STATE OF WISCONSIN
CIRCUIT COURT
WAUPACA COUNTY

BRUCE AND BAMBI AMES,

Plaintiffs,

v.

Case No.: 2022CV000300

FLEET FARM LLC,
FLEET FARM GROUP LLC,
FLEET FARM OF WAUPACA LLC,
FLEET FARM PROPERTIES LLC
MFF MORTGAGE BORROWER 27 LLC
FLEET FARM SUPPLY LLC and
FLEET FARM WHOLESALE SUPPLY CO. LLC

Defendants.

DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

The Defendants ("Fleet Farm") moved to dismiss this action under Wis. Stat. §§ 802.06(2)(a)(6) and 802.06(2)(b) because, as a matter of judicial public policy, Ryan Ames's suicide was a superseding cause of his death, barring the Plaintiffs' liability claim against Fleet Farm. The first policy consideration– the defendant's negligence is too remote from the injury to impose liability– incorporates the superseding cause doctrine, *see Fandrey v. Am. Fam. Mut. Ins. Co.*, 2004 WI 62, ¶ 12, n. 8, 272 Wis. 2d 46, 680 N.W.2d 345, and the rule that suicide is a superseding cause, *McMahon v. St. Croix Falls School Dist.*, 228 Wis. 2d 215, 224, 596 N.W.2d 875, 879 (Ct. App. 1999).

The Plaintiffs' Response Brief in Opposition to Fleet Farm's Motion to Dismiss, (Doc. 30), does not credibly distinguish the facts of this case and Ryan's suicide to prevent application of the general rule, established in *Bogust v. Iverson*, 10 Wis. 2d 129, 102 N.W.2d 228 (1960), that "suicide constitutes an intervening, superseding cause that breaks the chain of causation" (the "*Bogust* rule"[1]). *See McMahon,* 228 Wis. 2d at 217-18. They do not cite any authority supporting their contention that this case is distinguishable from *Bogust* and *McMahon*. The Complaint alleges facts potentially showing that Fleet Farm was negligent in various respects in failing to prevent Ryan from obtaining the gun that he used to cause his own death. (Compl., Doc. 10, ¶¶ 23, 26.) These allegations bring the case squarely within the *Bogust* rule. As a matter of policy, Wisconsin draws a bright line for non-liability in third-party wrongful death claims when a defendant is allegedly negligent in causing the Plaintiff's decedent's suicide. The act of suicide "is a new and independent agency which does not come within and complete a line of causation from the wrongful act to the death." *Bogust*, 10 Wis. 2d at 139 (internal quotations omitted).

The only exception to the *Bogust* rule is the "uncontrollable impulse" exception– "where the wrongful act produces a rage or frenzy or uncontrollable impulse, during which state self-destruction takes place." *Id.* at 137; *McMahon*, 228 Wis. 2d at 228 ("Wisconsin law is clear… that the uncontrollable impulse rule is the

1 *See McMahon*, 228 Wis. 2d at 225-26 (using "*Bogust* rule" for general rule of suicide as superseding cause and "uncontrollable impulse" as the term for the sole exception.)

only exception to the general rule that suicide is an intervening and superseding cause precluding liability."). Nonetheless, the Plaintiffs urge the court to adopt and apply other exceptions— first, when there is a special relationship between the defendant and the decedent ("special relationship" exception) and second, when the defendant supplies the instrumentality that the decedent uses to commit suicide ("instrumentality" exception). (Doc. 30, pp. 8-10.) However, *McMahon* is controlling on the issue and, while these exceptions may be recognized in some other jurisdictions, they are not exceptions to the application of the *Bogus*t rule in Wisconsin.

The Plaintiffs do not and cannot establish that their Complaint is legally sufficient to withstand the Defendants' Motion to Dismiss.

