COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2000

Cornelia G. Clark
Clerk of 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.

No. 99-2643-FT

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

DANIEL WILLECK, BY HIS FATHER AND NATURAL GUARDIAN, BRUCE WILLECK, CARRIE GROSS, AND DARCY K. GLUTH, F/K/A DARCY K. STAHL,

PLAINTIFFS,

V.

MROTEK, INC., DON MROTEK, HELEN MROTEK, AND JEFF CROWE,

DEFENDANTS-RESPONDENTS,

ABC INSURANCE COMPANY,

PLAINTIFF,

WESLEY FROEMING, WENDY FROEMING, AND GENERAL CASUALTY COMPANY OF WISCONSIN,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Wesley Froeming, Wendy Froeming, and General Casualty Company appeal a summary judgment that dismissed co-defendants Mrotek, Inc., Don Mrotek, Helen Mrotek, and Jeff Crowe (hereafter "Mroteks") from a personal injury lawsuit. The Mroteks variously own, operate and work at a horse-riding business. According to the complaint, the Froemings' dog barked at several of the Mroteks' horses on a riding trail. The startled horses ran and eventually threw their riders, who sustained injuries. The trial court made two rulings: (1) the Mroteks had statutory tort immunity under WIS. STAT. § 895.481 (1997-98);[1] and (2) the barking dog was a superceding cause of the riders' injuries. On appeal, the Froemings argue that the record fails to demonstrated that the Mroteks were entitled to immunity. They further contend that the trial court erred by granting summary judgment on the basis of superceding cause. We agree with the Froemings. We therefore reverse the summary judgment and remand the matter for further proceedings.[2]

STANDARD OF REVIEW

¶2 The trial court should grant summary judgment if there is no dispute of material fact and a party is entitled to judgment as a matter of law. *See* ***Powalka v. State Life Mut. Assur. Co.***, 53 Wis. 2d 513, 518, 192 N.W.2d 852 (1972). This case requires us to interpret WIS. STAT. § 895.481. Statutory

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] This is an expedited appeal under WIS. STAT. RULE 809.17.

interpretation presents a question of law that we determine de novo. ***Kettner v. Wausau Ins. Co.***, 191 Wis. 2d 723, 732, 530 N.W.2d 399 (Ct. App. 1995).

ANALYSIS

¶3 The Mroteks claim that they are entitled to immunity under WIS. STAT. § 895.481(2). Willeck contends that the Mroteks failed to satisfy the conditions under WIS. STAT. § 895.481(3)(b) necessary to entitle them to immunity. Subsections 895.481(2) and (3) state, in pertinent part:

> (2) Except as provided in subs. (3) and (6), a person, including an equine activity sponsor or an equine professional, is immune from civil liability for acts or omissions related to his or her participation in equine activities if a person participating in the equine activity is injured or killed as the result of an inherent risk of equine activities.
>
> (3) The immunity under sub. (2) does not apply if the person seeking immunity does any of the following:
>
> ….
>
> (b) Provides an equine to a person and fails to make a reasonable effort to determine the ability of the person to engage safely in an equine activity or to safely manage the particular equine provided based on the person's representations of his or her ability.

¶4 The Mroteks argue that under the statute, they are immune from liability unless the customer volunteers information about his or her riding ability. We disagree. The statute unambiguously requires that the equine activity sponsor affirmatively ascertain the rider's general riding ability and his or her ability to ride the particular horse provided. This responsibility includes eliciting representations about riding ability, before the sponsor may enjoy immunity. Put another way, before the sponsor can be immune from liability, he or she must first undertake the minimally burdensome task of making no more than the *reasonable* assessment

required by para. (3)(b). Since the sponsor receives immunity, he or she must satisfy the precondition. Nothing in the statute's language places any requirement for proaction on the customer. Finally, contrary, to the Mroteks' contention, the Willecks' interpretation does not "vitiate" the legislature's intent, but merely expresses it. The legislature did not intend to grant equine sponsors immunity. It intended to grant immunity on condition.

¶5 Here, the Mroteks offered no facts to show that they posed the necessary inquiries to the riders about their riding abilities. As a result, the Mroteks made an inadequate case for immunity at the summary judgment stage, and the trial court should have set the matter for trial.

¶6 The trial court also erroneously granted summary judgment on the issue of superceding cause. The trial court's ruling was premature. The issue does not arise until the factfinder finds that the defendant's negligence was a substantial factor in causing the injury. *See* ***Stewart v. Wulf***, 85 Wis. 2d 461, 475-76, 271 N.W.2d 79 (1978). Here, the trial court made no finding that the Mroteks' actions were a substantial factor in causing the riders' injuries. Until the trial court addresses that issue, for which it needs undisputed material facts on summary judgment, the superceding cause issue does not properly arise. Because the Mroteks made an insufficient case for summary judgment on the basis of a superceding cause, the parties must litigate the issue at trial.

By the Court.—Order reversed and cause remanded for proceedings consistent with this opinion.

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