COURT OF APPEALS
DECISION
DATED AND FILED

May 21, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1019 **Cir. Ct. No. 2007CV423**

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

KURT PROCHASKA,

PLAINTIFF-APPELLANT,

V.

MICHAEL RAINIERO, M.D.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed*.

Before Vergeront, Lundsten and Bridge, JJ.

¶1 VERGERONT, J. This action arises out of a shooting incident that occurred when Michael Rainiero, M.D., shot Kurt Prochaska after Prochaska broke into Dr. Rainiero's home late at night while he, his wife, and his three children were sleeping. The circuit court dismissed on summary judgment

Prochaska's claims for negligence and battery, concluding that Dr. Rainiero intentionally shot Prochaska but acted in self-defense. Prochaska appeals and contends that he is entitled to a trial on both claims. We hold the circuit court properly granted summary judgment on both claims. As to the negligence claim, it is undisputed that Dr. Rainiero intentionally shot and injured Prochaska. As to the battery claim, we conclude that there are no material factual disputes and that, as a matter of law, Dr. Rainiero reasonably believed he and his family were likely to suffer bodily harm and reasonably believed shooting Prochaska was necessary to prevent that harm. Accordingly, we affirm.

BACKGROUND

¶2 Prochaska entered Dr. Rainiero's home by climbing onto the roof and dropping through a roof vent into the living room. Because Prochaska's memory of the events is impaired due to his high level of intoxication at the time, Dr. Rainiero's account is the primary source of what occurred. According to his deposition, Dr. Rainiero awoke at about 11:30 p.m. to his dog barking. He stepped into the bedroom hallway (the hall in the bedroom wing of the house) to see what was disturbing the dog. He flipped on the light and saw the dog down the hallway, barking at a stranger, later identified as Prochaska. Prochaska was walking toward Dr. Rainiero. Prochaska said, "I just want to use your bathroom." At that point Dr. Rainiero told his wife, who was in their bedroom, to call 911, which she did. Dr. Rainiero stepped back into their bedroom, went to his closet to get his pistol, removed the trigger lock, and put a round in the chamber. He returned to the bedroom hallway and knelt down. He looked down the bedroom hallway and did not know where Prochaska was, so he called out three times, "hey, buddy." Prochaska walked out of the bathroom, which was located off the bedroom hallway, just before the intersection of that hallway with the hallway

running from the front door to the back door (the front/back hallway). Dr. Rainiero shouted at Prochaska to either "get out or get down." Prochaska did not acknowledge Dr. Rainiero and continued walking, turning right at the front/back hallway, in the direction of the back of the house. Dr. Rainiero did not see a weapon in Prochaska's hand nor did Prochaska say he was going to hurt Dr. Rainiero or his family. Once Prochaska left the bathroom there was a distance of about six or eight feet before Dr. Rainiero would lose sight of Prochaska. Dr. Rainiero shot Prochaska just before he reached that point. The police arrived at the front door shortly after Dr. Rainiero fired the shot. There is no dispute that Prochaska was injured.[1]

¶3 Prochaska filed this action claiming that Dr. Rainiero negligently used excessive force when he shot and injured him, and, alternatively, that Dr. Rainiero intentionally used excessive force. We will refer to these claims as negligence and battery.[2] Dr. Rainiero's answer alleged, among other affirmative defenses, that he was exercising his right to self-defense and to defend his wife and his children. He moved for summary judgment, which Prochaska opposed.

¶4 The circuit court granted Dr. Rainiero summary judgment on both claims. As to the negligence claim, the court concluded that no reasonable jury

[1] Prochaska testified the bullet entered his T12 vertebrae. The extent of his injuries are not relevant to the issues on this appeal. There is apparently a dispute over where the bullet entered, with Prochaska contending the police report shows the bullet entered his back and Dr. Rainiero testifying he believed he shot Prochaska in his flank, meaning the side. This dispute is not material for purposes of this appeal because it is undisputed that, at the moment Dr. Rainiero fired the shot, Prochaska was walking away from him.