I. The *Bogust* rule applies in this case to relieve Fleet Farm of any alleged liability.

In Section I of their response brief, the Plaintiffs attempt to distinguish *Bogust* and *McMahon* on their facts to argue that the *Bogust* rule should not apply to their claim. (Doc. 30, pp. 3-7.) However, while the negligent acts at issue in those cases were different from those in the instant case, and each other, the material facts supporting the *Bogust* rule are the same and control the outcome here— Ryan committed suicide and Fleet Farm's alleged negligence was an alleged cause in fact of the suicide. Thus, under *Bogust* and *McMahon*, Ryan's suicide is considered a superseding cause that breaks the chain of causation, relieving Fleet Farm from any alleged liability for his death. The factual differences pointed out by the

Plaintiffs are immaterial to the rule's application. The Plaintiffs do not cite any authority suggesting otherwise.

"Wisconsin follows the general rule that 'suicide constitutes an intervening force which breaks the line of causation from the wrongful act to the death and therefore the wrongful act does not render the defendant civilly liable.'" *McMahon*, 228 Wis. 2d at 224 (quoting *Bogust*, 10 Wis. 2d at 137). The court of appeals in *McMahon* held that under *Bogust*, the only exception to this rule was the "uncontrollable impulse" exception. *McMahon*, 228 Wis. 2d at 226-228. This exception allows recovery when the defendant's conduct creates a mental state in the decedent that causes them to commit suicide. *Id.* at 225. "In contrast, when suicide results from a moderately intelligent power of choice, even if the choice is made by a disordered mind, the suicide is a new and independent cause of death that immediately ensues." *Id.* See also *Barber v. Indus. Comm'n*, 241 Wis. 462, 6 N.W.2d 199 (1942) ("the voluntary, willful act of suicide of an insane person, whose insanity was caused by a railroad accident, and who knows the purpose and the physical effect of his act, is such a new and independent agency as does not come within and complete a line of causation from the accident to the death.")

There is no question that this case falls within the *Bogust* rule. The Complaint alleges that Fleet Farm was negligent in various respects in failing to prevent Ryan from causing his own death. (Doc. 10, ¶¶ 23, 26.) Per Wisconsin law, Ryan's death by suicide constitutes an intervening force which breaks the line of causation from Fleet Farm's alleged negligence to the death. The Plaintiffs do not

argue that the uncontrollable impulse exception applies, and there are no facts alleged in the Complaint that would support the exception. Ryan's decision to end his life resulted from a "moderately intelligent power of choice, even if the choice is made by a disordered mind."

Instead, the Plaintiffs argue that Fleet Farm's various failures, which allegedly support their claims of negligence, somehow distinguish this case from *Bogust* and *McMahon*.[2] They contend that, unlike *Bogust* and *McMahon*, Fleet Farm provided access to the instrument Ryan used to commit suicide—the handgun. However, the Plaintiffs fail to explain why negligence in this respect makes a difference.

In *Bogust*, the college counselor was negligent in providing proper guidance to the plaintiffs' daughter, failing to get the student emergency psychiatric treatment, and failing to notify the plaintiffs of her condition. *See Bogust*, 10 Wis. 2d at 132. In *McMahon*, the school district's negligence was its failure to advise the parents of concerns over their child's recent poor academic performance, his removal from the basketball team because of his grades, and emotional problems and his

2 The Plaintiffs assert, without explanation, that "The legal analysis in Bogust would likely be much different if after learning about the student's psychological and mental health problems, the college administrator made sure that she still had complete and unfettered access to the administrator's gun cabinet." (Doc. 30., p. 4.) Nothing in *Bogust* suggests that the analysis would be any different, even if the analogy were accurate. Unless the administrator's conduct created an uncontrollable impulse for the student to commit suicide, the *Bogust* rule would apply under the Plaintiffs' hypothetical additional facts. Moreover, the Complaint in the instant case asserts Fleet Farm was negligent in failing to know Ryan's mental condition and failing to prevent access to the firearm inventory in the storage area. Unlike the Plaintiffs' hypothetical administrator, Fleet Farm is not alleged to have "learned" about Ryan's mental health problems or "made sure that [Ryan] still had complete and unfettered access to" its firearms inventory.

truancy on the date of his suicide. *See McMahon*, 228 Wis. 2d at 220. The Plaintiffs assert that Fleet Farm was negligent by "providing teenage minors with unfettered access to unsecured firearms, [failing] to train its employees in regards to work place violence[3], and to monitor its security cameras for its firearm and ammunition storage." Thus, they conclude, "there is a clear causal connection between that conduct and the alleged injuries in this matter," distinguishing it from *Bogust* and *McMahon*.

