

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 30, 2014

Diane M. Fremgen
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. 2012AP2288

Cir. Ct. No. 2010CV490

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STEPHEN R. SCHEUREN,

PLAINTIFF-APPELLANT,

**CRAFTED PLASTICS, INC. HEALTH PLAN, BY ITS THIRD PARTY
ADMINISTRATOR BLUE CROSS BLUE SHIELD OF WISCONSIN, D/B/A
ANTHEM BLUE CROSS AND BLUE SHIELD,**

INVOLUNTARY-PLAINTIFF,

V.

**GREEN BAY SKYDIVERS, INC., ABC INSURANCE COMPANY, DEF
INSURANCE COMPANY, GHI INSURANCE COMPANY AND GBSD, LTD.,**

DEFENDANTS,

**CHERYL A. VOGEL, D/B/A SMILING MOOSE SALOON & GRILL, AND
GERMANTOWN MUTUAL INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Manitowoc County:
GARY L. BENDIX, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Stephen Scheuren appeals a circuit court order granting summary judgment in favor of Germantown Mutual Insurance Company and Cheryl Vogel d/b/a Smiling Moose Saloon & Grill. Scheuren argues on appeal that his claim against the respondents is not barred by the recreational immunity statute, WIS. STAT. § 895.52 (2011-12).¹ For the reasons set forth below, we affirm the order of the circuit court.

BACKGROUND

¶2 Cheryl Vogel owns and operates the Smiling Moose Saloon & Grill, which puts on an annual charity event called Moosefest. At the 2009 event, there was a skydiving activity involving a raffle. Paper plates with numbers written on them were scattered throughout the zone in which the skydivers planned to land. Upon landing, each of the skydivers was to pick up a paper plate, thus determining the winners of the raffle.

¶3 Stephen Scheuren was a spectator of the skydiving event. He was injured when two skydivers, skydiving in tandem, landed in the landing zone, slid into the spectator area, and collided with Scheuren. Scheuren commenced this action in circuit court, naming several defendants. Scheuren obtained default judgment against one defendant and reached settlements with several others,

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

leaving only Vogel and her insurer, Germantown, as defendants. Vogel and Germantown filed a motion for summary judgment, arguing that Vogel was immune from liability under the recreational immunity statute, WIS. STAT. § 895.52. The circuit court granted the motion after a hearing, and Scheuren now appeals.

STANDARD OF REVIEW

¶4 This case involves the construction and interpretation of a statute and its application to the facts, which presents a question of law that we review de novo. *State v. Keith*, 175 Wis. 2d 75, 78, 498 N.W.2d 865 (Ct. App. 1993).

DISCUSSION

¶5 On appeal, Scheuren argues that Vogel is not entitled to immunity under WIS. STAT. § 895.52(2), which states as follows:

(2) No duty; immunity from liability. (a) Except as provided in subs. (3) to (6), no owner and no officer, employee 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.

¶6 The term “owner” is defined in WIS. STAT. § 895.52(1)(d)(1) as a person who “owns, leases or occupies the property.” A “recreational activity” is defined in § 895.52(g) as “any outdoor activity undertaken for the purpose of exercise, relaxation, or pleasure.” It is undisputed that Scheuren was engaged in a

recreational activity at the time of his injury and that Vogel was an owner of the land upon which the injury occurred. It is also undisputed that none of the exceptions in § 895.52 apply.

¶7 Scheuren argues on appeal that Vogel is not entitled to recreational immunity because Vogel's alleged negligent conduct was not directly related to the land or related to the condition or maintenance of the land. In support of his argument, Scheuren relies on *Kosky v. International Ass'n of Lions Clubs*, 210 Wis. 2d 463, 475, 565 N.W.2d 260 (Ct. App. 1997). In that case, Kosky had been injured while assisting the Lions Club with a fireworks display. *Kosky*, 210 Wis. 2d at 469. The Lions Club had permission from the town of Land O'Lakes to use the town's property for the fireworks display. *Id.* The court held that "recreational immunity does not attach to a landowner when an act of the landowner's officer, employee, or agent that is unrelated to the condition or maintenance of the land causes injury to a recreational land user." *Id.* at 475.

