

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 2000

Cornelia G. Clark
Acting 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 WIS. STAT. § 808.10 and RULE 809.62.

**Nos. 99-0327
99-0858**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

No. 99-0327

**MINNESOTA FIRE & CASUALTY INSURANCE COMPANY, A
MINNESOTA CORPORATION,**

PLAINTIFF-RESPONDENT,

v.

**PAPER RECYCLING OF LA CROSSE, A WISCONSIN
CORPORATION AND GENERAL CASUALTY COMPANY, A
WISCONSIN CORPORATION,**

DEFENDANTS-APPELLANTS.

No. 99-0858

**JOYCE A. DEVENPORT, INDIVIDUALLY AND AS
PERSONAL REPRESENTATIVE OF THE ESTATE OF DANIEL
RAYMOND DEVENPORT, DECEASED,**

PLAINTIFF-APPELLANT,

v.

**PAPER RECYCLING COMPANY, AND REGENT INSURANCE
COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County:
DENNIS G. MONTABON. *Affirmed.*

APPEAL from a judgment of the circuit court for La Crosse County:
MICHAEL J. MULROY. *Reversed and cause remanded.*

Before Dykman, P.J., Eich and Vergeront, JJ.

¶1 EICH, J. These consolidated cases arose from a 1997 fire at the Paper Recycling Company of La Crosse which destroyed the premises and resulted in the death of eleven-year-old Daniel Davenport, who was playing in a large pile of baled papers in the company’s yard. They present a single issue: whether the “recreational immunity” statute, WIS. STAT. § 895.52—which generally shields landowners from liability for injuries suffered by persons engaging in recreational activities on their property—applies to the facts of this case and renders Recycling immune from liability for Davenport’s death. We conclude that the statute does not apply. As a result, we affirm the judgment in No. 99-0327, *Minnesota Fire & Casualty Ins. Co. v. Paper Recycling of*

La Crosse, and we reverse in No. 99-0858, *Davenport v. Paper Recycling of La Crosse*.¹

¶2 The facts are undisputed. On the day of the fire, David Davenport and two of his friends gained access to Paper Recycling’s premises through an opening in the fence and began playing among several large piles of baled paper stacked in the yard. The bales were stacked in such a manner as to leave interior spaces which the boys pretended were “tunnels,” which they would crawl through to reach other, larger spaces in the interior of the pile, which they imagined to be “forts” or “rooms,” and where they would invent games to play. One of the boys had a box of matches and they began lighting small fires among the bales of paper. While they were playing in one of the interior “forts,” the boys noticed a fire in the “tunnel” through which they had entered the “fort.” Two of the boys were able to escape through a small opening in the pile, but Daniel Davenport was unable squeeze through the opening and was killed in the fire.

¶3 As we have noted above, the recreational immunity statute, WIS. STAT. § 895.52(2), renders a property owner immune from liability for injury suffered or caused by any person “engaging in recreational activity” on the

¹ *Minnesota Fire & Casualty* was a subrogation action in which the insurance company sought to recover damages paid to its insured, the owner of the property on which the fire occurred (which was occupied by Paper Recycling as lessee). Recycling moved for summary judgment dismissing the action on grounds that it was barred by WIS. STAT. § 895.52. The trial court denied the motion and we granted leave to appeal the denial. In *Davenport*, David Davenport’s mother sued Paper Recycling, seeking damages for the boy’s wrongful death. Paper Recycling moved for summary judgment based on § 895.52, and the court granted the motion. We consolidated the actions for ease of disposition on appeal.

owner's property.² The term "recreational activity" is defined in § 895.52(1)(g) as follows:

"Recreational activity" means any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity. "Recreational activity" includes hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle, ballooning, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, sight-seeing, rock-climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature, sport shooting and any other outdoor sport, game or educational activity. "Recreational activity" does not include any organized team sport activity sponsored by the owner of the property on which the activity takes place.

² WISCONSIN STAT. § 895.52, Recreational activities; limitation of property, provides in part:

(2) NO DUTY; IMMUNITY FROM LIABILITY.

(a) Except as provided in subs. (3) to (6), no owner and no officer, employe(e) or agent of an owner owes to any person who enters the owner's property to engage in a recreational activity:

1. A duty to keep the property safe for recreational activities.

2. A duty to inspect the property, except as provided under s. 23.115 (2).

3. A duty to give warning of an unsafe condition, use or activity on the property.

(b) Except as provided in subs. (3) to (6), no owner and no officer, employe(e) or agent of an owner is liable for the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner's property or for any death or injury resulting from an attack by a wild animal.