The various allegations of negligence in this case do not, in fact, distinguish it from *Bogust* and *McMahon* for application of the *Bogust* rule. Like the Ameses, the plaintiffs in *Bogust* alleged that their daughter's death was a foreseeable result of the defendant's negligence. *See Bogust*, 10 Wis. 2d at 137. *McMahon* assumed that the defendants' negligence was a cause-in-fact of the suicide. *McMahon*, 228 Wis. 2d at 229. Fleet Farm's failures in training and access to inventory storage is asserted to have been a cause-in-fact of Ryan's death. "Our supreme court has held that suicide is an intervening and superseding force that breaks the chain of causation, even if negligence and cause-in-fact have been established." *Id.*

3 The Plaintiffs' complaint and brief refer to the alleged deficient training in this case as failure to provide workplace violence training. The term "workplace violence" is ambiguous and whether it includes the concept of suicide awareness is debatable at best. Based on their Complaint, the Plaintiffs' only meaningful way to interpret the allegations about Fleet Farm failing to train employees regarding workplace violence is that it failed to train employees to report other employees who talked to them about their mental health issues or suicidal ideation. Further, this case does not involve any allegations of violence in the workplace by customers or between employees. It does not involve a store shooting or an injury in the workplace. The Complaint makes it clear that Ryan ended his life at home, using store merchandise that he took without his employer's knowledge. This case does not involve workplace violence under any common use of that term.

The Plaintiffs contend that harm to Ryan or employee theft of guns was foreseeable and seem to suggest that that the element of foreseeability is a distinguishing feature. However, the court of appeals was quite clear in *McMahon* that while issues of foreseeability, duty, causation in fact may be considerations when applying policy factors in other situations, *see e.g. Toeller v. Mutual Serv. Cas. Ins. Co.*, 115 Wis.2d 631, 340 N.W.2d 923 (Ct.App.1983) (public policy did not limit liability for injured child's claim against bus company where parents were not told child was suspended from riding school bus and child was injured while biking to school), the *Bogust* rule controls in cases of suicide.

> Unlike [*Toeller v. Mutual Serv. Cas. Ins. Co.*, 115 Wis.2d 631, 340 N.W.2d 923 (Ct.App.1983)] here we are dealing with a death from suicide. Our supreme court has held that suicide is an intervening and superseding force that breaks the chain of causation, even if negligence and cause-in-fact have been established. Further, our courts have held that the intervening and superseding cause doctrine is another way of saying that the public policy consideration that the injury is too remote from the negligence and precludes liability.
>
> Because *Bogust* controls, we need not decide whether the McMahons have established the foreseeability of an unreasonable risk of harm, that is, whether they have established a duty. This is because even if the district had a duty to notify the McMahons or follow up on the student's report to a school counselor that Andrew was despondent, the suicide is an intervening and superseding cause and is thus too remote from the negligence to render the district liable.

McMahon, 228 Wis. 2d at 229 (citing *Bogust* at 137; *Morgan v. Pa. Gen. Ins. Co.,* 87 Wis.2d 723, 738, 275 N.W.2d 660 (1979)) (internal citations omitted)).

The Wisconsin courts have drawn a judicial line for non-liability in wrongful death cases for deaths by suicide. Under Wisconsin's formulation of negligence law,

each person owes a broad duty of care to the entire world. *See Fandrey*, 2004 WI 62, ¶ 12, n. 8. Substantial factor causation is cause-in-fact and does not include the concept of proximate cause. *See id.* "What we do mean by the word 'proximate' is that, because of convenience, *of public policy,* of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." *Id.* at ¶ 11 (quoting *Palsgraf v. Long Island R.R. Co.,* 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) (emphasis in original).) Wisconsin preserves the concept of proximate cause as a limitation to tort actions in the judicially applied public policy considerations. *Id.* at ¶ 13 (citing *Morden v. Cont'l AG*, 2000 WI 51, ¶ 60, 235 Wis. 2d 325, 611 N.W.2d 659).