¶8 The respondents argue that *Kosky* is distinguishable from the present case, and we agree. In *Kosky*, the issue of whether Kosky was engaged in a recreational activity was disputed, whereas Scheuren concedes in the present case that he was engaged in a recreational activity. In addition, the court focused in *Kosky* on the activities that the Lions Club and its agents engaged in with respect to the supervision and training of workers like Kosky, concluding that those activities were unrelated to the condition or maintenance of the land. *Id.* at 476-77. Conversely, in the present case, Scheuren alleges that Vogel was negligent in setting up the skydivers' landing zone in proximity to the spectator area and in placing paper plates on the ground in the landing zone. We conclude that Vogel's alleged conduct is related to the condition and maintenance of the land, such that the recreational immunity statute applies to bar Scheuren's claims against her.

¶9 In arriving at our conclusion, we note that the legislature intended that the recreational immunity statute be liberally construed in favor of property owners. See *Miller ex rel. Fehring v. Wausau Underwriters Ins. Co.*, 2003 WI App 58, ¶11, 260 Wis. 2d 581, 659 N.W.2d 494 (citing 1983 Wis. Act 418, § 1).

¶10 The following cases illustrate this liberal construction in contexts that may be analogized to the instant case.

¶11 In *Held v. Ackerville Snowmobile Club, Inc.*, 2007 WI App 43, ¶10, 300 Wis. 2d 498, 730 N.W.2d 428, Held argued that an abandoned piece of equipment left on a trail, when the respondent snowmobile club had ample opportunity to retrieve it, was unrelated to the condition or maintenance of the land. This court rejected Held's argument, concluding that the acts alleged were related to the condition or maintenance of the snowmobile trail. *Held*, 300 Wis. 2d 498, ¶13. We stated, "[T]he statute does not distinguish between active and passive negligence in the recreational immunity law." *Id.*

¶12 Similarly, in *Milton v. Washburn Cnty.*, 2011 WI App 48, ¶6, 332 Wis. 2d 319, 797 N.W.2d 924, snowmobilers were injured when they collided with a closed gate on an access trail on county land. The plaintiffs argued that the county was negligent for closing the gate and that the trails club that groomed the trail was negligent for failing to ensure that the gate was kept open. *Id.* We rejected the plaintiffs' arguments and affirmed the circuit court's ruling that the town and the trails club were entitled to recreational immunity. *Id.*, ¶¶17-18.

¶13 We also applied the recreational immunity statute in *Sauer v. Reliance Insurance Co.*, 152 Wis. 2d 234, 448 N.W.2d 256 (Ct. App. 1989). In that case, a fisherman drowned after falling into a hole allegedly created during a bridge replacement project. *Sauer*, 152 Wis. 2d at 236-37. We rejected Sauer's

argument that the recreational immunity statute did not apply to bar his claim against the state because the condition was artificial. *Id.* at 241.

¶14 In the present case, the conditions created by placing paper plates in the skydivers' landing zone were also in a sense artificial. According to one of the tandem skydivers, the paper plates in the landing zone created a slippery surface. Vogel's acts of having paper plates placed in the landing zone and designating the spectator area in proximity to the landing zone are just as related to the condition and maintenance of the land as were the allegedly negligent actions in *Held*, *Milton*, and *Sauer*, if not more so. Accordingly, we conclude that Vogel and Germantown Mutual Insurance Company are entitled to recreational immunity.

¶15 Scheuren argues that granting Vogel and her insurer immunity does not serve the recreational immunity statute's purpose as intended by the legislature. We reject this argument because, as previously stated, the legislature intended the recreational immunity statute to be construed liberally. Our supreme court has stated, "Public policy is well-served by the current statute under which landowners are encouraged to allow public access to their property[.]" *Verdoljak v. Mosinee Paper Corp.*, 200 Wis. 2d 624, 635-36, 547 N.W.2d 602 (1996). We are satisfied that applying the recreational immunity statute in this case is not contrary to legislative intent.

By the Court.—Order affirmed.

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

