COURT OF APPEALS
DECISION
DATED AND FILED

June 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2447 **Cir. Ct. No. 2010CV559**

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

E. S. AND S. S., MINORS, BY THEIR GUARDIAN AD LITEM, ANNE E. SCHMIEGE,

PLAINTIFFS-RESPONDENTS,

MARTIN S. AND NANCY S.,

PLAINTIFFS,

V.

KENNETH GOLDEN,

DEFENDANT,

ALICE GOLDEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Alice Golden appeals a judgment, entered on a jury verdict, that found her negligent for failing to warn or protect her granddaughters, E.S. and S.S., from being sexually assaulted by Alice's now former husband Kenneth Golden.[1] Alice argues the circuit court erred by failing to dismiss the negligence claims against her on public policy grounds. She asserts allowing recovery in this case would enter a field that has no sensible starting or stopping point. We reject Alice's argument, and affirm.

BACKGROUND

¶2 The plaintiffs in this case, E.S. and S.S., were sexually abused by their step-grandfather, Kenneth, at Kenneth and Alice's house. S.S. reported the abuse to a camp counselor in 2008. When asked by her parents following S.S.'s report, E.S. also reported that Kenneth sexually abused her. Kenneth was ultimately convicted, on his guilty pleas, of two counts of first-degree sexual assault of a child under the age of thirteen.

¶3 E.S. and S.S., by their guardian ad litem, and their parents brought a civil suit against Kenneth, Alice, and the Goldens' insurer.[2] The plaintiffs alleged that Kenneth had a history of sexual abuse, that he sexually assaulted his step-daughter (Carol B., the aunt of E.S. and S.S.) in 1980, and that he sexually assaulted E.S. and S.S. from 2004-2007. The plaintiffs alleged Alice had "knowledge of the sexual abuse which occurred in approximately 1980, prior to

[1] For clarity we will refer to Alice and Kenneth by their first names.

[2] The Goldens' insurer was dismissed from the case before trial.

the abuse perpetrated against E.S. and S.S., as well as some of the sexual abuse which occurred from 2004-2007." On the basis of those allegations, the plaintiffs claimed Alice "was negligent, including, but not limited to, negligently supervising plaintiffs E.S. and S.S., and in failing to warn [their parents] of the abuse perpetrated by defendant Kenneth Golden in 1980 and in 2004-2007."[3]

¶4 At trial, Alice's daughter, Carol B., testified that Kenneth sexually abused her in 1980 and that she told Alice, who did nothing. Carol explained that, after the third incident, she left and went to live with her father and rarely visited Alice and Kenneth. Alice, however, testified Carol never told her Kenneth sexually abused her. She explained, "There's lots of times [Carol] would be yelling and screaming and sometimes you … couldn't understand everything she said."

¶5 Portions of Alice's deposition were read into the record. Significantly, Alice described an incident where she walked into the computer room and saw Kenneth with her granddaughter S.S. and Kenneth's trousers were unzipped. Alice admitted telling Kenneth on that occasion that "if you want sex, that's what I'm here for" and "you have it with me, nobody else." At trial, Alice testified she made that statement to Kenneth because "he told me that … what [S.S.] said was that she wanted to see him and I told him that that's not right." Alice clarified that Kenneth said S.S. wanted to see Kenneth's "private parts."

¶6 At the close of evidence, Alice moved to dismiss the negligence claims against her on public policy grounds. As relevant to this appeal, Alice

[3] E.S. and S.S.'s parents withdrew their claims against Alice and Kenneth before the case was submitted to the jury.

argued that allowing recovery against her would enter a field that has no sensible starting or stopping point. She questioned when she would have had a duty to advise E.S. or S.S. or their parents about the event that happened approximately thirty years ago. She also argued E.S. and S.S.'s mother knew about Kenneth's sexual abuse of Carol and was responsible for protecting E.S. and S.S.

¶7 The circuit court denied Alice's motion. It concluded Alice's negligence was not simply her failure to report something that happened approximately thirty years ago. It noted the evidence showed Alice walked in on Kenneth and S.S. in the computer room and observed his pants were unzipped, and Alice made comments that if Kenneth was going to have sex with someone it was going to be Alice. The court reasoned "there are all sorts of inferences [from that incident] about what Alice Golden knew or didn't know." The court also concluded that the relationship between Alice and E.S. and S.S. was different from the relationships in cases where public policy had precluded liability. The court noted that in those cases "it was a much more extenuated relationship than the very intimate and close relationship between a grandparent and a child."

¶8 The jury found that Alice was negligent as to both E.S. and S.S. and that her negligence caused E.S.'s and S.S.'s injuries. She appeals.

