzner***, 235 Wis. 2d 781, ¶¶75, 83-86 (Abrahamson, C.J., concurring).[3]

¶10 Applying the public policy factors only after negligence has been established is the general rule. ***Sawyer v. Midelfort***, 227 Wis. 2d 124, 141, 595 N.W.2d 423 (1999). However, our supreme court has also recognized that "where the facts presented are simple and the question of public policy is fully presented by the complaint and the motion for summary judgment, this court may make the public policy determination." ***Id.*** (citing ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 654-55, 517 N.W.2d 432 (1994)). Here, the circuit court appears to have presumed the question of public policy did not require resolution of the underlying facts.

¶11 We disagree. Here, the parties dispute how the injury occurred. A fact finder might determine the injury was caused through Hansen's or Glennon's negligence, or some combination of the two. It might also find Hansen

[2] Although ***Gritzner***'s lead opinion opines that public policy considerations should bar the defendants' claim for negligent failure to warn, it is not the opinion of the court on this issue. ***Gritzner v. Michael R.***, 2000 WI 68, ¶73, 235 Wis. 2d 781, 611 N.W.2d 906. Rather, the court's opinion on this is the concurrence, which held that the circuit court erred by applying the public policy considerations before first resolving the factual issues. ***Id.***, ¶83.

[3] As noted above, Chief Justice Abrahamson's concurrence is the opinion of the court on this issue.

intentionally injured Glennon. How these facts are resolved bears directly on the question of whether public policy considerations should bar Glennon from holding Hansen liable for his injury.

¶12 Furthermore, as the Glennons argue in their brief, there is no rule that categorically exempts police officers from bringing negligence claims when injured in the line of duty.[4] We discern no basis for concluding that recovery by Glennon would enter a field with no reasonable or just stopping point.

2. The Intentional Acts Exclusion

¶13 American Family argues that even if liability is not barred as a matter of law, the intentional acts exclusion to its policy excludes coverage because Hansen intentionally resisted arrest. An intentional acts exclusion, however, only precludes insurance coverage "where the insured acts intentionally and intends some harm or injury to follow from the act." ***Ludwig v. Dulian***, 217 Wis. 2d 782, 788, 579 N.W.2d 795 (Ct. App. 1998) (citation omitted).

¶14 The circuit court found Hansen's intent to injure to be a disputed issue of material fact. If the jury believed the witnesses who claimed they saw Hansen punch or kick Glennon, it could conclude Hansen intended to injure Glennon. If it found credible Hansen's and Glennon's assertions that Hansen was only eluding the officers it could conclude there was no intent to injure. American

[4] Glennon characterizes the circuit court's public policy rationale as an extension of the firefighters' rule beyond the limits to which it has traditionally been expanded. The court did not expressly employ this rule as its rationale for limiting public policy here. Therefore, we need not address the rule either.

Family, however, argues ***Ludwig*** permits this court to infer intent to injure as a matter of law.

¶15 In ***Ludwig***, several police officers attempted to restrain the defendant, Dulian, in his kitchen. The officers reported a "violent struggle" in which Dulian pushed officer Ludwig into a cabinet and Ludwig "careen[ed] off the counter[]top and the island area." ***Id.*** at 785. Dulian, however, denied having any contact with Ludwig. The court opined, "If the officers' version was uncontradicted, then the court could infer, as a matter of law, from these acts that Dulian intended to harm Ludwig." ***Id.*** at 789. American Family seizes on this statement to argue that the ***Ludwig*** holds that a court may infer as a matter of law the resisting individual intended to cause injury if he (a) resists arrest, and (b) there is undisputed evidence of a struggle.

¶16 However, ***Ludwig*** eschews the type of standard American Family proposes. In ***Ludwig***, we stated, "There is no bright-line rule to determine when intent to injure should be inferred as a matter of law. Rather, each set of facts must be considered on a case-by-case basis." ***Ludwig***, 217 Wis. 2d at 789. We also recognized, "A court may infer intent to injure as a matter of law only in narrow circumstances." ***Id.*** (citing ***Loveridge***, 161 Wis. 2d at 170); *see also* ***Raby v. Moe***, 153 Wis. 2d 101, 105, 450 N.W.2d 452 (1990) (a court may infer intent to injure in the case of armed robbery only because some type of bodily injury is so substantially certain to occur).

3. Principle of Fortuity

¶17 We likewise reject American Family's argument that the principle of fortuity bars coverage. For the principle of fortuity to apply, the damage must be intentionally caused by the insured. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461,

483-84, 326 N.W.2d 727 (1982). As noted above, the circuit court found Hansen's intent to injure was a disputed issue of material fact. American Family contends, however, that it is undisputed Hansen intentionally broke the law, drank illegally, lied to police officers, and resisted arrest. But intent to break a law does not prove intent to cause injury. *See* ***Becker v. State Farm Mut. Auto. Ins. Co.***, 220 Wis. 2d 321, 582 N.W.2d 499 (Ct. App. 1998).

¶18 American Family then cites ***Hagen v. Gulrud***, 151 Wis. 2d 1, 442 N.W.2d 570 (Ct. App. 1989), for the proposition that it is not within the reasonable expectations of contracting parties for an insurance policy to cover liability arising from criminal acts. The ***Hagen*** holding, however, was limited to sexual assaults and was based on a prior holding that "the intentional act of sexual assault was of a nature that the intent to harm could be inferred as a matter of law." ***Prosser v. Leuck***, 196 Wis. 2d 780, 785, 539 N.W.2d 466 (Ct. App. 1995) (discussing ***K.A.G. v. Stanford***, 148 Wis. 2d 158, 434 N.W.2d 790 (Ct. App. 1988)).

¶19 With limited exceptions, Wisconsin courts have declined to infer intent to injure simply because the defendant was engaged in criminal activity when the injury occurred. ***Becker***, 220 Wis. 2d 321. We decline to infer intent here.

4. Negligence as a Matter of Law

¶20 Alternatively, American Family argues Glennon was more causally negligent than Hansen as a matter of law because:

> Glennon testified … Hansen did not take any physical action toward him that resulted in his knee being injured, … Hansen was not struggling with him when his knee was injured and that the only physical action that was taken that

> resulted in … [Glennon's] injury was Glennon himself pulling Hansen backward causing Hansen to fall onto Glennon's knee.

While these facts may weigh in Hansen's favor, they do not warrant a conclusion that Glennon's negligence exceeded Hansen's as a matter of law.

¶21 To find negligence as a matter of law, "the court must be able to say that no properly instructed, reasonable jury could find, based upon the facts presented, that the defendants failed to exercise ordinary care." ***Ceplina v. South Milwaukee Sch. Bd.***, 73 Wis. 2d 338, 342, 243 N.W.2d 183 (1976). We conclude a properly instructed, reasonable jury could find Hansen's negligence exceeded Glennon's. Therefore, the circuit court correctly declined to hold that Glennon was not more causally negligent than Hansen as a matter of law.

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

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