COURT OF APPEALS
DECISION
DATED AND FILED

September 4, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP44 **Cir. Ct. No. 2006CV5714**

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

MARY J. REID, INDIVIDUALLY AND AS THE ADMINISTRATRIX OF THE ESTATE OF JORDAN REID,

PLAINTIFF-APPELLANT,

V.

GRAEBNER ENTERPRISES, INC. D/B/A HOSPITALITY INN AND SELECTIVE INSURANCE COMPANY OF AMERICA,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 LUNDSTEN, J. Mary Reid appeals a circuit court judgment dismissing her wrongful death action following a jury finding that the defendant,

Hospitality Inn, was not negligent in the pool drowning death of Mary's husband, Jordan Reid. We assume, for argument's sake only, that Hospitality Inn was negligent as a matter of law for the reason that Mary asserts, but we conclude that Mary points to no evidence from which a reasonable jury could have found that the alleged negligence caused Jordan's death. Thus, even if Mary is correct regarding negligence, the court would have been required to direct a verdict against Mary, as a matter of law, because the evidence was insufficient to prove causation. Accordingly, we affirm the judgment.

Background

¶2 During the morning hours of May 19, 2006, Mary's husband Jordan was with three children, ages five, two, and one, in an indoor pool area at the Hospitality Inn. Around 11:35 that morning, housekeeping staff found the bodies of Jordan and the five-year-old, Jordan's step-son Nathaniel, at the bottom of the pool. Neither Nathaniel nor Jordan could swim. Nathaniel was resuscitated and survived. Jordan did not survive.

¶3 Mary sued Hospitality Inn for the wrongful death of Jordan. The case was tried to a jury. In a special verdict, the jury found in favor of Hospitality Inn by answering the following two questions "No":

> Question No. 1: At or immediately prior to the time of the accident of May 19, 2006, was the defendant … negligent?
>
> ….
>
> Question No. 2: At or immediately prior to the time of the accident of May 19, 2006, was the defendant … negligent in failing to construct and/or maintain their premises in a condition as safe as the nature of its business would reasonably permit?

Consequently, the jury did not reach the issue of causation. The circuit court entered judgment on the verdict in favor of Hospitality Inn. Mary appealed.

Discussion

¶4 Mary's central argument on appeal is that the circuit court should have overridden the jury verdict and declared Hospitality Inn negligent as a matter of law based on a provision in WIS. ADMIN. CODE ch. HFS 172 that required Hospitality Inn to provide a pool-side telephone. Mary argues that the evidence indisputably showed that the required phone was missing when Jordan drowned. She further argues that the pertinent administrative code provision is a "safety statute," making irrelevant any dispute over whether Hospitality Inn knew the phone was missing.

¶5 We need not address the merits of Mary's negligence arguments because, regardless of the merit of those arguments, a directed verdict against her was required. The evidence presented at trial was insufficient to support a jury verdict finding that the alleged negligence caused Jordan's death.

¶6 Causation is an essential element of any negligence claim. *See, e.g.*, ***Nichols v. Progressive N. Ins. Co.***, 2008 WI 20, ¶11, 308 Wis. 2d 17, 746 N.W.2d 220; ***Gritzner v. Michael R.***, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906. The meaning of "cause" in the sense that we use it here refers to whether the asserted negligence was a "substantial factor" in causing harm. *See* ***Richards v. Badger Mut. Ins. Co.***, 2008 WI 52, ¶47, __ Wis. 2d __, 749 N.W.2d 581 ("One is causally negligent when his or her conduct is a substantial factor in causing injury to another."). The defendant's negligent conduct need not be the sole or primary factor. ***Ehlinger v. Sipes***, 155 Wis. 2d 1, 13, 454 N.W.2d 754 (1990). Regarding sufficiency of the evidence, we have explained:

> A reviewing court will not upset a verdict if any credible evidence supports it. The evidence must under any reasonable view support the verdict and remove the question from the realm of conjecture. We look for credible evidence to sustain a jury's verdict, and the credibility of witnesses and the weight afforded their individual testimony is left to the jury. In addition, even if more than one reasonable inference may be drawn from the evidence, we must accept the inference the jury draws.

Johnson v. Neuville, 226 Wis. 2d 365, 378, 595 N.W.2d 100 (Ct. App. 1999) (citations omitted). Applying these standards, the evidence here is insufficient to prove that the absence of a pool-side phone played any causal role in Jordan's death.

¶7 It is pure speculation, unsupported by evidence, that anyone could have used a pool-side phone to alter the course of events. All that the evidence shows is that the three children with Jordan were ages five, two, and one, and that the five-year-old child was found in the pool with Jordan. There is no evidence regarding the sequence of events immediately preceding Jordan and the five-year-old becoming incapacitated in the pool. There is no evidence suggesting that anyone else was present who could have intervened in Jordan's death by using a pool-side phone. Simply put, Mary points to no evidence from which a reasonable jury could have found that the absence of a pool-side phone played any role in Jordan's death.

¶8 We recognize that the jury did not reach the special verdict question asking whether Hospitality Inn's negligence caused the accident because the jury found that Hospitality Inn was not negligent in the first place. We may, however, affirm the circuit court's judgment on grounds different from those relied on below. ***Chevron Chem. Co. v. Deloitte & Touche***, 176 Wis. 2d 935, 945, 501 N.W.2d 15 (1993). Here, even if the circuit court had rejected the jury's

findings regarding negligence, the court would have been compelled to enter judgment against Mary because of the lack of evidence showing causation. And, although it is not a requirement, we note that Mary had fair notice that causation is an issue on appeal because Hospitality Inn's response brief contains several arguments that raise the question of causation.

¶9 Mary makes other, secondary arguments, such as her argument that the verdict was perverse because the jury found artificially low damages after being rushed through deliberations on a Friday afternoon, but these arguments are moot in light of our conclusion that causation is lacking.

By the Court.—Judgment affirmed.

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