¶4 In *Sievert v. American Family Mut. Ins. Co.*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995), the supreme court characterized WIS. STAT. § 895.52(1)(g) as containing:

(1) a broad definition stating that a recreational activity is “any outdoor activity” undertaken for the purpose of exercise, relaxation or pleasure”; (2) a list of 28 specific activities denominated as recreational; and (3) a second broad definition, directing that a recreational activity can be “any other outdoor sport, game or educational activity.”

Id. at 629. The *Sievert* court, referring to the declaration of legislative purpose accompanying the statute, pointed out that the “list” contained in § 895.52(1)(g) was intended only to provide examples of recreational activity, and that the statute should apply not only to the listed activities, but also to activities “substantially similar” to them. *Id.* at 630. And the court pointed to the test set forth in *Linville v. City of Janesville*, 184 Wis. 2d 705, 516 N.W.2d 427 (1994), as the appropriate means of determining “whether an activity is substantially similar to the activities listed in the statute or whether an activity is undertaken in circumstances substantially similar to the circumstances of a recreational activity.” *Sievert* at 631.

¶5 The *Linville* test considers both the purpose and nature of the activity and the user’s intent; and it requires examining “all aspects” of the particular activity.

The intrinsic nature, purpose and consequence of the activity are relevant. While the injured person’s subjective assessment of the activity is relevant, it is not controlling. Thus, whether the injured person intended to recreate is not dispositive, but why he was on the property is pertinent.

Id. at 716 (internal citations omitted). According to *Linville*, such a test—which pays primary consideration to the nature of the activity, rather than the property-

user’s subjective intent—achieves two goals: first, it “comports with the focus of the statute[,] which is the user’s activity rather than the user’s state of mind,” and second, it “furthers the goal of the recreational immunity statute [by] encourag[ing] landowners to open their land by according them a degree of certainty regarding their potential liability for injuries occurring on their land.” *Id.*

¶6 In the *Minnesota Fire* action, the trial court ruled that Davenport and the other boys were not engaged in “recreational activities” within the meaning of the statute:

I can’t conceive myself how children playing with matches, which is an inherently dangerous activity for children, be construed as a recreational activity under any stretch of the imagination, even if courts are instructed to construe the ... definitions liberally in favor of the property owners. I believe to do so would [abrogate] the attractive nuisance law and ... there is nothing in the legislative intent to show that it was [its] intent to do that.

¶7 The court in the *Davenport* action reached a contrary conclusion, holding that the statute applied to Paper Recycling because the boys were engaged in a recreational activity. The court explained the reasons for its decision as follows:

The bottom line is that all of the children represented that they were playing among the ba[le]s of paper at [Paper Recycling’s] premises, making tunnels and forts from the ba[le]s. [Davenport’s] position seems to be that the activity at the moment of the incident is what should be considered. I don’t believe that that is what the cases say nor do I believe that that is logical under any circumstance. The over all activity has to be looked at and that clearly was recreational as defined by statute.

¶8 We review the grant or denial of a motion for summary judgment de novo, employing the same methodology as the trial court. *Green Spring Farms v.*

Kersten, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). The methodology is well-established and need not be repeated here. See *State Bank v. Elsen*, 128 Wis. 2d 508, 511-12, 383 N.W.2d 916 (Ct. App. 1986). In general, summary judgment is appropriate if the record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Since the material facts are not in dispute, whether WIS. STAT. § 895.52(2) applies is a question of law which we review independently. *Meyer v. School Dist. of Colby, Wausau Under.*, 221 Wis. 2d 513, 518, 585 N.W.2d 690 (Ct. App. 1998).

¶9 Applying the *Sievert/Linville* test, we are satisfied that David Davenport and his companions were not engaged in a recreational activity at the time he was killed in the fire because the boys’ “imaginary game-playing” in piles of baled papers in an industrial yard is not “substantially similar” to the activities enumerated in WIS. STAT. § 895.52(1)(g). We are aware of cases holding that some forms of childplay may be considered recreational activities—but all involved more traditional activities, such as playing on a swing, *Kruschke v. City of New Richmond*, 157 Wis. 2d 167, 458 N.W.2d 832 (Ct. App. 1990), playing “catch” with a football, *Taylor v. City of Appleton*, 147 Wis. 2d 644, 433 N.W.2d 293 (Ct. App. 1988), attending a fair, *Hall v. Turtle Lake Lions Club*, 146 Wis. 2d 486, 431 N.W.2d 696 (Ct. App. 1988), or exploring a fishing spot at a city pond, *Linville, supra*. All of these activities are well-known, traditional child’s play, and none is similar to entering a closed industrial yard to play among piles of commercial products.

