COURT OF APPEALS
DECISION
DATED AND RELEASED

September 19, 1996

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.

NOTICE

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

No. 95-1117

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

ELIZABETH COLLINS,

Plaintiff-Respondent,

v.

ROSE MILOT AND
MT. MORRIS MUTUAL INSURANCE COMPANY,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Waushara County: LEWIS R. MURACH, Judge. *Affirmed*.

Before Dykman, P.J., Paul C. Gartzke and Robert D. Sundby, Reserve Judges.

PER CURIAM. Rose Milot appeals from a judgment finding her negligent for improperly filling a hole on her land, causing the plaintiff's injury. Milot raises three issues on appeal: (1) whether public policy allows liability to be imposed for the plaintiff's injury; (2) whether there was sufficient medical evidence supporting the award of future damages; and (3) whether the jury

verdict was perverse. We conclude that (1) public policy does not impede the imposition of liability for the defendant's negligence; (2) the award of future damages was based on a sufficient medical standard; and (3) the jury verdict was not perverse. We therefore affirm.

BACKGROUND

Rose Milot owns property in Bancroft, Wisconsin, consisting of a home adjacent to a grassy lot and a horse corral. Prior to May 7, 1992, Milot noticed a hole in the ground between the house and the horse corral. She believed that the hole was caused by a mole and that her dog dug in the hole trying to catch the mole. She attempted to fix the hole by kicking the displaced dirt back into the hole. Afterward, the hole appeared to be level. However, Milot did not pat down the dirt or make other attempts to see if the hole was solidly filled.

On May 7, 1992, Elizabeth Collins went to Milot's home to visit. After their visit, Milot left to run an errand and asked Collins to feed her horse. Collins agreed. After feeding the horse, Collins began walking back to the house. She started to run when she heard the phone ring. She noticed a bare spot in her path, which appeared to be level, so she made no attempt to avoid it. When she stepped on the spot, the earth collapsed, causing her to fall and break her wrist and two ribs.

Collins sued Milot and Mt. Morris Mutual Insurance Company, Milot's insurer. A jury trial was held on December 8, 1994. The jury returned a verdict for Collins which included an award of $35,000 for future pain, suffering and disability. The jury attached a note to the verdict which read, "It's the jury's feeling that this money is to be used to rehabilitate your arm and improve your life." Milot appeals.

DISCUSSION

First, Milot contends that public policy precludes the imposition of liability for injury resulting from a hole caused by an animal on her land. We disagree.

The law is clear that liability may be imposed on one who, having no duty to act, gratuitously undertakes to act and does so negligently. ***Nischke v. Farmers & Merchants Bank & Trust***, 187 Wis.2d 96, 113, 522 N.W.2d 542, 549 (Ct. App. 1994). Thus, while it may be true that people have no duty to protect others from the actions of wild animals on their land, once they undertake such duty, they will be held liable for any harm resulting from their failure to exercise reasonable care. *See* ***id.*** at 114, 522 N.W.2d at 549. Thus, by attempting to fill the hole caused by the animal, Milot undertook the duty to fill the hole in a safe and reasonable manner.

Milot did not fill the hole in a safe and reasonable manner. Instead, by not checking to make sure the hole was solidly filled, Milot created a latent hazard on her land. Milot herself testified that the land appeared to be level after she kicked the dirt into the hole. This created the appearance of nothing out of the ordinary. Only after stepping into the hole would a person become aware of the danger.

Further, because the hole was between the horse corral and the house, Milot should have known that persons would walk through the lot to get to and from the horse corral. Thus, it should have been foreseeable to Milot that someone might be injured in the lot if the hole were not properly filled.

Having determined that Milot could be found to have breached a duty resulting in foreseeable damages, we must then look to see if there are any public policy considerations that would preclude the imposition of liability. *See* ***Kelli T-G. v. Charland***, 198 Wis.2d 123, 129, 542 N.W.2d 175, 177 (Ct. App. 1995). Recovery may be denied on public policy grounds because: (1) the injury is too remote from the negligence; (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; (3) in retrospect, if it appears too highly extraordinary that the negligence should have brought about the harm; (4) allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; (5) allowance of recovery would be too likely to open the way to fraudulent claims; or (6) allowance of recovery would

enter a field that has no sensible or just stopping point. ***Coffey v. City of Milwaukee***, 74 Wis.2d 526, 541, 247 N.W.2d 132, 140 (1976).

Any one of these six considerations is sufficient to deny liability. ***Rieck v. Medical Protective Co.***, 64 Wis.2d 514, 518, 219 N.W.2d 242, 244 (1974). However, our discussion is limited to the second, third and fourth considerations, which Milot argues apply.

