COURT OF APPEALS
DECISION
DATED AND FILED

April 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.

Appeal No. 2004AP519 Cir. Ct. No. 2003CV1004

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

CARMELLA A. MARINO, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF EUGENE R. MARINO,

PLAINTIFF-APPELLANT,

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN, A DOMESTIC INSURANCE CORPORATION, AND TOMMY G. THOMPSON, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, A FEDERAL GOVERNMENT AGENCY,

PLAINTIFFS,

V.

CAPITOL INDEMNITY CORPORATION, A DOMESTIC INSURANCE CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Carmella Marino, individually and as special administrator of the estate of her late husband, Eugene Marino, appeals from a summary judgment dismissing claims against Capitol Indemnity Corporation, the insurer for the Racine Raiders semi-professional football team, arising from Eugene's death after he fell from the bleachers at a Raiders game. We conclude that there are no disputed material facts or reasonable inferences demonstrating that the Raiders exercised the requisite custody or control over the playing field, bleachers and guardrails to render the Raiders liable under the safe-place statute for Eugene's death. We affirm the circuit court.

¶2 The Raiders play their home games at Horlick Field in Racine. Horlick Field is owned by the City of Racine. Eugene Marino attended a Raiders game in August 2002 and, as he was leaving the game, he lost his balance and fell through the bleacher railing to the ground. He ultimately died from the injuries he sustained in the fall.

¶3 In her amended complaint against the Raiders' insurer,[1] Marino alleged that although the City owned Horlick Field, the City had an arrangement with the Raiders to permit the team to play its home games there. Marino alleged that the Raiders had control or custody of the field for purposes of the safe-place

[1] At the summary judgment hearing, Marino stated that recovery was not being sought against the City because of the $50,000 limit on recovery.

statute, WIS. STAT. § 101.11 (2001-02),[2] that the bleacher stands and/or guardrails were unsafe within the meaning of the statute, and that the Raiders had notice or knowledge that the bleacher stands and/or guardrails "were not as free from danger as the nature of the place would reasonably permit." Marino further alleged that the Raiders negligently failed to maintain the premises in a safe condition as required by the statute and that this failure was a substantial factor in Eugene Marino's death.

¶4 Capitol Indemnity moved for summary judgment because the Raiders lacked the requisite custody or control of the premises to be liable under the safe-place statute. Wisconsin's safe-place statute, WIS. STAT. § 101.11(1), requires that "every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe." "Owner" is defined in WIS. STAT. § 101.01(10) as any entity "having ownership, control or custody of any place of employment or public building …." It is undisputed that the City of Racine, not the Raiders, owns Horlick Field. Therefore, the liability of the Raiders and its insurer under the safe-place statute can "only rest upon the conclusion that it had 'control or custody' of the bleachers." ***Novak v. City of Delavan***, 31 Wis. 2d 200, 207, 143 N.W.2d 6 (1966).

¶5 The summary judgment record reveals the following. The written contract between the City and the Raiders governs only the right to sell concessions at Horlick Field. An oral agreement between the parties requires the Raiders to pay a

[2] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

fee for each home game. The agreement does not address maintenance or improvements to the field. The City regularly inspected, maintained and repaired the bleachers, and stationed Parks Department employees at the field to prepare the field and facilities for play. The Raiders generally practice at another field, but they use the locker room at Horlick Field on practice days. Although the Raiders have funded some improvements to the field, they forward complaints regarding the facilities to the City. The City makes the field available for numerous other public events not related to the Raiders.

¶6 The circuit court isolated the issue on summary judgment as being whether, as a matter of law, the Raiders had custody or control of the bleachers to make the Raiders an "owner" within the meaning of the safe-place statute. The circuit court, relying on ***Novak***, agreed with Capitol Indemnity that no genuine material factual issues exist on this question. The court concluded that the City maintained and repaired the grounds and the bleachers, and it was undisputed that the Raiders have never purported to inspect or maintain the bleachers. Because the Raiders did not have the requisite custody or control, they were not subject to safe-place liability as a matter of law. Marino appeals.

¶7 We review decisions on summary judgment by applying the same methodology as the circuit court. ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** at 496-97.