[2] The elements of battery are that the defendant intentionally caused bodily harm to the plaintiff and the plaintiff did not consent. WIS JI—CIVIL 2005. The allegations of the second cause of action, although labeled "intentional use of excessive force" satisfy the elements of battery.

could find that any negligence by Dr. Rainiero was equal to or greater than that of Prochaska. As to the battery claim, the circuit court concluded that, based on the undisputed facts, Dr. Rainiero acted in self-defense in that he had a reasonable belief that he and his family were in danger of being harmed by Prochaska and he used reasonable force to prevent that harm.

DISCUSSION

¶5 Prochaska, proceeding pro se on appeal, contends the circuit court erred in dismissing both claims. First, he asserts that there is a genuine issue of fact concerning whether Dr. Rainiero intended to shoot him or, instead, acted negligently when Dr. Rainiero shot the gun in his direction. Second, Prochaska contends that, viewing the evidence most favorably to him, there is a factual dispute over whether Dr. Rainiero acted reasonably in shooting him, and he is entitled to a jury trial on this issue.

¶6 A party is entitled to summary judgment if there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2007-08).[3] We employ the same methodology as the circuit court and our review is de novo. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). In analyzing the factual submissions, we view them most favorably to the opposing party and draw all reasonable inferences in favor of that party. ***Burbank Grease Servs. v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781. Whether an inference is reasonable and whether more than one reasonable inference may be

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

drawn from particular evidence are questions of law, which we review de novo. ***H&R Block E. Enters. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421.

I. Negligence

¶7 The difference between negligent conduct and intentional conduct is succinctly explained in ***Gouger v. Hardtke***, 167 Wis. 2d 504, 512, 482 N.W.2d 84 (1992):

> The principal difference between negligent and intentional conduct is the difference in the probability, under the circumstances known to the actor and according to common experience, that a certain consequence or class of consequences will follow from a certain act. Intent requires both an intent to do an act and an intent to cause injury by that act. An intent to cause injury exists where the actor subjectively intends to cause injury or where injury is substantially certain to occur from the actor's conduct. If the conduct merely creates a foreseeable risk of some harm to someone, which may or may not result, the conduct is negligent.

(Citations omitted.)

¶8 Dr. Rainiero testified at his deposition that he intentionally shot Prochaska and intentionally injured him. He did not shoot to kill Prochaska, he stated, but he did intend to stop Prochaska any way he could, even if it meant killing him. Prochaska argues that, despite this testimony, there is a reasonable inference that Dr. Rainiero acted negligently rather than intentionally because Dr. Rainiero testified that he did not have Prochaska "in his sight" when he fired the shot and simply shot in the direction of Prochaska. This testimony, according to Prochaska, creates a factual dispute over whether there was a substantial certainty that Dr. Rainiero would hit Prochaska.

¶9 We disagree with Prochaska's characterization of the record. In his deposition, Dr. Rainiero described his gun as one that "just sights along the top of the barrel," and he answered "no" to the question: "Did you get the intruder in your sights before you made that split second decision to shoot?" However, it is undisputed that Dr. Rainiero saw where Prochaska was located and he aimed at him and fired. There is no reasonable inference on this record that Dr. Rainiero did not subjectively intend to shoot Prochaska and did not subjectively intend to cause him injury. Thus, there is no need to inquire in this case whether injury was substantially certain to occur as a result of Dr. Rainiero's conduct. *See* ***Gouger***, 167 Wis. 2d at 512 ("An intent to cause injury exists where the actor subjectively intends to cause injury *or* where injury is substantially certain to occur from the actor's conduct.") (emphasis added).