DISCUSSION

¶9 If a plaintiff establishes a negligence claim against a defendant,[4] the court may nevertheless determine public policy considerations preclude liability. ***Gritzner v. Michael R.***, 2000 WI 68, ¶26, 235 Wis. 2d 781, 611 N.W.2d 906. On appeal, Alice asserts the negligence claims against her must be dismissed because public policy precludes liability.

¶10 There are six public policy considerations that may preclude liability:

> (1) the injury is too remote from the negligence, (2) the injury is too wholly out of proportion to the tortfeasor's culpability, (3) in retrospect it appears too highly extraordinary that the negligence should have resulted in the harm, (4) allowing recovery would place too unreasonable a burden on the tortfeasor, (5) allowing recovery would be too likely to open the way for fraudulent claims, and (6) allowing recovery would enter a field that has no sensible or just stopping point.

Id., ¶27. Any one of these considerations is sufficient to preclude liability. ***Kelli T-G. v. Charland***, 198 Wis. 2d 123, 130, 542 N.W.2d 175 (Ct. App. 1995). The question of whether a public policy consideration should preclude liability is a legal question we review independently. ***Id.*** at 128-29.

¶11 In the circuit court, Alice argued all six public policy considerations precluded liability against her. On appeal, she makes the same general assertion;

[4] To establish a negligence claim, a plaintiff must prove: (1) the existence of a duty of care on the part of the defendant; (2) a breach of that duty of care; (3) a causal connection between the defendant's breach of the duty of care and the plaintiff's injury; and (4) actual loss or damage resulting from the injury. ***Gritzner v. Michael R.***, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906.

however, she only develops an argument regarding the sixth public policy factor—that allowing recovery would enter a field that has no sensible or just stopping point. Accordingly, that is the only public policy factor we will address. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider undeveloped arguments).

¶12 Specifically, Alice analogizes her situation to the ones in ***Kelli T-G.*** and ***Gritzner***. She argues that, in those cases, the courts determined public policy precluded liability for failing to warn a victim or the victim's parents about a third-party's propensity for sexual assault.

¶13 In ***Kelli T-G.***, after Gerald Charland sexually abused six-year-old Kelli, Kelli and her mother brought suit against Charland's ex-wife, Patricia Neubauer, on the basis that Neubauer breached her duty to warn Kelli's mother about Charland's pedophilia. ***Kelli T-G.***, 198 Wis. 2d at 125-26. The facts established that Neubauer and Charland were married in 1985 and had a daughter Geri. ***Id.*** at 126. The couple separated approximately eight months after their marriage, and Neubauer filed for divorce a few months later. ***Id.*** Neubauer did not learn about Charland's convictions for sexually assaulting children until after the couple separated. ***Id.*** Immediately following the couple's divorce, Charland was not allowed to have unsupervised visitation with Geri. ***Id.*** However, by approximately January 1991, Charland had completed counseling and probation for his prior convictions and was allowed unsupervised visitation. ***Id.*** In April or May 1991, Neubauer became aware that Geri's friend Kelli sometimes played with Geri at Charland's house. ***Id.*** Neubauer was concerned about the risk that Charland might sexually abuse Kelli and intended to say something about it to Kelli's mother, who Neubauer had occasional contact with. ***Id.*** at 127. Neubauer,

however, never told Kelli's mother, and Charland sexually abused Kelli in July 1991. ***Id.*** at 125, 127.

¶14 Neubauer argued she had no duty to warn a third party about another person's dangerous propensities in the absence of a special relationship, and that no such special relationship had been established. ***Id.*** at 128. The circuit court agreed. ***Id.*** On appeal, we determined that, irrespective of the relationship between Kelli's mother and Neubauer, public policy precluded liability against Neubauer. ***Id.*** at 129. We concluded "recovery [against Neubauer] would enter a field not only with no definable, sensible stopping point, but no sensible starting point as well." ***Id.*** at 130. To illustrate the lack of starting or stopping point, we asked a variety of questions illustrating the amorphous nature of liability in that case. ***Id.*** at 131. We questioned when Neubauer's duty to warn would cease (would it stop if Charland was progressing in counseling? would it stop based on Neubauer's assessment of how well the criminal justice system worked?) and to whom would Neubauer have a duty to warn (everyone? Charland's neighbors? Kelli's classmates?). ***Id.***

¶15 In ***Gritzner***, ten-year-old Michael R. sexually abused his four-year-old neighbor, Tara. ***Gritzner***, 235 Wis. 2d 781, ¶1. The abuse occurred when Tara was visiting Michael's home, where Michael lived with his mother and her boyfriend, Roger Bubner. ***Id.*** Tara's parents filed a civil suit against various parties, including Bubner. ***Id.*** As to Bubner, Tara's parents alleged Bubner was entrusted with the care of Tara while she was in his home, that Bubner had custody and control of Michael, and that Bubner should have known that Michael might engage in inappropriate sexual acts if left alone with Tara. ***Id.***, ¶2. The complaint alleged that Michael had previously engaged in inappropriate sexual acts with another child or children. ***Id.***, ¶7. Tara's parents claimed Bubner was

negligent for failing to warn them of Michael's propensity to engage in inappropriate sexual acts, and negligent for failing to control Michael's conduct. Before trial, Bubner moved to dismiss these claims on public policy grounds and the court granted Bubner's motion. ***Id.***, ¶¶2-3.

