**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**March 2, 2004**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 03-1979** **Cir. Ct. No. 02CV656**

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

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**PAMELA KETELLE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TEACY A. SCHRAMM,**

**PLAINTIFF-APPELLANT,**

**V.**

**WAUSAU-STETTIN MUTUAL INSURANCE COMPANY AND DAVID J. HOLSTER,**

**DEFENDANTS-RESPONDENTS,**

**TERRI L. LEMKE, BARTH LEMKE, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY AND GHI INSURANCE COMPANY,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Marathon County: DOROTHY BAIN, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Pamela Ketelle appeals a summary judgment granted in favor of David Holster and his insurance company, Wausau-Stettin Mutual Insurance Company. The court concluded there are no material facts to prove that Holster was negligent by failing to prevent Craig Shannon from shooting and killing Ketelle's son, Teacy Schramm. Further, the court found no material facts to prove that Holster conspired or acted in concert with Shannon in the shooting. Ketelle argues there are facts from which a jury could find Holster negligent or that he conspired or acted in concert with Shannon. We disagree and affirm the judgment.

## BACKGROUND

¶2 On February 1, 2001, Shannon shot Schramm, Heather Brown, and Christi Elliot, killing Schramm and Brown. Shannon then killed himself. The shooting occurred at the home of Terri and Barth Lemke, Shannon's mother and stepfather.

¶3 Shannon and Brown had been romantically involved. Shannon, Brown and her son were living at the Lemke residence. Approximately a week prior to the shooting Brown decided to end the relationship. The day before the shooting, Shannon attempted to see Brown but was unable to do so.

¶4 Shannon and Holster had been friends for a number of years. Holster stated he did not know the three victims before the day of the shooting. On that day, Holster went to the Lemke home to visit Shannon. Holster and Shannon went into the basement of the home, and Shannon showed Holster two loaded firearms. At some point Holster had the firearms in his possession, but then returned them to Shannon. Shannon told Holster about his attempt to see Brown the day before and stated he felt like killing Brown and her friends.

Holster responded that there were "more fish in the sea" and that shooting someone would not be worth it. Holster testified by deposition that he did not believe that Shannon would actually shoot anyone.

¶5 At some point, Shannon went upstairs and Schramm, Brown, and Elliot arrived at the home. Shannon and the three victims then came downstairs. Shannon picked up one of the firearms and started shooting. Holster started to run up the stairs. As he looked back, he saw Shannon pointing the firearm at himself.

¶6 Ketelle filed this claim against the Lemkes and Holster on July 3, 2002. Wausau-Stettin was later added as a defendant. Among other things, Ketelle claimed that Holster was negligent and that his negligence was a cause of Schramm's death. The complaint alleged that Holster encouraged Shannon to commit the shootings, knew Shannon was intoxicated and threatened to kill someone, provided Shannon with firearms and alcohol, and failed to warn of Shannon's statements and thereby prevent the shooting. Further, Ketelle alleged that Holster conspired with Shannon.

¶7 Holster filed a motion for summary judgment on January 31, 2003. The circuit court concluded there was no genuine issue of material fact regarding any of Ketelle's claims against Holster. The court dismissed the complaint as to Holster and Wausau-Stettin, with prejudice.

## DISCUSSION

¶8 We review an order granting summary judgment independently using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). Any doubt as to the existence of a genuine issue of material fact should be resolved against the party seeking summary judgment. ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

**Negligence**

¶9 A person is negligent when he or she fails to exercise ordinary care. ***Gritzner v. Michael R.***, 2000 WI 68, ¶22, 235 Wis. 2d 781, 611 N.W.2d 906. Whether a defendant uses ordinary care "is to be determined by ascertaining whether the defendant's exercise of care foreseeably created an unreasonable risk to others." ***Coffey v. City of Milwaukee***, 74 Wis. 2d 526, 537, 247 N.W.2d 132 (1976).

¶10 Although "summary judgment does not lend itself well to negligence questions and should be granted in actions based on negligence only in rare cases." ***Ceplina v. South Milw. Sch. Bd.***, 73 Wis. 2d 338, 342-43, 243 N.W.2d 183 (1976). The circuit court determined this is one of the rare cases where summary judgment is appropriate. We agree.

¶11 Ketelle first cites ***Stewart v. Wulf***, 85 Wis. 2d 461, 271 N.W.2d 79 (1978), for the propostion that conduct relating to a firearm may constitute foreseeable harm. In ***Stewart***, a houseguest saw a firearm lying on a bed. The guest picked up the firearm and accidentally shot himself. ***Id.*** at 466-67. The court stated the injury was "the kind of harm that is to be expected when loaded guns and careless people combine." ***Id.*** at 480-81. Ketelle argues that if leaving a

firearm on a bed is negligent, then "providing a loaded handgun directly to an intoxicated, underage drinking, despondent individual" is negligent as well.

¶12 However, in ***Stewart***, the firearm was left unattended and accessible and was picked up by a guest. The owner of the firearm was found to be negligent. Nothing similar took place here. Shannon's stepfather owned the firearms. Shannon lived in the home. Holster did not provide Shannon with the firearms. Holster was a guest in the home. In fact, Shannon was in possession of the firearms before Holster arrived. Ketelle makes much of the fact that at some point Shannon gave Holster the firearms to hold and Holster eventually returned them to Shannon. However, this is not the same as providing firearms to Shannon.

¶13 Ketelle also cites ***Fleming v. Threshermen's Mut. Ins. Co.***, 131 Wis. 2d 123, 130, 388 N.W.2d 908 (1986), where a defendant was found negligent after he provided a sawed-off shotgun to the plaintiff. Again, however, Holster did not provide Shannon with a firearm so ***Fleming*** does not support Ketelle's argument that Holster was negligent.