> When we preclude liability based on "public policy factors," formerly referred to as "proximate cause," we are simply stating that the cause-in-fact of the injury is legally insufficient to allow recovery. In doing so, we are engaged in judicial line drawing, endeavoring to make a rule in each case that will be practical and in keeping with the general understanding of mankind.

Fandrey, 2004 WI 62, ¶ 15 (citing *Palsgraf* at 104 (Andrews J., dissenting) (some internal quotations omitted)).

"One policy ground for relieving a negligent tortfeasor from liability for conduct which has been a substantial factor in producing injury is the intervening and superseding cause doctrine.... The doctrine is another way of saying the negligence is too remote from the injury to impose liability." *Morgan,* 87 Wis.2d at 738. *See also Fandrey*, 2004 WI 62, ¶¶ 12, n. 8, 15, n. 12.

In the present case, the Plaintiffs' conclusions that there is a clear causal connection to Ryan's death and that harm or stolen inventory were foreseeable are not revelations that take this case out of the *Bogust* rule. The rule applies even if the Plaintiffs "have established the foreseeability of an unreasonable risk of harm" and "even if negligence and cause-in-fact have been established." *McMahon*, 228 Wis. 2d at 229. "Suicide constitutes an intervening force which breaks the line of causation from the wrongful act to the death and therefore the wrongful act does not render defendant civilly liable." *See Bogust*, 10 Wis. 2d at 137. The only exception is when the defendant's wrongful conduct causes the decedent's suicidal mental status.[4] *See McMahon*, 228 Wis. 2d at 228.

The Plaintiffs allege that Fleet Farm was causally negligent as to Ryan's death by suicide. The Complaint does not allege facts implicating the uncontrollable impulse exception and the Plaintiffs do not argue for its application. Under Wisconsin law, Ryan's suicide was a superseding cause; thus, the Defendants negligence is too remote from the harm to be held liable.

II. Wisconsin only recognizes the uncontrollable impulse exception to the Bogust Rule.

In Section II of their response brief, the Plaintiffs urge the court to apply the special relationship and instrumentality exceptions discussed in *Logarta v. Gustafson*, 998 F. Supp. 9989 (E.D. Wis. 1998).

As indicated, *McMahon* held that the only exception to the *Bogust* rule in

4 Per the Complaint, Ryan suffered from mental health issues, including depression, and had attempted to harm himself before December 5, 2020. (Doc. 10, ¶ 15.)

Wisconsin is uncontrollable impulse (causing the decedent's suicidal mental state). The District Judge in Logarta discussed Bogust and various exceptions to the general rule in other states. *See Logarta*, 998 F. Supp. at 1004. In addition to uncontrollable impulse, the judge also considered exception when there is a special relationship between the decedent and defendant and when the defendant supplies the instrumentality to the decedent that he knows or should know will be used to commit suicide. *See id.* at 1105-06.

The court of appeals' *McMahon* decision was released a year after *Logarta* and cited *Logarta* several times. *See McMahon*, 228 Wis. 2d at 224, n. 5, 225, 227. The parents in *McMahon* argued that the defendant school district stood *in loco parentis* to their son; thus, his suicide should not bar their claim against the school district. Noting that other jurisdictions recognized the special relationship exception in the school-student context, the court succinctly stated, that "Wisconsin has not adopted the special relationship exception" "but has adhered to *Bogust*." *Id.* at 227. The court later reiterated, "Wisconsin law is clear, however, that the uncontrollable impulse rule is the only exception to the general rule that suicide is an intervening and superseding cause precluding liability." *Id.* at 228. *Bogust* created a "bright-line rule" that "suicide breaks the chain of causation, even if negligence and cause-in-fact have been established." *Id.* at 217, 229.[5]

5 As a federal district court opinion, *Logarta* is not binding on a Wisconsin state court. However, McMahon is precedential. *See Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Only the state supreme court can "overrule, modify or withdraw language from a published opinion of the court of appeals." *Id.*, 208 Wis. 2d at 189-90.