¶16 Justice Abrahamson's concurrence became the majority opinion on the failure to warn issue. ***Id.***, ¶86 (Abrahamson, J., concurring) ("[T]his concurrence is the opinion of the court on the issue of negligent failure to warn[.]"). The court determined liability could not be barred against Bubner for public policy reasons as a matter of law. ***Id.***, ¶75. It reasoned the circuit court improperly granted the motion before a full factual resolution. ***Id.***, ¶85. The court explained the circumstances and facts may have been such that Bubner should have warned Tara's parents about Michael. ***Id.***, ¶¶81-83. The court noted that, unlike ***Kelli T-G.***, it was undisputed that Bubner had a special relationship with Michael and Tara because both had been entrusted to his care. ***Id.***, ¶77 n.2. Accordingly, the court reversed and remanded for a full factual resolution before applying the public policy factors. ***Id.***, ¶86.

¶17 On appeal, Alice relies on the lead, but minority, opinion in ***Gritzner***, which concluded liability against Bubner should be precluded on public policy grounds. *See* ***id.***, ¶36 (lead opinion). That opinion reasoned that, based on the facts in the complaint, if liability was imposed against Bubner for his purported negligent failure to warn, "the practical effect would be to require any adult who cared for a child who had previously engaged in any conduct that could be characterized as an 'inappropriate sexual act' to stigmatize this child in all of his or her relations with other children." ***Id.***, ¶38. However, the opinion left open the "possibility that under different circumstances a plaintiff could recover based on negligent failure to warn about a known risk of sexual abuse." ***Id.***, ¶43.

¶18 Alice argues that, similar to ***Kelli T-G.*** and the lead opinion in ***Gritzner***, recovery must be limited in this case because there is no sensible starting or stopping point. In support of her assertion, Alice asks a variety of questions that she asserts show recovery has no sensible starting or stopping point. For example, she asks who was she required to warn, and whether she had a duty to everyone. She asks when was she required to warn the children about Kenneth, and whether she was required to put aside her doubt that Carol was sexually abused by Kenneth. Alice also argues her testimony suggests she did not know of Kenneth's sexual propensities before her granddaughters were assaulted. She questions whether expressing her concerns about something she did not believe would leave her liable for a defamation claim. She also contends that if recovery is allowed it would confer upon her the responsibility to warn a much larger group than her family. Finally, she asks if Carol and/or the children's mother had a duty to warn and protect the children.

¶19 At the outset, liability against Carol and/or the children's mother is irrelevant when determining whether public policy precludes liability against Alice. That being said, we disagree with Alice that liability in this case has no sensible starting or stopping point. Alice overlooks the special relationship she has with E.S. and S.S. Unlike the relationships in ***Kelli T-G.*** and even ***Gritzner***, Alice is both the children's grandmother and was entrusted with their care. Liability is not being imposed against Alice for her negligence toward some person in the world-at-large. Rather, recovery is specifically limited to her young granddaughters who were entrusted to her care.

¶20 Alice, however, appears to object to the determination that she has a special relationship with her grandchildren or that they were entrusted to her care. She argues that she was not present when the sexual assaults occurred, that

Kenneth was the primary babysitter, and that, any time she was present, there was no sexual misconduct. However, the evidence showed that, although Kenneth was the primary babysitter when the children were at Kenneth and Alice's house, Alice also babysat the children. As for the special relationship, the evidence was undisputed that Alice was E.S.'s and S.S.'s grandmother, that the children lived next door to Alice and Kenneth, and that they visited often.

¶21 Additionally, the evidence in this case showed Alice knew Kenneth *still* had a propensity to sexually abuse young females. Not only did Alice know Kenneth sexually abused her daughter Carol approximately thirty years ago but, around the time of the sexual assaults on her granddaughters, Alice found Kenneth alone with S.S. and his pants were unzipped. At that time, Alice admitted telling Kenneth "if you want sex, that's what I'm here for" and "you have it with me, nobody else" and testified that Kenneth explained his behavior to Alice by saying S.S. wanted to see his "private parts."

¶22 In short, despite the fact that Alice knew of Kenneth's sexual abuse propensities and knew that he still had these propensities around the time of the assaults on her granddaughters, Alice did nothing to protect her young granddaughters, who were entrusted to her care. We conclude public policy does not preclude liability in this case because recovery is appropriately limited.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).