COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP739 **Cir. Ct. No. 2009CV11305**

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

JANE DOE,

PLAINTIFF-APPELLANT,

V.

CERTAIN INTERESTED UNDERWRITERS AT LLOYDS LONDON,
SIGMA CHI FRATERNITY AND
SIGMA CHI FRATERNITY ALPHA LAMBDA CHAPTER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 CURLEY, P.J. Jane Doe appeals the grant of summary judgment to Certain Interested Underwriters at Lloyds London, Sigma Chi Fraternity (Sigma

Chi), and Sigma Chi Alpha Lambda Chapter (Alpha Lambda).[1] She argues that the trial court erred in granting summary judgment based on public policy grounds because there are many material facts that are disputed.[2] She also contends that the trial court erred in finding that Mitchell Holzman was not negligent, and that Alpha Lambda was not vicariously responsible for his negligence. We affirm the grant of summary judgment; however, we do so on slightly different grounds. *See* ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶2, 318 Wis. 2d 216, 768 N.W.2d 53 (We may affirm the trial court's order on different grounds than those relied on by the trial court.). We conclude that: the *material* facts are not in dispute; Holzman was not negligent, therefore, there is no issue concerning vicarious liability; and, neither Sigma Chi nor Alpha Lambda was negligent.

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[1] Jane Doe is a pseudonym. She is using a pseudonym to protect her identity as a sexual assault victim.

[2] In ***Hornback v. Archdiocese of Milwaukee***, 2008 WI 98, ¶49, 313 Wis. 2d 294, 752 N.W.2d 862, the supreme court reiterated the six public policy grounds upon which Wisconsin courts may deny liability even in the face of proven or assumed negligence:

> (1) "the injury is too remote from the negligence"; (2) the recovery is "wholly out of proportion to the culpability of the negligent tort-feasor"; (3) the harm caused is highly extraordinary given the negligent act; (4) recovery "would place too unreasonable a burden" on the negligent tort-feasor; (5) recovery would be "too likely to open the way to fraudulent claims"; and (6) recovery would enter into "a field that has no sensible or just stopping point."

(Citation and one set of quotation marks omitted.) *See also* ***Bowen v. Lumbermens Mut. Cas. Co.***, 183 Wis. 2d 627, 655, 517 N.W.2d 432 (1994). A court "may refuse to impose liability on the basis of any of these factors without full resolution of a cause of action by trial." *See* ***Hornback***, 313 Wis. 2d 294, ¶49.

Whether it was proper for the circuit court to use public policy considerations to limit liability before all the facts had been presented in a negligence determination is a question of law subject to independent appellate review. *See* ***Gritzner v. Michael R.***, 2000 WI 68, ¶27, 235 Wis. 2d 781, 611 N.W.2d 906.

I. BACKGROUND.

¶2 Jane Doe alleges that on October 5, 2008, she was sexually assaulted by an unknown person or persons in a bedroom of a privately-rented apartment in the building that houses the Alpha Lambda chapter of the Sigma Chi fraternity in Madison, Wisconsin.

¶3 According to depositions filed in this matter and other properly admitted evidence, Jane Doe went to a party given by the Sigma Chi fraternity on the afternoon of October 4, 2008, before attending an evening University of Wisconsin football game. Alcoholic beverages were served at the Sigma Chi party and, despite being underage, Doe drank several alcoholic beverages. After the football game, she returned to the Sigma Chi house. By this time, the pre-football-game party was over. Upon returning to the house, she and a fellow student, Spencer Hadelman, who lived at the property, engaged in sex, consisting of her performing oral sex on him and his performing manual sex on her, including placing his finger in her vagina.[3] She then left the house later in the evening and went to two bars with several friends where she used her older sister's identification to gain entry. While at the bars, she both purchased and consumed additional alcoholic beverages.

¶4 Doe does not remember going back to the Sigma Chi house after leaving the bars. Her next recollection was being awakened by Adam Kahn, who told her to get up as she was passed out in his bed, located in a bedroom of a privately-rented apartment on the second floor of the same building that housed

[3] Doe testified in her deposition that she was not sure if Hadelman touched her vagina. He testified that he did.

the Alpha Lambda chapter of Sigma Chi. When she awoke she was partially clothed with her pants off, but her underpants, top and bra were still on.[4] Embarrassed, Doe got dressed and left. She has little memory of how and when she returned to her own room, but she remembers waking up there the next morning.