¶8 On appeal, Marino repeatedly argues that the circuit court should not have decided the case on summary judgment because questions of negligence and

custody or control under the safe-place statute must be decided at trial, not summary judgment. We disagree. Capitol Indemnity was not precluded from attempting to show that the material facts were not disputed and that no reasonable competing inferences could be drawn on the question of whether the Raiders exercised the requisite custody or control for safe-place liability. In the appropriate case, the question can be decided on summary judgment.

¶9 Marino argues that the bleacher guardrails are patently unsafe or fail to meet applicable safety codes. Marino puts the cart before the horse. We must first decide whether there are any factual disputes relating to the Raiders' custody and control such that the Raiders could be held liable for the allegedly unsafe condition of the bleacher guardrails.

¶10 Marino next argues that there are factual issues in the record which should have precluded summary judgment. As evidence of the Raiders' custody and control, Marino cites the Raiders' requests for maintenance and repair of the facility; the "Horlick Field-Home of the Raiders" sign; the Raiders' payment for a new scoreboard, improvement of the concession stand, electrical work and improvements in the office; and the Raiders' performance of duties specific to the use of the facility by a football team.

¶11 Capitol Indemnity counters that other teams use the field, the Raiders do not routinely practice there, the City maintains and repairs the facility and addresses maintenance and repair concerns brought to its attention by the Raiders, the City prepares the field for play, and the City provides employees to be present at the game and cleans up the facility after the game. The City regularly inspects and maintains the bleachers. The Raiders maintain the concession stand and supply the equipment and supplies for the concession stand.

¶12 The parties do not raise factual disputes. Rather, the inquiry is whether these activities are sufficient to amount to custody or control to render the Raiders an owner under the safe-place statute.

¶13 The circuit court relied upon ***Novak*** in determining the custody or control question. The Novaks attended a high school football game and sat in the bleachers. At some point, the footboard gave way, causing the Novaks to fall to the ground, injuring Mrs. Novak. The Novaks sued under the safe-place statute. ***Novak***, 31 Wis. 2d at 202-03. The City of Delavan owned the field; the school district paid a per game fee to use the field for its seven football games. ***Id.*** at 203. On game nights, the school district provided ticket sellers and takers and parking lot workers. Teachers safeguarded the field from students and prepared the lines on the field. The school district never inspected the bleachers or performed any repairs on them. ***Id.*** The City was responsible for preparing the field for the game and cleaning up after the game. City employees regularly inspected the bleachers before and after every game and performed all maintenance and repair on the bleachers. ***Id.*** at 204.

¶14 After a jury trial, the circuit court entered a judgment holding that the school district was an owner as a matter of law and had a duty to construct safe bleachers. ***Id.*** at 205. On appeal, our supreme court focused on whether the school district, which did not hold legal title to the field, had control or custody of the field such that it could be held liable under the safe-place statute. ***Id.*** at 207. The court concluded that the school district did not have control or custody of the bleachers such that the district was entitled to enter the premises to rebuild or repair the bleachers. ***Id.*** at 208. In so holding, the court relied upon the following undisputed facts: the school district used the field for seven football games and while its employees supervised the events, its employees "did not purport to inspect the bleachers or to perform any maintenance services with reference to them. When any

problems arose concerning the bleachers, it was the city's employees who attended to them." ***Id.***[3]

¶15 While the Raiders' use of Horlick Field is more multi-faceted than that of the school district in ***Novak***, we conclude that the Raiders still do not have the necessary custody or control to render the team an owner under the safe-place statute. The undisputed facts are that the City maintains the bleachers and responds to maintenance and repair issues brought to its attention by the Raiders. Like the school district, the Raiders pay a fee to use the field and do not maintain or repair the bleachers or guardrails. The Raiders are one of several users of the field and do not have any contractual obligation to maintain the field; their written contract is limited to concessions. The "Home of the Raiders" sign at the field and the Raiders' occasional payment for improvements to benefit the team do not confer custody or control. The Raiders' use of Horlick Field was not sufficient to confer safe-place liability.[4]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

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[3] We reject Marino's claim that ***Novak v. City of Delavan***, 31 Wis. 2d 200, 143 N.W.2d 6 (1966), stands for the proposition that a jury trial is required to resolve the question of whether the Raiders had custody or control under the safe-place statute. In ***Novak***, the question was whether the facts, regardless of how they were established, showed the requisite degree of custody and control. ***Novak*** does not stand for the proposition that a jury trial is necessary to resolve that question.

[4] To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978). ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").