Bogust recognized the uncontrollable impulse exception because it allows a "cause of action in which the defendant actually causes the death." *See id.* at 225. "In contrast, an act of suicide resulting from a moderately intelligent power of choice, even if the choice is made by a disordered mind, the suicide is a new and independent cause of death that immediately ensues." *Id* (quoting *Bogust*, 10 Wis. 2d at 138).

The moderately intelligent choice rationale underpins the Wisconsin courts' limitation of exceptions to the *Bogust* rule. If the negligence of a defendant causes the suicidal mental state that compels a person to end their life, the defendant may be liable for their wrongful death. However, in any other circumstance, the fact remains that decedent's suicide was the result of their moderately intelligent power of choice, even if the choice was made by a disordered mind. *See id.* Recognizing this reality, the supreme court ended its opinion in *Bogust* by stating:

> Even assuming he had secured psychiatric treatment for Jeannie or that he had advised her parents of her emotional condition or that he had not suggested termination of the interviews—it would require speculation for a jury to conclude that under such circumstances she would not have taken her life.

Bogust, 10 Wis. 2d at 140.

In the instant case, the Plaintiffs have invited this court to ignore *Bogust* and *McMahon* and consider the special relationship and dangerous instrumentality exceptions recognized in other jurisdictions and examined by the District Court in *Logarta.* Their invitation is contrary to controlling precedent and should be rejected. However, even if considered, these exceptions do not apply in this case.

The Plaintiffs' brief discussion of the instrumentality exception (Response Brief, pp. 9-10) does not alter the defense's analysis that the exclusion is inapplicable, (Brief in Support of Motion, pp. 13-15). Per *Logarta*, the exception applies if the defendants supplied the decedent with the instrumentality of the suicide and knew or should have known that the deceased intended to use the supplied item to commit suicide. *Logarta*, 998 F. Supp. at 1006. In the instant case, the inapplicability of the exclusion fails at the start. Fleet Farm did not supply Ryan with the handgun. The Complaint quite clearly alleges that Ryan stole the firearm. The Defendants' purported negligence in failing to prevent his theft simply does not equate with supplying the gun with knowledge that the decedent will use it to take his life.

The Complaint alleges that "as a teenage minor employee of Fleet Farm Defendants, Ryan Ames was given complete, unfettered, and unsupervised access to the firearm storage area." (Doc. 10, ¶ 14.) Although the Defendants deny the allegation, the court treats all well-pled factual allegations as true on a motion to dismiss for failure to state a claim. *Kaloti Enters., Inc. v. Kellogg Sales Co.,* 2005 WI 111, ¶ 11, 283 Wis.2d 555, 699 N.W.2d 205. The Complaint also sets out Ryan's actions on the night of December 5, 2020, entering the storage area on several occasions and, at the end of his shift, concealing the gun under his clothing and successfully leaving the store without getting caught. The Complaint clearly states that Fleet Farm did not know that Ryan took the gun. (Doc. 10, ¶¶ 119, 21.) Nothing suggests that anyone affiliated with Fleet Farm knew that Ryan planned

to take a handgun from the store or that he did it. The only reasonable inference is that Ryan did not want anyone at Fleet Farm to know he took the gun, because he was not allowed to do so.

The plaintiffs can certainly argue that Fleet Farm was negligent if it allowed Ryan unsupervised access to the storage area, but that negligence in no way supports the contention that Fleet Farm supplied him with a handgun to take home for the night.