¶5 Doe later decided to go to the hospital because when she wiped herself after urinating, she saw a small amount of blood and had some vaginal pain. At this time she began to believe that she had been sexually assaulted. She also complained later to the nurse that she had various unexplained bruises and tenderness in several parts of her body which also led her to believe she had been assaulted.

¶6 Holzman, one of the people who accompanied Doe to the bars after the football game, testified that he, Doe and two others walked back to the Sigma Chi residence where he lived after bar hopping. When they got there, Doe asked if she could use the bathroom. Holzman said he admitted her for that purpose and later offered to walk her home because he believed she "needed assistance walking home," but she declined.

¶7 Holzman said that he saw Doe later that night on the second floor, which contains privately-rented apartments, some of which were leased to non-fraternity members, such as several of Doe's sorority sisters. When Holzman saw Doe at that time, he saw her talking to several Sigma Chi alumni. At one point he also saw her standing in the hallway by herself.

[4] Doe also reported that her underpants were off in some reports, but she told the nurse who examined her after the alleged assault that they were on.

¶8 A girlfriend of one of Kahn's roommates, who spent the night in the same apartment but in a different bedroom, testified that she did not see any inebriated women that night and the only thing out of the ordinary that evening was her waking up to hear a male voice telling "someone that they needed to get out … they couldn't be there." Another girlfriend of another of Kahn's roommates was also present that evening and she testified that she neither saw nor heard anything unusual that evening before she left around 12:00 midnight.

¶9 The nurse who examined Doe at the hospital testified that Doe stated that she believed she had been sexually assaulted but was unsure where it occurred. Doe told the nurse that it could have been at the Sigma Chi fraternity house or at the two bars she had been at, Johnnie O.'s or State Street Brats. Medical personnel conducted various tests. All the results were either negative or normal. There was no evidence that Doe was given a date rape drug as she originally alleged and no sperm was found. However, Doe did report that she was experiencing pain in her genital area and, as noted, she also had some tenderness in various parts of her body. The nurse did observe some redness in the genital area and a small laceration. Although Doe testified that the nurse told her she had been raped multiple times, the nurse, in her deposition, denied telling her that.

¶10 Doe determined that the national organization of the Sigma Chi fraternity was located in Illinois. Doe also discovered that the property located at 221 Langdon Street, the Sigma Chi house, was not owned by the chapter; rather, it was owned by the Alpha Lambda Alum Investors LLC, who hired a local property management company to lease and manage the apartments used by the chapter and the apartments that were rented out to non-Sigma Chi residents.

¶11 With this information, Doe filed a complaint against Certain Interested Underwriters at Lloyds London, the insurer for the Sigma Chi Fraternity; Sigma Chi, the national organization; Sigma Chi, Alpha Lambda Chapter; Alpha Lambda Alum Investors, LLC; and The Risk Management Foundation. Notably, Holzman was not named in the suit. The complaint alleged that all the defendants were negligent. Further, Doe sought punitive damages against all defendants. As to Alpha Lambda Alum Investors, Doe also alleged that it failed to keep a safe place, contrary to WIS. STAT. § 101.11(2) (2009-10).[5] During the course of this litigation, Doe amended her complaint several times. In November 2010, the Risk Management Foundation and Alpha Lambda Alum Investors, LLC, a/k/a Alpha Lambda Chapter House Company, were dismissed from the suit by stipulation.

¶12 The remaining defendants all filed summary judgment motions. The trial court ordered several sets of briefs concerning various issues raised in the summary judgment motions and ultimately granted the fraternity and the chapter's motion for summary judgment. In its oral decision, the trial court pointed out that the property where the alleged incident occurred was not owned by either the fraternity or the chapter, nor did the alleged incident occur in that portion of the property used by the fraternity. Rather, the alleged assault happened in an apartment in an independent living area within the property, and the apartments located in this independent living area were available to be rented by students and non-students alike.

[5] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶13 In its decision, the trial court discounted any connection between the pre-game party held at the fraternity house which Doe attended and the alleged sexual assault, which Doe claimed occurred well after both the party and the football game had ended. The trial court pointed out that Doe did not consume alcohol at the game, but then went out to various bars, remembering little until she was awakened in Kahn's bed. Evidence put forth by the fraternity and the chapter pointed out that Doe was admitted to the fraternity house later that evening only because she stated she wanted to use the bathroom, and Holzman thereafter offered to walk Doe home but she refused. Again, the trial court noted that none of the events leading up to Doe's being awakened in Kahn's bedroom occurred in the area housing the chapter house.