¶10 ***Gouger***, on which Prochaska relies, does not support his position. In ***Gouger*** the defendant threw a soapstone, a form of chalk used for writing on metal, at his classmate and injured his classmate's eye. The defendant averred in his affidavit that he "was trying to hit" his classmate. ***Id.*** at 509. The court held this affidavit did not, as a matter of law, rule out negligence because the defendant did not aver that he intended to injure his classmate and there was evidence from which one could reasonably infer that he did not intend injury—such as the size of the soapstone (3" x 1/2" x 1/8"), the distance from which it was thrown, and the fact that the two boys were friends. ***Id.*** at 514-15. There was also a reasonable inference from the first two facts that injury was not substantially certain to occur from throwing the soapstone at his friend. ***Id.***

¶11 In contrast to the facts in ***Gouger***, in this case Dr. Rainiero testified that he *did* intend to injure Prochaska. Thus, as noted above, our inquiry ends there.

¶12 Because we conclude it is undisputed that Dr. Rainiero intentionally shot and injured Prochaska, there is no need to weigh Dr. Rainiero's negligence against that of Prochaska's negligence. Accordingly, although our analysis differs from that of the circuit court, we reach the same conclusion: Dr. Rainiero was entitled to summary judgment dismissing the negligence claim.

II. Battery

¶13 Because there is no dispute that Dr. Rainiero intentionally caused bodily harm to Prochaska without his consent,[4] the focus in analyzing the battery claim is whether Dr. Rainiero acted in self-defense. If a determination is made that a defendant acted in self-defense, there is no battery. *See* WIS JI—CIVIL 2006.

¶14 In ***Crotteau v. Karlgaard*** the Wisconsin Supreme Court approved the then-current WIS JI—CIVIL 2006 as an accurate statement of the law for self-defense in a civil action. 48 Wis. 2d 245, 249, 179 N.W.2d 797 (1970). The current version, which is substantially the same as the instruction and supplementary legal principles approved in ***Crotteau***, provides:

> Self-defense is the right to defend one's person by the use of whatever force is reasonably necessary under the circumstances.
>
> If defendant reasonably believed that his life was in danger or that he was likely to suffer bodily harm, then the defendant had a right to defend himself by the use of such force as under the circumstances he reasonably believed was necessary. Defendant, who alleges that he acted in self-defense, has the burden of proof to satisfy [the jury] by the greater weight of the credible evidence, to a reasonable

[4] *See* footnote 2, *supra*.

> certainty, that he reasonably believed that the exercise of some force was necessary to prevent injury and also that the amount of force used was reasonable under the circumstances.
>
> A 'reasonable belief' is one a person of ordinary intelligence and judgment in the position of the defendant would have under the circumstances existing at the time of the alleged offense. The fact that defendant's belief may have been erroneous does not make his conduct wrongful if a person of ordinary intelligence and judgment would have had the same belief under the same circumstances.

WIS JI—CIVIL 2006. Essentially the same principles apply when the defense of others is involved. *See* ***id.***, cmt.

¶15 In accordance with the instruction, we examine the evidence of the circumstances confronting Dr. Rainiero to determine whether he reasonably believed that he and his family were likely to be harmed by Prochaska and that shooting Prochaska was necessary to prevent that harm.

¶16 Dr. Rainiero was awakened from sleep and confronted late at night by Prochaska, a stranger in his home. He did not know how Prochaska had entered the house. Dr. Rainiero testified that Prochaska was saying irrational things about why he was in the house—that it was cold outside, he had to go to the bathroom, and he was looking for a place to sleep. A person of ordinary intelligence and judgment in Dr. Rainiero's position would not believe that these were the reasons Prochaska entered the house but would believe he intended to rob or to harm the occupants, or both. A person of ordinary intelligence and judgment would not know whether Prochaska was alone and would not know whether he had a weapon, and therefore would assume that he was armed and not alone until persuaded otherwise. The fact that Prochaska did not show a weapon would not cause a person of ordinary intelligence and judgment to believe he did not have one, either on his person or somewhere else in the house.