¶10 We think the facts of this case are more akin to those in *Shannon v. Shannon*, 150 Wis. 2d 434, 442 N.W.2d 25 (1989), where a three-year-old girl wandered onto her neighbors’ property and nearly drowned. The supreme court,

with little discussion, found that the child’s random wanderings did not constitute recreational activity because they were not substantially similar to the activities listed in WIS. STAT. § 895.52(1)(g). The same is true here, where the three young boys were drawn onto an industrial site—a site neither open to, nor intended for, recreational use³—to play imaginary games among stacks of commercial products. The circuit court’s holding in the *Davenport* case (that the boys were engaged in a recreational activity within the meaning of the statute) emphasizes the boys’ subjective intent—playing in an imaginary system of “tunnels” and “forts” among the piles—to the point where that intent is given controlling weight in the analysis, making the test wholly subjective in nature. That is not only contrary to *Sievert*, *Linville*, and similar cases emphasizing a more objective analysis, but, as Joyce Davenport says in her brief, such an approach would result in near-automatic application of recreational immunity to “every situation in which children believe they [a]re playing.” And that would be contrary to not only the language and the spirit of the law, but its stated purpose.

¶11 Finally, we emphasize that the determinative factor in our decision is not that the boys were playing with matches—an inherently dangerous activity for any child. We agree with Paper Recycling that children can engage in inherently dangerous play, even when partaking in what would be a concededly recreational activity (e.g., throwing rocks while hiking, rough play while swimming, racing while motorcycling, attempting stunts on an all-terrain vehicle—or even lighting fires while camping), and we do not believe the incidental dangerous conduct

³ We note that whether a person using the property is a trespasser or non-trespasser is not relevant to an inquiry into application of the recreational immunity statute. *Verdoljak v. Mosinee Paper Corp.*, 200 Wis. 2d 624, 547 N.W.2d 602 (1996).

necessarily transforms an otherwise recreational activity to one that is not. Our decision is, as we explain, based on the nature and context of the boys' activity.

¶12 We affirm the order in No. 99-0327, and reverse the judgment dismissing the action in No. 99-0858, and remand for further proceedings.

By the Court.—Order affirmed; judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

Nos. **99-0327(D)**
99-0858(D)

¶13 DYKMAN, P.J. (*dissenting*). When the legislature passed WIS. STAT. § 895.52 (1997-98),⁴ it thought that it had immunized landowners from lawsuits by those injured while using other people's land. To be sure that courts would respect that policy decision, the legislature included an unusual provision in 1983 Wis. Act 418, which created § 895.52. Section 1 of 1983 Wis. Act 418 provides the legislative intent:

The legislature intends by this act to limit the liability of property owners toward others who use their property for recreational activities under circumstances in which the owner does not derive more than a minimal pecuniary benefit. While it is not possible to specify in a statute every activity which might constitute a recreational activity, this act provides examples of the kinds of activities that are meant to be included, and the legislature intends that, where substantially similar circumstances or activities exist, this legislation should be liberally construed in favor of property owners to protect them from liability. The act is intended to overrule any previous Wisconsin supreme court decisions interpreting section 29.68 of the statutes if the decision is more restrictive than or inconsistent with the provisions of this act.

¶14 Not only did the legislature intend to overrule previous opinions which permitted suits against landowners, the history of 1983 Wis. Act 418 shows that the legislature was serious about preventing lawsuits of this sort. A note from the Legislative Reference Bureau attorney who provided drafting services for the bill commented on the breadth of the proposed legislation: "Would seem to do

⁴ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

away with liability of anyone on whose land any recreational activity takes place.”

In a responding letter, an associate of a sponsor of the legislation replied:

Moreover, one of our main purposes in proposing this new landowner liability legislation was to make this law so certain that a landowner could be held liable only under clearly specified conditions. And in addition, this should do away with most nuisance lawsuits, which, even if won by a landowner, are bound to be expensive, time consuming, and mind-wrenching.

¶15 A second letter by the Legislative Reference Bureau attorney questioning the breadth of the proposed legislation noted: “It is our impression that you do not really want, for example, to abolish the doctrine of attractive nuisance” The associate of the sponsor replied: “It is very clear that this legislation is intended to supersede all other statutory and common law on the subject. This includes attractive nuisance. This is one of the main purposes of the proposed legislation.” Further in the response: “The courts have trampled upon the legislative intent of Wisconsin’s present landowner liability legislation.” At a public hearing on the bill, the Wisconsin Association of Manufacturers and Commerce registered in favor of the bill.