¶14 Based on these facts, the trial court found that the "case is appropriate for a public policy analysis," and after reciting some of the pertinent cases, determined that the public policy doctrine applied, and held that the fraternity, the chapter house and its members, including Holzman, were not responsible for any assault that may have occurred. Implicit in the trial court's ruling was a determination that assumed there was negligence of at least one of the defendants, but the party or parties were being absolved of this negligence under the public policy doctrine.

II. ANALYSIS.

A. Summary Judgment

¶15 We review a trial court's grant or denial of summary judgment *de novo*, owing no deference to the trial court. *See* ***Krier v. Vilione***, 2009 WI 45, ¶14, 317 Wis. 2d 288, 766 N.W.2d 517. Summary judgment is only "appropriate when there is no genuine issue of material fact and the moving party is entitled to

judgment as a matter of law." ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995).

¶16 Upon review of a trial court's decision on summary judgment, we apply the same standards used by the trial court, as set forth in WIS. STAT. § 802.08. *See* ***Krier***, 317 Wis. 2d 288, ¶14. First, we must determine if the pleadings state a claim. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). If the plaintiff has stated a claim and the pleadings show the existence of factual issues, then we must examine whether the party moving for summary judgment has presented a defense that would defeat the claim. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶22, 241 Wis. 2d 804, 623 N.W.2d 751. If the moving party has made a *prima facie* case, the court examines the pleadings, affidavits, depositions, or other proof of the opposing party to determine whether there exist disputed material facts, or whether reasonable conflicting inferences may be drawn from undisputed facts, therefore requiring a trial. *See* ***id.*** Evidentiary facts, as set forth in the affidavits or other proof of the moving party, are taken as true if not contradicted by opposing affidavits or other proofs. ***L.L.N. v. Clauder***, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997).

¶17 When determining causation on summary judgment, a court must determine "'whether the defendant's negligence was a substantial factor in contributing to the result.'" ***Zielinski v. A.P. Green Indus., Inc.***, 2003 WI App 85, ¶16, 263 Wis. 2d 294, 661 N.W.2d 491 (citation omitted). To be a "'substantial factor,'" requires "'that the defendant's conduct ha[ve] such an effect in producing the harm as to lead the trier of fact, as a reasonable person, to regard it as a cause, using that word in the popular sense.'" ***Id.*** (citation and one set of quotation marks omitted). "A mere possibility of … causation is not enough; and when the matter remains one of pure speculation or conjecture or the probabilities

are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." ***Id.*** (citation and quotation marks omitted).

B. Evidence of the Sexual Assault

¶18 We first observe that Doe's evidence concerning whether a sexual assault actually occurred and where it occurred is razor thin. At best, the evidence is circumstantial. To be sure, Doe believes that an assault occurred and she has experienced severe psychological repercussions as a result of this belief, despite the fact she has no memory of any events leading up to the assault or the assault itself. As noted, Doe suspected she had been sexually assaulted for the first time when, after awakening the next morning in her own bed, she saw a small amount of blood upon urinating and experienced some genital discomfort. We observe that although these symptoms possibly could have been caused by a sexual assault, they could also have been the result of her sexual encounter with Hadelman in the evening after the football game. As noted, Doe testified that she did not recall whether Hadelman had inserted his finger in her vagina, although he testified that he did.

¶19 Doe's examination at the hospital was also somewhat inconclusive. She did have redness in her genital area and a small laceration, and she did complain of bruising and tenderness to various parts of her body, but there was no evidence of sperm in either her urine or vagina. Also, testing revealed no evidence of a date rape drug having been administered to her as Doe originally claimed. As to the discovery of minor bruises and tenderness in various parts of Doe's body, these injuries would be consistent with rough treatment at the hands of an assailant or assailants, but they also could have been the result of her loss of balance due to her acute intoxication. Doe's condition was such that Holzman, who accompanied

her on her trip to the bars that evening, thought she needed assistance walking home.