The exception for supplying an instrumentality used in a suicide is essentially a claim for negligent entrustment.[6] See *Bankert v. Threshermen's Mut. Ins. Co.*, 110 Wis. 2d 469, 476, 329 N.W.2d 150, 153 (1983) (quoting the elements of a negligent entrustment claim under the Restatement of Torts, § 308, "[i]t is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others."). It is self-evident that a party cannot be liable for negligently entrusting an item if they do not knowingly give the item to the other person in the first instance. However, one court has addressed the issue and held that when the instrumentality is stolen, "the owner cannot be said to have supplied, entrusted, or made [it] available." *Mackey v. Dorsey*, 655 A.2d 1333, 1338 (Md. App. 1995) (reviewing negligent entrustment

7 Note that a cause of action for negligent entrustment applies only when the entrustee injures someone else, not himself. *See* S*tehlik v. Rhoads*, 2002 WI 73, ¶ 20, 253 Wis. 2d 477, 645 N.W.2d 889.

under the same Restatement of Torts sections adopted in Wisconsin). Negligent entrustment requires "that the supplier do so knowingly or with intent to supply the chattel." *Id.*

If Fleet Farm had supplied the handgun to Ryan to take home, the instrumentality exception still would not apply because, contrary to the Plaintiffs' unfounded assertions about actual knowledge, the Complaint does not allege or imply that Fleet Farm had knowledge of Ryan's mental health condition or suicidal ideation. The Complaint alleges that Ryan had discussed self-harm with co-workers, but the co-workers did not warn or notify any supervisors, managers or other co-workers. (Doc. 10, ¶ 17.) In other words, the Complaint alleges that Fleet Farm did not know about Ryan's condition or statements. The Plaintiffs allegations in this case are that Fleet Farm failed to train its staff to report conversations concerning self-harm, not that Fleet Farm knew Ryan had discussed suicide.

The Plaintiffs cite no legal authority for their assertion that Ryan's conversations with co-workers impute knowledge of the contents of those conversations to the employer and the defense is not aware of any. Generally, "a corporation is charged with constructive knowledge, regardless of its actual knowledge, of all material facts of which its officer or agent receives notice or acquires knowledge while acting in the course of his employment within the scope of his authority." *Suburban Motors of Grafton, Inc. v. Forester*, 134 Wis. 2d 183, 192, 396 N.W.2d 351, 355 (Ct. App. 1986). Personal matters discussed between co-

workers during their shift are not material facts acquired while acting in the course of employment within the scope of employees' authority.

The plaintiffs cite *McMahon* for the proposition that the special relationship exception applies. As the court acknowledged in *Logarta*, however, special relationships "are typically custodial in nature, or at least supervisory, such as the doctor-patient relationship associated with hospitals or mental institutions, the jailor-inmate relationship associated with prisons and local jails, and sometimes the teacher-student relationship associated with schools." *Logarta*, 998 F. Supp. at 1005. In *McMahon*, the McMahons argued that the school stood *in loco parentis* to its students. *McMahon*, 228 Wis. 2d at 227. The court did not address the merits of this argument, instead concluding that Wisconsin had not adopted the "special relationship" exception.

Even assuming the court had adopted or could adopt this exception, it would not apply under these facts. The examples in the case law are indeed doctor-patient, inmate-prison, and student-teacher, none of which are analogous to employer-employee. An employer does not stand *in loco parentis* to its employees, nor is there any "custodial" element to the relationship between an employer and its employees. The court in *Logarta* cited many cases from other jurisdictions, none of which involved an employer-employee relationship. *See Logarta*, 998 F. Supp. at 1005. The Plaintiffs cite no case law to support their claim that an employer-employee relationship could constitute a "special relationship" for purposes of an exception to the *Bogust* rule.

Based on the alleged facts, the *Bogust* rule applies. The Plaintiffs have not shown that any exception to the rule applies, even assuming those exceptions were adopted by the Wisconsin court in the first instance. Consequently, because Ryan's suicide was a superseding cause that broke the chain of causation to any alleged negligence of Fleet Farm, the court should conclude that public policy precludes liability against Fleet Farm, because the alleged negligence is too remote from the harm to impose liability.

CONCLUSION

For the foregoing reasons and those stated in the Defendants' Brief in Support of Motion to Dismiss, the Defendants respectfully request that the Court dismiss the Plaintiffs' Complaint, with prejudice and with costs.

Dated at Wausau, Wisconsin, this 1st day of May 2023.

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