COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 99-0088

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

ROBERT PHILIPP,

PLAINTIFF-APPELLANT,

MEDICAL BENEFIT ADMINISTRATORS, INC., VASA BROUGHER, INC., AND PRUDENTIAL INSURANCE COMPANY OF AMERICA,

PLAINTIFFS,

V.

ODYSSEY RE (LONDON) LIMITED (F/K/A SPHERE DRAKE INSURANCE PLC), 5-D PROMOTIONS, INC. AND UNITED STATES SNOWMOBILE ASSOCIATION,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

ROYAL INSURANCE COMPANY OF AMERICA,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Vilas County: JAMES B. MOHR, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Robert Philipp appeals a judgment dismissing his complaint against several defendants connected with the operation of a snowmobile race in Eagle River. Philipp was seriously injured when he slipped and fell from the roof of a concession trailer. Philipp and several others had climbed onto the roof in order to better view the race. The trial court ruled, as a matter of law, that Philipp was a trespasser on the trailer roof and granted summary judgment to the defendants. Because we conclude that the facts give rise to competing inferences as to whether Philipp's presence on the roof was with the defendants' implied consent, we reverse the judgment and remand for further proceedings.

Appellate review of a summary judgment is de novo. *See* ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Section 802.08(2), STATS. However, even if the facts are undisputed, summary judgment should not be granted when reasonable persons could draw differing inferences on a material issue of fact. *See* ***Delmore v. American Family Mut. Ins. Co.***, 118 Wis.2d 510, 516, 348 N.W.2d 151, 154 (Ct. App. 1984).

Philipp's complaint alleged negligence and a violation of the safe-place statute.[1] His potential recovery on both claims depends on his legal status while on the roof of the concession trailer.[2] If Philipp were a "trespasser," then the defendants' duty was merely to refrain from willful and intentional injury. *See* ***Johnson v. Blackburn***, No. 97-1414, slip op. at 8 (Wis. June 30, 1999). Philipp does not allege that the defendants willfully or intentionally injured him. If a trespasser, Philipp's complaint must be dismissed.

A trespasser is "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." ***Id.***, *quoting* ***Antoniewicz v. Reszczynski***, 70 Wis.2d 836, 840, 236 N.W.2d 1, 4 (1975). Consent may be express or it may be implied when it "may be reasonably assumed from the circumstances which have caused the person to be on the premises of another." WIS J I—CIVIL 8012; *see also* ***Monsivais v. Winzenried***, 179 Wis.2d 758, 765, 508 N.W.2d 620, 624 (Ct. App. 1993). The test looks to the totality of the circumstances, including the owner's "acquiescence" "in the previous use of the premises," the "customary use" of the premises; "the apparent holding out of the premises … to a particular use by the public and the general arrangement or design of the premises." WIS J I—CIVIL 8015.

Philipp does not suggest that the defendants expressly consented to his presence on the roof. However, he does argue that facts support the inference

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[1] Section 101.01, STATS.

[2] The duty owed to a trespasser is identical for claims sounding in negligence and under the safe-place statute. *See* ***Monsivais v. Winzenried***, 179 Wis.2d 758, 766, 508 N.W.2d 620, 624 (Ct. App. 1993).

that the defendants gave their implied consent to use of the roof for viewing purposes. We agree.

In his affidavit opposing summary judgment, Philipp stated that "other individuals [were] standing on elevated structures" such as "hay bails [sic], snow banks, [and] motor homes" "to obtain a better view." Philipp also stated that other people were on the concession trailer's roof before he climbed onto the roof. In his deposition, Philipp testified that he had attended the snowmobile race in previous years and "it was commonplace to see people standing on elevated structures to provide better viewing."

Mark Heinrich testified in his deposition that he noticed the concession trailer "with a couple people on, higher than anybody else" when he entered the grounds. Because he "wanted to get a better seat," Heinrich later returned to the trailer, which was located approximately fifty feet from the main grandstand. When he returned, a table was in front of the trailer. Heinrich used the table to climb onto the trailer's roof. He estimated that he was on the roof about twenty-five minutes before Philipp came to the trailer.

Another witness, Philip Reynolds, testified that he saw "people standing on everything, all over, fences, wherever they could get a good seat." Reynolds further testified "it's that way every year." A third witness, Bruce Pregont, testified that he was "looking for the best spot to watch the race from" when he saw others on the trailer roof before the race and decided "hey, there is room up there for more people." Pregont further noted that at snowmobile races, "especially Eagle River," "it's in the brain, you get up high, you, get, get a better spot to see something." No witness reported seeing any "No Trespassing" signs

on the trailer or any sign prohibiting entry onto elevated structures. No one told the men to get off the roof.

In addition to the testimonial evidence, several photographs of the snowmobile race in the years before this accident were before the court. Those photographs show persons standing on the top of various structures to gain a better view of the race. While no photograph precisely depicts persons standing on the roof of a concession trailer, collectively they depict an event where spectators take every opportunity to gain a height advantage over their fellow patrons.

We hold that the above-described evidence supports an inference of implied consent. A jury could infer that the defendants' consent to the presence of spectators on the trailer roof "may be reasonably assumed from the circumstances" of the premises, the customary viewing habits of the spectators, and the defendants' failure to take any action designed to prevent persons from climbing onto elevated structures such as the concession trailer.

Both respondent's briefs argue that Philipp was a trespasser because the defendants had not given him permission to be on the trailer roof. The respondents focus on express consent and they do not respond to Philipp's implied consent argument. We agree that if Philipp were a trespasser, the defendants' duty of care would be minimal and that Philipp's complaint would fail. However, before Philipp can be declared to be a trespasser as a matter of law, the question of implied consent must be answered in the negative. We cannot answer that inquiry as a matter of law. Competing inferences on that question may be drawn from facts. Summary judgment was not appropriate. This case should proceed to trial on the factual issue of implied consent, an inquiry that must be addressed before

the determination of the level of duty owed by the defendants to Philipp. *See* ***Johnson***, No. 97-1414, slip op. at 13.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.