¶20 The question of where the assault occurred is also problematic. Indeed, Doe gave the nurse at the hospital three locations where the assault might have happened. Because Doe had no recollection of the events during most of the evening it is entirely possible, although unlikely, that an assault, if there was one, could have occurred elsewhere. While Doe's attorney argued at the summary judgment motion that Sigma Chi alumni were seen taking her into Apartment 204, no admissible evidence of this contention exists. What is known is that she was seen in the hallway by Holzman, talking to who he believed were some Sigma Chi alumni and later standing by herself. Further, Holzman testified that he offered to walk her home, but his offer was refused. No one saw Doe enter Apartment 204. When she was awakened in Adam Kahn's bed she had her pants off, but was otherwise fully clothed. Moreover, exactly what happened inside Kahn's bedroom is unknown. Also, Doe had no recollection of her whereabouts after she left Kahn's apartment until she awoke the next morning in her own bed. Again, it is possible that any assault may have occurred at some unknown location following her departure. In any event, like the trial court, we conclude that there is sufficient evidence in the record, based on Doe's belief that she was sexually assaulted, to survive summary judgment on the claim that there is insufficient evidence to establish a sexual assault.

C. Holzman's conduct was not negligent.

¶21 Doe argues that Holzman's conduct constituted his "abandonment" of her, and thus he was negligent. We disagree.

¶22 In Wisconsin, "'[e]veryone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.'" ***Alvarado v. Sersch***, 2003 WI 55, ¶13, 262 Wis. 2d 74, 662 N.W.2d 350 (quoting ***Palsgraf v. Long Island R.R. Co.***, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting)) (brackets in ***Alvarado***). A "general duty" arises under the rule that one must use ordinary care in all of one's activities and one is negligent when one fails to exercise ordinary care. *See* ***Alvarado***, 262 Wis. 2d 74, ¶14. "'A person is not using ordinary care and is negligent, if the person, without intending to do harm, does something (or fails to do something) that a reasonable person would recognize as creating an unreasonable risk of injury or damage to a person or property.'" ***Gritzner v. Michael R.***, 2000 WI 68, ¶22, 235 Wis. 2d 781, 611 N.W.2d 906 (quoting WIS JI—CIVIL 1005). In addition, the general duty of ordinary care imposed by Wisconsin law obligates every person to exercise ordinary care for his or her own safety. *See* ***Jankee v. Clark Cnty.***, 2000 WI 64, ¶9, 235 Wis. 2d 700, 612 N.W.2d 297.

¶23 After attending a pre-game party at the Sigma Chi house, Doe went to an evening football game and later returned and engaged in consensual sex with a resident. She left late in the evening and, with three of her friends, went to at least two bars. Doe was not legally eligible to enter a bar or purchase alcohol, but she used her older sister's identification to do both. She later walked back to the building housing the Alpha Lambda Chapter of the Sigma Chi fraternity. By the time the foursome returned to the house, the pre-game activities were long over. Holzman and Doe had no further plans for socializing. Doe would have, in all likelihood, continued her return home had she not requested Holzman to let her in to use the bathroom. Holzman's intentions upon returning to the building were to go to bed, and he went up to his bedroom after allowing Doe in. Instead of going

to bed, Holzman began chatting with his roommate and then looked around to see who else was awake. Holzman socialized with others and at some point walked another young woman back to her residence. After returning, Holzman encountered Doe when she was talking with some alumni.[6] Holzman offered to walk Doe home, but she refused his offer. Holzman eventually went to bed.

¶24 Holzman had no obligation to see that Doe returned to her residence. Holzman permitted Doe to enter for the sole purpose of going to the bathroom. Holzman had no duty to Doe once she elected to remain in the building after his offer to walk her home. Holzman exercised ordinary care. Doe was familiar with the layout of the building as she had been there numerous times before. There were no previous reports of any sexual assaults in the building and Doe knew several sorority sisters who lived there. Under the circumstances, Holzman was not negligent. The connection between the earlier party (and underage drinking) and the football game was severed long before Doe returned to the house; moreover, Doe was not intoxicated when she returned to the Sigma Chi house after the football game. Further, Doe went bar-hopping many hours after the party had ended.