¶16 With a statute that comprehensively precludes landowner liability, an emphatic statement of legislative intent, and legislative history showing that the legislature adopted a policy strongly in favor of landowner immunity from suit, appellate courts have, with few exceptions, followed what the legislature required. *See Verdoljak v. Mosinee Paper Corp.*, 200 Wis. 2d 624, 638, 547 N.W.2d 602 (1996); *Linville v. City of Janesville*, 184 Wis. 2d 705, 714-17, 516 N.W.2d 427 (1994); *Ervin v. City of Kenosha*, 159 Wis. 2d 464, 472-78, 464 N.W.2d 654 (1991); *Schultz v. Grinnell Mut. Reinsurance Co.*, 229 Wis. 2d 513, 518-20, 600

N.W.2d 243 (Ct. App. 1999). Why then has the majority in the case decided today done otherwise?

¶17 I agree with the methodology used by the majority. In *Linville*, the supreme court adopted the test we used when deciding that case:

The test requires examination of all aspects of the activity. The intrinsic nature, purpose and consequence of the activity are relevant. While the injured person's subjective assessment of the activity is relevant, it is not controlling. Thus, whether the injured person intended to recreate is not dispositive, but why he was on the property is pertinent.

Linville, 184 Wis. 2d at 716 (quoting *Linville v. City of Janesville*, 174 Wis. 2d 571, 579-80, 497 N.W.2d 465 (Ct. App. 1993)).

¶18 In the case decided today, the intrinsic nature, purpose and consequence of the activity are easily determined. The boys went to Paper Recycling's premises to make forts and tunnels among the bales of paper and to play games. This sort of activity among eleven-year-old children is as common as dirt. Tragically, one of the boys brought matches, and disaster occurred. But the purpose of the activity was to play games, an activity that most people would call recreational. The intrinsic nature of fort and tunnel building, whether of snow or paper bales, is recreational—no-one earns a living doing those things. And the usual consequence of this sort of activity is most often a tired eleven-year-old child who would tell his or her parents that he or she had fun that day, a consequence most often associated with recreation. The subjective intent of the boys would have been to have fun, in other words, to recreate, and they were on Paper Recycling's property to do so, not to transact business with that corporation.

¶19 It would seem that the *Linville* test leads to the conclusion that Paper Recycling was immunized by WIS. STAT. § 895.52. Why then does the majority

conclude otherwise? There seem to be two reasons. First, the majority concludes that “imaginary game-playing” is not substantially similar to the activities enumerated in § 895.52(1)(g) because it is not a traditional activity such as playing on a swing.⁵ But “imaginary game-playing” does not define what the boys were doing. *Linville* teaches that we are to look at the “activity,” and that the boys’ subjective assessment of the activity is not controlling. I question whether even the boys’ subjective assessment of their activity was “imaginary game-playing.” In fact, they were playing in forts and tunnels. “Imaginary game-playing” is the subjective assessment of the majority, not the boys. If, despite the inclusive nature of § 895.52(1)(g) (“and any other outdoor sport, game or educational activity”), it is necessary to equate the boys activity with one of those listed in the statute, the boys’ tunneling is certainly similar to “exploring caves.” Even the Legislative Reference Bureau’s analysis of 1983 Wis. Act 418 notes: “The bill defines ‘recreational activity’ as any activity undertaken for the purpose of exercise, relaxation or pleasure.” Relaxation and pleasure define quite closely the boys’ initial activity on the day the tragedy occurred.

¶20 The second reason the majority gives for its conclusion is that the facts of this case are more akin to those in *Shannon v. Shannon*, 150 Wis. 2d 434, 448, 442 N.W.2d 25 (1989), where the supreme court concluded that the “random wanderings” of a three-year-old child did not constitute recreational activity because they were not substantially similar to the activities listed in WIS. STAT. § 895.52(1)(g). To do this, the majority must equate the random wanderings of a three-year-old with the tunnel and fort building of three eleven-year-old children.

⁵ The majority cites no authority for its conclusion that to be recreational, an activity must be traditional. I find none. It appears, then, that this conclusion is no more than an *ipse dixit*.

Just pointing out these facts shows that the two situations are in no way analogous. Using the *Linville* test, it becomes apparent that the intrinsic nature, purpose and consequences of a three-year-old child's random wanderings are probably unknowable. Asking a three-year-old for his or her subjective assessment of the activity would be an exercise in futility even if put in simple language. And most three-year-old children would respond that they were there because their mother or father brought them. Three eleven-year-old children, away from their parents' control, are in an entirely different situation. For me, *Shannon* and this case are both easily decided, but go in different directions.

¶21 Having examined the majority's reasons for coming to its decision, I find that neither is convincing. Were I writing for a majority, I would conclude that, with certain exceptions not present here, the legislature made clear its intent to immunize landowners when someone is injured while on the landowner's property without permission. Accordingly, I would reverse the order in No. 99-0327, affirm the judgment in No. 99-0858, and remand for further proceedings.