¶14 Ketelle next lists twenty-five potential findings of fact a jury could make that would support a negligence finding. Many of them relate to Holster returning the firearms to Shannon, knowing Shannon was drinking and stating he wanted to shoot Brown and her friends. Further, Ketelle states that Holster knew Schramm, Brown and Elliot were coming to the Lemke residence and knew when they arrived. From these circumstances, Ketelle argues a jury could find that Holster was negligent by failing to warn Schramm, Brown and Elliot or to intervene and prevent Shannon from shooting them.

¶15 However, Holster did not provide Shannon with either alcohol or firearms. These things were already in Shannon's possession when Holster

arrived at the Lemke home. At most, Holster merely returned the firearms to Shannon after Shannon handed them to him.

¶16 Additionally, when Shannon told Holster he wanted to shoot Brown and her friends, Holster told him there were more fish in the sea and that shooting people would not be worth it. Ketelle contends Holster's statement indicates he believed Shannon would actually shoot someone. However, this innocuous statement does not reasonably support the inference that Ketelle attempts to draw. Holster testified he did not believe Shannon would actually shoot anyone. Ketelle's argument would require anyone to take action if they overheard someone state they wanted to kill another person, even if they did not take the threat seriously. It is universally understood that people often make outrageous statements without any intent to follow through. There is no evidence that Holster should have taken Shannon's statements any more seriously than the average person would in a similar situation.

¶17 The record also fails to show that Holster was negligent for not warning Schramm, Brown and Elliot. Ketelle argues Holster was aware that Schramm, Brown and Elliot arrived at the Lemke home. However, that is by speculation. In his statement to the police, Holster never states anything that would suggest he was aware the victims were coming over or that they had arrived. In fact, he states that he saw the victims come into the basement but had not heard a knock on the door. He also stated that he did not know the victims.

¶18 Ketelle alleges that because of the layout of the home, Holster must have heard from the basement conversations upstairs when the victims arrived. However, Terri Lemke testified that she was unable to hear from the first floor conversations that Holster and Shannon had while in the basement. Therefore, any

suggestion that Holster could hear from the basement conversations that took place upstairs is contrary to the facts. Because Holster did not state he heard any conversations from upstairs, a jury would have to speculate whether Holster heard anything. "[W]here there is no direct evidence of how an accident occurred … it is not within the proper province of a jury to guess where the truth lies and make that the foundation for a verdict." ***American Family Mut. Ins. Co. v. Dobrzynski***, 88 Wis. 2d 617, 628, 277 N.W.2d 749 (1979) (citing ***Hyer v. Janesville***, 101 Wis. 371, 377, 77 N.W. 729 (1898)).

¶19 As the circuit court stated, Ketelle is in effect seeking to impose liability on Holster merely because he was present. Mere presence does not amount to a breach of the duty to exercise ordinary care. ***McNeese v. Pier***, 174 Wis. 2d 624, 632, 497 N.W.2d 124 (1993). In effect, Ketelle's arguments are based on hindsight as to how Holster should have interpreted Shannon's actions and statements on the day of the shooting. However, as the circuit court noted, negligence is based on foreseeable harm at the time of an incident. There is no evidence from which a jury could find that Holster's conduct on the day of the shooting created an unforeseeable risk.

¶20 Ketelle argues the court erred by interpreting Shannon's statement to be that he wanted to shoot someone, rather than saying he wanted to shoot Brown and her friends. Whether Shannon stated he wanted to kill someone generally or Brown and her friends specifically, Holster is not negligent for the reasons we already discussed.[1] Holster did not provide Shannon with firearms and the evidence does not reasonably support an inference that Holster had any reason to

[1] Ketelle also argues that the trial court erred by determining that Holster should not be held liable as a matter of public policy. Because we conclude Holster was not negligent, and therefore not liable, we need not reach the public policy argument.

believe Shannon was serious when he stated he wanted to kill Brown and his friends. There is no reason to conclude that the court's decision would have been different had it categorized the threat as being directed toward a particular person.

**Conspiracy or acting in concert**

¶21 Ketelle also alleges that disputed issues of material fact exist as to whether Holster was engaged in a conspiracy with Shannon or whether Holster otherwise acted in concert with Shannon to commit the shooting.

¶22 Conspiracy is the "combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish by unlawful means a purpose not in itself unlawful." ***Winslow v. Brown***, 125 Wis. 2d 327, 330, 371 N.W.2d 417 (Ct. App. 1985). Further, "[m]ere presence and ambivalent conduct at the scene of the illegal conduct is insufficient to support liability." ***Id.*** at 332. There must be agreement to commit the unlawful act. ***Bruner v. Heritage Cos.***, 225 Wis. 2d 725, 736, 593 N.W.2d 814 (Ct. App. 1999). There is no evidence of any such agreement here. Indeed, Holster did just the opposite by telling Shannon violence "would not be worth it." Holster stated he did not take Shannon's threat seriously. He could not agree to participate in something he did not believe would actually take place. Holster was merely present when Shannon committed the shooting, and this is not sufficient to support liability.

¶23 Ketelle also claims Holster acted in concert with Shannon.

> The concerted action theory of liability rests upon the principle that "those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him."

***Collins v. Eli Lilly Co.***, 116 Wis. 2d 166, 184, 342 N.W.2d 37 (1984) (citation omitted).

¶24 However, Holster cannot be found liable under the concerted action theory because there is no proof that Holster agreed to take part in the shooting or that he encouraged Shannon to commit the shooting. Holster actually told Shannon that there were more fish in the sea and that killing someone would not be worth it. As the circuit court noted, "Merely hearing Shannon say something about killing someone, without any expression of agreement, did not make Holster an actor in concert with Shannon."

*By the Court.*—Judgment affirmed.

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