¶25 Doe purchased and consumed alcoholic beverages by falsely claiming to be her older sister. She drank to the point that she had no memory of most of the late evening's events. She refused a walk back to her residence,

[6] Doe claims that an Alpha Lambda alumni led her into Room 204. As noted, this is inaccurate. Although Holzman's attorney told the police early in the investigation that is what Holzman told him, Holzman testified in his deposition that he saw Doe talking to several alumni. He never testified that he saw Doe being led into any room by anybody.

electing to stay in the upper floors of the building housing the Alpha Lambda chapter of the Sigma Chi fraternity, only to wake up in a stranger's bed.

D. Neither Sigma Chi nor Alpha Lambda are negligent.

¶26 Doe makes several arguments that we address here. First, in an attempt to implicate Sigma Chi and Alpha Lambda, Doe has documented the cases around the country where Sigma Chi has been sued. She also has listed the various infractions of the Alpha Lambda house for the past thirty years. However, Alpha Lambda Chapter House has never been cited as the location of any sexual assaults. While it may be that the house was not properly supervised, the lack of supervision of the chapter house did not contribute to any assault, as the alleged assault occurred in a privately-rented apartment.

¶27 Next, assuming *arguendo* that Holzman was negligent, his negligence would not implicate either Sigma Chi or Alpha Lambda because Holzman was not acting within the scope of his membership with Sigma Chi or Alpha Lambda. The question as to vicarious liability is whether, at the time of the act alleged, the employee's conduct was within the scope of his employment, which we have defined as conduct that is "actuated, at least in part, by a purpose to serve the employer." ***Olson v. Connerly***, 156 Wis. 2d 488, 500, 457 N.W.2d 479 (1990). As applied here, Holzman had to be engaged in conduct that was "actuated, at least in part, by a purpose to serve the fraternity." *See* ***id.*** The question on summary judgment is whether there is any genuine issue of material fact. *See* ***Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d at 497.

¶28 Although Holzman was not an employee, he was a member of the fraternity, and Doe argues that through the rituals and procedures, Alpha Lambda "exercised very substantial control" over Holzman, each member having "a

lifetime obligation to obey the laws and rules of Sigma Chi." Thus, she argues Holzman's membership in the organization makes Sigma Chi and Alpha Lambda responsible for his actions. We reject this theory of liability. Stated otherwise, Doe claims that while the assault occurred in a private apartment not owned or rented by Sigma Chi or Alpha Lambda, they are nevertheless responsible for Holzman's negligence as a result of his being a member of the fraternity.[7] We agree with the trial court's analysis that vicarious liability due to the actions of a single member "goes too far."

> Basically, as I see it, plaintiff is arguing that the fraternity as an association, a group, is responsible for its members, no matter where they may be….
>
> ….
>
> Applying the plaintiff's argument of responsibility, the fraternity in any member organization would be responsible no matter where its members lived and because the argument is that the alumni continue to be members, and were involved in this circumstance, wherever the alumni might be residing.
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> ….
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> And any organization with members would be responsible for its members, such that to the extent that groups such as Lions, Rotarians, Kewauneeans, they're having a convention somewhere, one of their members is staying not at a hotel that's the primary hotel where the convention is going on and yet engages in a sexual assault of someone, that association is responsible for the member and should've prevented it from happening.

[7] As noted, Doe has amassed a large number of citations for cases in other jurisdictions in which Sigma Chi and/or a chapter has been sued. Doe has also gathered evidence that Alpha Lambda has been chastised by the university for minor violations. Inasmuch as the alleged assault apparently occurred in a private apartment not owned or managed by either entity, those cases and disciplinary actions are irrelevant to these proceedings.

> There's no stopping point under that circumstance….
>
> ….
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> And I think I mentioned [] the last time we were talking about what if the – another analogy is that if the basement is being used by the Habitat for Humanity and the first floor by a fraternity, who's responsible for the things that occur in the living areas? Can you sue Habitat? What if the frat members are also members of Habitat? Does that open the door for their liability? It just goes too far.

¶29 The alleged assault did not occur on property owned or managed by either Sigma Chi or Alpha Lambda. There was no fraternity event taking place when the alleged assault occurred. Although evidence of drinking was observed that evening in the chapter house, there is no evidence that Doe was drinking in the chapter house or was offered anything to drink by Alpha Lambda members that evening. Doe also makes much of the post-event actions taken by the chapter after the incident was reported. However, all of the changes would constitute subsequent remedial measures pursuant to WIS. STAT. § 904.07 and would be inadmissible even if relevant. For the reasons stated, the judgment is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.