

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2016AP3333

DONALD STEIN,

Plaintiff-Respondent,

v.

JOHN BANKS,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT JOHN BANKS

Appeal from a Final Judgment Entered by the Circuit Court
for Waukesha County, Honorable Joseph Story, Presiding
Case No. 2013SC7779

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STATEMENT OF ISSUES

1. Did Stein prove that Banks's conduct was a "substantial factor" in causing Stein's deck to collapse?

The trial court answered: The trial court did not specifically consider this issue.

2. Do public policy considerations preclude holding Banks liable for the collapse of Stein's deck?

The trial court answered: No.

STATEMENT ON ORAL ARGUMENT

Oral argument is also unnecessary because the briefs will fully present the issues on appeal. Wis. Stat. § 809.22(2)(b).

STATEMENT ON PUBLICATION

Publication is unnecessary because this case involves settled law and undisputed facts. *See* Wis. Stat. § 809.23(1)(b)(1).

STATEMENT OF CASE AND FACTS

Respondent Donald Stein sued Appellant John Banks, alleging that Banks was negligent in constructing a deck for Stein. In June 2014, Stein hired Banks to install a new deck to a house that Stein rents to students at Carroll University. (Contract, R.1 Ex. A.) Stein asked Banks to remove the old deck attached to Stein's house, replace any rotted or decayed

wood in the deck's foundation, and install a new deck. (*Id.*) Banks completed the project in August 2014, and a third-party inspector approved the newly installed deck. (Inspection Report, R.1 Ex. B.) Based on the inspector's report, the deck's maximum capacity was 100 people. (*Id.*)

On January 15, 2016, the deck collapsed during a party thrown by students who were leasing the house from Stein. The police report documenting the incident noted that roughly 200 people had been standing on the deck before its collapse. (Police Report, R.1 Ex. C.)

Stein sued Banks in small-claims court, saying that Banks had been negligent in installing the deck, causing its collapse. (Compl., R.1.) In an oral decision issued on May 20, 2016, the court commissioner dismissed Stein's claims for lack of proof that Banks's negligence caused Stein's deck to collapse. (R.5.) On May 24, 2016, Stein requested a trial before the circuit court. (R.7.)

On October 27, 2016, following a short trial, the circuit court decided that Banks's negligence had caused the deck to collapse. (R.10). Relying on photographs of the deck during construction, the judge reasoned that "the equipment Banks used to build the deck was not up to standard." (R.9, Tr. 25:1-4.) The judge found that the equipment caused "incidental damage" to the deck's foundation. (*Id.*) The judge determined that Banks was liable for \$10,000 in damages for the cost of rebuilding the deck. (*Id.* at 27:10).

ARGUMENT

I. Summary of Argument.

To hold Banks liable for the collapse of Stein's deck, Stein had to show that Banks was negligent. That requires (1)

that Banks owed a duty of care; (2) that Banks breached his duty; (3) that Banks's breach caused Stein's injury; and (4) that Stein suffered actual damages as a result of the injury. *Lemke-Wojnicki v. Kolodziej*, 2002 WI App 316, ¶7, 258 Wis. 2d 950, 655 N.W.2d 212. Even if all four of these elements are satisfied, the court must analyze public policy considerations that preclude liability. *Morgan v. Penn. Gen. Ins. Co.*, 87 Wis. 2d 723, 737, 275 N.W.2d 660 (1979).

Stein did not establish any causal connection between Banks's use of equipment that damaged the deck's foundation and the collapse of the deck on the night of the party. Based on the evidence presented at trial, a reasonable person could not conclude that Banks caused the collapse. Moreover, public policy considerations show that Banks is not liable because the deck's collapse was too remote and wholly out of proportion to any negligence by Banks.