First, Milot argues that public policy prohibits the imposition of liability for holes caused by animals on one's land, especially in rural areas because it creates too onerous of a burden on the landowner. That issue is not before us. Milot is not being held liable for an animal causing a hole on her land; rather, her liability stems from her negligence in repairing the hole.

Next, Milot argues that it was highly unlikely that her actions would have caused Collins' injury. We disagree. Instead, if a person fills a hole so that it appears level, but is not, it is foreseeable that someone could step into the hole and fall, resulting in injuries such as those suffered here. There was no warning to alert Collins that the ground was unstable. Instead, a person would only know of the hole once he or she had already stepped into it. Therefore, it is not so extraordinary that Milot should know that if the hole were not properly filled, it could cause injury.

Finally, Milot argues that Collins' injury is wholly out of proportion with the culpability of Milot. Milot relies on the fact that she lives alone on her land to support her argument. However, regardless of Milot's living status, it is foreseeable that someone could be injured in her lot if he or she came across an area which appeared level, but in actuality was unstable ground. Milot knew or should have known that persons would cross the lot to get to the horse corral and even sent Collins out to do so. Therefore, it was foreseeable that someone would be injured in the hole if it were not properly filled. Accordingly, public policy will not shield Milot from liability for a hazard on her land that she created.

Next, Milot contends that the award of future damages was based on an insufficient medical standard because Collins' doctor used the words "I imagine" and "I guess" in his testimony. We disagree.

Medical opinions do not require absolute certainty. ***Pucci v. Rausch***, 51 Wis.2d 513, 518, 187 N.W.2d 138, 141 (1971). Instead, it is only required that physicians base medical opinions on their knowledge of medicine and the case facts and that their opinions are correct to a reasonable medical probability. ***Id.*** at 518-19, 187 N.W.2d at 141.

While no particular words of art are necessary to express the degree of medical certainty required to sustain an award for future damages, it is necessary that a reasonable interpretation of the expert's words show more than a mere possibility or conjecture. ***Casimere v. Herman***, 28 Wis.2d 437, 445 137 N.W.2d 73, 77 (1965). Whether the standard has been met is not measured by the general use of the words; rather, we must look to the meaning or sense in which a particular word is used. ***Unruh v. Industrial Comm'n***, 8 Wis.2d 394, 402, 99 N.W.2d 182, 186 (1959). Accordingly, words such as "liable," "likely" and "probable" have been accepted as connoting a reasonable probability as opposed to a mere possibility. ***Pucci***, 51 Wis.2d at 519, 187 N.W.2d at 142.

We conclude that Dr. Riordan's testimony regarding the issue of future damages is stated in terms of reasonable medical certainty notwithstanding the fact that he used the words "I imagine" and "I guess" in his testimony. Although Dr. Riordan used some words that connote some expression of uncertainty, taken as a whole, it is clear that Dr. Riordan's testimony was an assertion of his medical opinion and not an expression of his guesswork.

Dr. Riordan testified that the accident caused Collins to suffer a ten percent permanent partial disability of the right wrist. He believed, to a reasonable degree of medical certainty, that Collins would never be totally pain free. He also testified that Collins' future ability would be limited to preclude "[p]owerful use of the right wrist in maximum gripping efforts, climbing or pulling or pushing on the wrist, and also with twisting motions of the forearm."

The language used by Dr. Riordan was not so vague as to lead one to believe that there was only a possibility that future damages would be appropriate. Accordingly, we conclude that his testimony was based on a sufficient medical standard.

Finally, Milot contends that the jury verdict was perverse because of the note attached to the verdict. A verdict is perverse when it reflects highly emotional, inflammatory or immaterial considerations or an obvious prejudgment with no attempt to be fair. ***Fahrenberg v. Tengel***, 96 Wis.2d 211, 223, 291 N.W.2d 516, 522 (1980). The trial judge is in the best position to determine whether the verdict is perverse. ***Id.*** at 224, 291 N.W.2d at 522.

The note attached to the verdict indicates how the jury felt the money should be spent. It does not establish that the jury based its award on immaterial or highly emotional considerations. In fact, the note indicates that the jury felt future rehabilitation would be necessary for Collins. Thus, the award was based on the belief that Collins would continue to suffer from this injury.

Further, the verdict is supported by the record. The doctor testified that Collins acquired arthritis as a result of the accident. The doctor stated that this injury would continue into the future. The doctor opined that Collins probably will have trouble with twisting motions of the forearm, powerful use of the right wrist and lifting weights in excess of fifty pounds. Based on Collins employment in manual labor, future damages are reasonably foreseeable. Thus, the trial court did not erroneously exercise its discretion in determining that the verdict was not perverse.

By the Court.—Judgment affirmed.

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