¶17 Dr. Rainiero testified that when Prochaska came out of the bathroom and Dr. Rainiero yelled at him to get out or get down, Prochaska seemed to be defiant, ignored him, and did not follow his commands. This meant to Dr. Rainiero that Prochaska was not in "the right frame of mind." Dr. Rainiero testified that, had Prochaska at that point continued walking in the direction he had been when Dr. Rainiero first saw him—towards the front door—he would have reached the well-lit front door after walking about ten feet. Instead, Prochaska headed in the other direction down the front/back hallway, towards the back of the house. Dr. Rainiero testified that there was a distance of about six or eight feet before he would lose sight of Prochaska. Dr. Rainiero feared that Prochaska was going to a darker part of the house where Dr. Rainiero would not be able to see him or know what he was doing. Prochaska did not seem to Dr. Rainiero to be leaving the house and he was not talking to Dr. Rainiero at that point. Dr. Rainiero felt he had "several seconds to make a decision about how to take control of the situation. I did not hear the police coming, I did not see [sic] sirens and I shot him."

¶18 Prochaska contends that there is a factual dispute that entitles him to a trial. In his view a reasonable jury could decide that Dr. Rainiero acted unreasonably in shooting him because he had not shown a weapon, had not made a threat to harm Dr. Rainiero or his family, and was in the process of walking towards the back door. Prochaska also points to Dr. Rainiero's testimony estimating that he was forty feet from Prochaska when he shot him.

¶19 Prochaska's argument does not distinguish between the circumstances of which Dr. Rainiero was aware and what Prochaska testified he

intended to do when he left the bathroom.[5] Accepting Prochaska's testimony as true and viewing it most favorably to him, among the few things that he could remember about being inside the house were sitting on the toilet, hearing someone yell to get out of the house, and then thinking he needed to get out of there and so he "started heading towards the back door…."[6] However, there is no evidence Prochaska said anything to Dr. Rainiero about intending to leave the house. True, the only reasonable inference is that Dr. Rainiero knew that the back door was in the general direction Prochaska was going. However, according to Dr. Rainiero's testimony and the diagram of the house Prochaska submitted, the entrance to the living room (called "family room" on the diagram) was off the front/back hallway, and Prochaska would pass it while going in the direction he was headed. It is undisputed that, if he chose to enter the living room, he would be able, while out of Dr. Rainiero's sight, to make his way from there into the dining room and the kitchen and circle back to the front/back hallway and thence to the bedroom hallway. A person of ordinary intelligence and judgment in the position of Dr. Rainiero would not assume that Prochaska was leaving the house by the back door when it was feasible for him, without being seen, to take another route and return to the bedroom hallway—perhaps with a weapon or with another person.

[5] In a similar vein Dr. Rainiero brings to our attention evidence of Prochaska's activities before Dr. Rainiero saw him, apparently in an effort to establish that Prochaska broke into the house in order to steal. We disregard this evidence because information Dr. Rainiero did not know about Prochaska at the time is not relevant in assessing the reasonableness of Dr. Rainiero's beliefs about the danger Prochaska presented and the force necessary to prevent that danger.

[6] Although Prochaska testified that he got up from the toilet "and I started heading towards the back door," he also testified that he did not remember walking out of the bathroom, and, when asked whether he knew where the front and back doors were located, he answered, "I don't know." In addition, he testified that standing up from the toilet and thinking he had to get out was the last thing he remembered until he woke up in the hospital. We are assuming for purposes of this opinion that a reasonable jury could find, based on this testimony, that Prochaska could remember that he "started heading to the back door."

¶20 With the proper focus on what Dr. Rainiero saw Prochaska do and heard him say or not say, we are unable to identify any material disputed facts and any conflicting reasonable inferences from the facts with respect to the reasonableness of Dr. Rainiero's belief that he and his family remained in danger of being harmed by Prochaska when Prochaska headed toward the back of the house without saying a word.