II. Standard of Review.

This court of appeals reviews the circuit court's legal conclusions without deferring to the court. *Hatleberg v. Nw. Bank of Wis.*, 2005 WI 109, ¶15, 283 Wis. 2d 234, 700 N.W.2d 15. This court of appeals defers to the circuit court's factual findings. *Id.*

Whether a defendant's negligence was a cause of the plaintiff's damages is a factual question if reasonable people could differ on the issue. *Cefalu v. Cont'l W. Ins. Co.*, 2005 WI App 187, ¶9, 285 Wis. 2d 766, 703 N.W.2d 743. If reasonable people could not disagree, "the question becomes one of law for judicial decision." *Id.* Whether public policy considerations prevent liability is "a question of law solely for judicial decision." *Morgan*, 87 Wis. 2d at 737.

III. Banks's Conduct Did Not Cause Stein's Deck to Collapse.

A defendant's negligence causes the plaintiff's injury if the negligence is a "substantial factor" in producing the injury. *Cefalu v. Cont'l W. Ins. Co.*, 2005 WI App 187, ¶11, 285 Wis. 2d 766, 703 N.W.2d 743. "The phrase, 'substantial factor,' denotes that the conduct has such an effect in producing the injury as to lead a reasonable person to regard it as the cause, using that word in the popular sense." *Id.*

No reasonable person would conclude that the damage to the deck's foundation, resulting from the equipment that Banks used, caused the deck to collapse on the night of the party. The photographs of the deck during construction that the judge relied on showed minor surface scrapes and dents in the deck's foundation. (*See* R.1 Ex. D.) Moreover, these same scrapes and dents were plainly visible to the third-party inspector who examined the deck after Banks completed his work and concluded that the deck was sound. (*See* R.1 Ex. F.) Given the inspector's conclusion, no reasonable person could find that these superficial marks caused the entire deck to collapse.

IV. Public Policy Considerations Preclude Banks from Being Held Liable for the Collapse of Stein's Deck.

Even if a defendant's negligence causes the plaintiff's damage, public policy considerations may prevent liability. *Moden v. Cont'l AG*, 2000 WI 51, ¶60, 235 Wis. 2d 325, 611 N.W.2d 659. These are the public policy factors:

The injury is too remote from the negligence; (2) the injury is wholly out of proportion to the tortfeasor's culpability; (3) in retrospect it appears too highly extraordinary that the negligence should have resulted from 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 to fraudulent claims; (6) allowing recovery would enter a field that has no sensible or just stopping point.

Alvarado v. Sersch, 2003 WI 55, ¶17, 262 Wis. 2d 74, 662 N.W.2d 350. Courts determine on a case-by-case basis whether one or more of these factors should limit liability. *Hoida, Inc. v. M&I Midstate Bank*, 2004 WI App 191, ¶18, 276 Wis. 2d 705, 688 N.W.2d 691. The presence of any one factor can be enough to deny recovery. *Rieck v. Med. Protective Co. of Fort Wayne*, 64 Wis. 2d 514, 518, 219 N.W.2d 242, 244 (1974).

Here, under the first two public-policy factors, Banks cannot be liable for the collapse of Stein's deck. Police reports show that 200 people were standing on the deck at the time of the collapse, which is twice as many people as the deck could safely hold. (R.1 Ex. C.) The report also shows that the strain these people placed on the deck was the immediate cause of its collapse. See *McMahon v. St. Croix Falls Sch. Dist.*, 228 Wis. 2d 215, 224, 596 N.W.2d 875, 879-80 (Ct. App. 1999).

For similar reasons, the injury is also wholly out of proportion to Banks's conduct. The presence of nearly twice as many people as the deck could safely hold would probably have caused the structure's collapse even without the minor and superficial damage to the deck's foundation that Banks's equipment caused. See *Rockweit by Donohue v. Senecal*, 197 Wis. 2d 409, 428, 541 N.W.2d 742, 750-51 (1995). Based on these factors, Banks should not be liable for the deck's collapse.

CONCLUSION

This court of appeals should reverse the circuit court's judgment and hold that Banks is not liable for the collapse of Stein's deck.

Dated this 1st day of December, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,427 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of December, 2016.

Signed:

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