¶21 We next turn to the reasonableness of Dr. Rainiero's belief that shooting Prochaska to injure him in order to stop him was necessary in order to prevent him from harming Dr. Rainiero and his family. Prochaska does not suggest that, if Dr. Rainiero reasonably believed Prochaska remained a danger at the point in time when he was shot, there is a factual dispute that must be resolved to determine if a lesser amount of force would have been sufficient to prevent that danger. Prochaska's position appears to be that, when a defendant raises self-defense as a defense to a battery claim, the question of the reasonableness of a person's beliefs and actions is always to be decided by the jury. However, we do not agree that ***Maichle v. Jonovic***, 69 Wis. 2d 622, 630, 230 N.W.2d 789 (1975), supports this proposition.

¶22 In ***Maichle*** the jury found the defendant had acted in self-defense and the circuit court changed the answer to that verdict question. ***Id.*** at 625-26. The supreme court reversed that determination by the circuit court. ***Id.*** at 631. Prochaska cites to the supreme court's statement that "… this court has held that the question of reasonableness of a person's actions and beliefs, where a claim of self-defense is asserted, is a question peculiarly within the province of the jury. ***Id.*** at 630 (citing ***Higgins v. Minaghan***, 76 Wis. 298, 45 N.W. 127 (1890)). However, before the court made this statement it recounted the significantly different versions of what occurred between the plaintiff and the defendant both at

the time of the incident and in the past, and the court described the version the jury could have believed to arrive at its verdict. ***Id.*** at 624-25, 628-30. Similarly, in ***Higgins*** the plaintiff's and the defendant's versions of what occurred differed, making it improper for the circuit court to decide self-defense as a matter of law. 76 Wis. at 299-300. ***Maichle*** does not suggest that, if there are no disputed facts and no conflicting reasonable inferences from the facts concerning the relevant circumstances confronting the defendant, the reasonableness of the defendant's beliefs and conduct is nonetheless an issue for the jury.

¶23 We also observe that summary judgment is not categorically unavailable in other contexts where the applicable legal standard involves reasonableness. *See, e.g.*, ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 161, 465 N.W.2d 812 (1991) (although ordinarily the question whether a person acted with reasonable diligence for purposes of the accrual of a claim is a question of fact, when the facts and reasonable inferences from the facts are undisputed, the question is one of law; thus summary judgment in favor of defendant was proper). Prochaska does not explain why a different principle should apply in this context.

¶24 In summary, neither ***Maichle*** nor Prochaska's underdeveloped argument persuades us that the question of reasonableness presented by a defense of self-defense in a civil action is always a question for the jury.

¶25 Returning to the evidence in this case, it is undisputed that Dr. Rainiero gave Prochaska an opportunity to see his gun and to do or say something to show that he was getting out of the house before Dr. Rainiero shot him. It is also undisputed that Prochaska said nothing to indicate he was leaving and that he elected to walk in a direction that gave Dr. Rainiero a reasonable basis for believing that he was not leaving the house, but was going to a part of the house

from which he could, without being seen, obtain a weapon or communicate with a partner and take another route back to the bedroom hallway. We conclude that, based on these undisputed facts, Dr. Rainiero reasonably believed that shooting Prochaska to injure him in order to stop him was necessary. A person of ordinary intelligence and judgment in Dr. Rainiero's position would believe that trying to chase Prochaska and overpower him presented too great a risk for a number of reasons: Prochaska could have a gun that he had not shown and could fire it at Dr. Rainiero if he followed him; Prochaska could have a knife he had not shown and could use it on Dr. Rainiero if he came close enough; there could be someone else with Prochaska who would come to his aid and attack Dr. Rainiero; and, most importantly, as soon as Dr. Rainiero left the bedroom hallway to follow Prochaska, someone else could enter the bedroom hallway from the other direction—from the kitchen or the front door—and reach the bedrooms of Dr. Rainiero's wife and children.

¶26 Accordingly, we conclude the circuit court properly decided that there were no material factual disputes and Dr. Rainiero was entitled to summary judgment dismissing the battery claim.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.