COURT OF APPEALS
DECISION
DATED AND FILED

September 30, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2826

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

RICHARD G. JANKOWSKI,

PLAINTIFF-APPELLANT,

V.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, JAMES P. HAUSMANN, SUSAN HAUSMANN, AND MIDWEST SECURITY INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

SNYDER, P.J. Richard G. Jankowski appeals from a summary judgment dismissing his negligence action, on the merits, against James P. and Susan Hausmann and their insurers. Jankowski suffered permanent injuries while he was using a boat lift on the Hausmanns' Pewaukee Lake property. He argues

that the trial court erred by finding that the recreational immunity statute, § 895.52, STATS., bars the action against the Hausmanns. The trial court alternatively found that Jankowski's negligence exceeded the Hausmanns' negligence as a matter of law, warranting dismissal under the comparative negligence statute, § 894.045, STATS. We conclude as a matter of law that Jankowski was more negligent than the Hausmanns and affirm the judgment.

FACTS

The Hausmanns' "track and dolly" boat lift was installed on their lake property prior to their 1974 purchase of the property and had not been in use since about 1990. The boat lift operates with an electric motor winch system which pulls a boat from the water on a set of metal tracks. The boat sits in a cradle on the metal tracks and is then pulled by a cable. Before the boat comes ashore, the boat's motor must be tilted out of the water and latched in order to avoid scraping the propeller blade on the ground.

James Hausmann gave Jankowski permission to use the boat lift for the entire 1995 summer season. In return, Jankowski agreed to make repairs to the lift and install the Hausmanns' pier. James provided Jankowski with some instructions on how to repair the boat lift, including how to fasten the metal tracks together and alter the cradle to fit Jankowski's boat. Jankowski had used the boat lift four times before the night of his injuries.

On the night of July 3, 1995, Jankowski was seriously injured while attempting to dock his motorboat using the Hausmanns' boat lift. At the time of his injuries, Jankowski was legally intoxicated with a blood alcohol level of 0.21% and the dock area was not lit by any outdoor lights. Nevertheless, Jankowski made three attempts to operate the boat lift to secure his boat. During the first two

attempts, the boat slipped out of the cradle as the winch began to pull the boat from the water. As Jankowski made a third attempt to secure the boat, the lift's metal tracks collapsed under the weight of the boat. Consequently, Jankowski, who had started the electric winch and then jumped into the back of the boat to pull the motor out of the water, was thrown over the back of the boat and hit his head on the lake bottom causing his injuries.

STANDARD OF REVIEW

The trial court granted the Hausmanns' summary judgment dismissal motion. We review summary judgments de novo. *See* ***Grosskopf Oil, Inc. v. Winter***, 156 Wis.2d 575, 581, 457 N.W.2d 514, 517 (Ct. App. 1990). The methodology used in reviewing a summary judgment has been stated many times and need not be repeated in detail here. *See* ***Kloes v. Eau Claire Cavalier Baseball Ass'n, Inc.***, 170 Wis.2d 77, 86, 487 N.W.2d 77, 83 (Ct App. 1992). Summary judgment is not appropriate where there is a disputed issue of material fact. *See* ***id.*** at 83, 487 N.W.2d at 80. Where the facts are undisputed, whether a plaintiff's negligence exceeds a defendant's negligence as a matter of law is a question of law that we review de novo. *See* ***id.*** at 86, 487 N.W.2d at 81. We must resolve all doubts about the existence of genuine and material factual issues or inferences in favor of the nonmoving party. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477 (1980). However, "[w]here the evidence of the plaintiff's negligence is so clear and the quantum so great, and where it appears that the negligence of the plaintiff is as a matter of law equal to or greater than that of the defendant, it is not only within the power of the court but it is the duty of the court to so hold." ***Johnson v. Grzadzielewski***, 159 Wis.2d 601, 608, 465 N.W.2d 503, 506 (Ct. App. 1990).

DISCUSSION

Jankowski contends that genuine issues of material fact remain in this case precluding summary judgment disposition. We disagree. First, the facts concerning Jankowski's comparative negligence are straightforward and undisputed.

While operating the boat lift, Jankowski had a duty to exercise ordinary care for his own safety. *See* ***id.*** A breach of this duty to exercise ordinary care will occur if a reasonable person under the circumstances would foresee an unreasonable risk or injury to a person by his or her action. *See* ***Miller v. Wal-Mart Stores, Inc.***, 219 Wis.2d 250, 261, 580 N.W.2d 233, 238 (1998).

Jankowski operated the boat lift by running from the boat to the electric winch onshore as the boat motor remained in gear. As the winch began reeling the boat ashore, Jankowski would then run to the front of the boat in order to turn off the boat motor and then to the back of the boat where he would lift the motor out of the water. At the time of the accident, Jankowski had twice failed to keep the boat on the cradle but continued to use the boat lift in the same fashion. When the metal tracks finally gave way on the third attempt, Jankowski was tossed into the water as he stooped over the back of the boat attempting to lift the motor from the water. It is undisputed that Jankowski attempted to use the boat lift in this precarious manner while in the dark and without the assistance of another person.

Jankowski was also legally intoxicated. Wisconsin courts have generally held that operating a motor vehicle while under the influence of intoxicants constitutes negligence per se. *See* ***State v. Lohmeier***, 196 Wis.2d 432, 442, 538 N.W.2d 821, 824 (Ct. App. 1995), *rev'd on other grounds*, 205 Wis.2d 183, 556 N.W.2d 90 (1996). Intoxicated boating itself is specifically proscribed

by law: "No person may engage in the operation of a motorboat while the person has an alcohol concentration of 0.1 or more." Section 30.681(1)(b), STATS. Accordingly, because Jankowski's intoxicated use of a motorboat was conduct that constituted a "violation of a safety statute whose purpose is to avoid or diminish the likelihood of the harm that resulted," ***Koback v. Crook***, 123 Wis.2d 259, 273, 366 N.W.2d 857, 864 (1985), it can be deemed negligence per se. While we do not consider Jankowski's intoxication determinative in this case, the undisputed evidence of his intoxication plays an important part in our analysis.

Jankowski's situation is analogous to the plaintiff's in ***Johnson***. In that case, Johnson sustained injuries while he was "express" riding an elevator with two college friends. *See* ***Johnson***, 159 Wis.2d at 606, 465 N.W.2d at 505. To "express" an elevator, Johnson would intentionally override the elevator's safety mechanisms, thereby causing the elevator car to descend rapidly. *See* ***id.*** At the time of the accident, Johnson had attempted to climb out of the elevator after it had stopped between two floors. *See* ***id.*** Johnson was seriously injured when the elevator started moving again as he lay part way in the elevator and part way on the second floor. *See* ***id.*** at 606-07, 465 N.W.2d at 505. The ***Johnson*** court concluded as a matter of law that Johnson was more than 50% negligent based on his intentional disregard for his own safety. *See* ***id.*** at 609, 465 N.W.2d at 506. Jankowski, like Johnson, intentionally disregarded his safety as he attempted to operate the boat lift while alone in the dark after having consumed a significant amount of alcohol.

Second, any negligence that may be attributed to the Hausmanns is also undisputed. Jankowski contends that James was negligent in maintaining the boat lift and in instructing Jankowski on how to modify the boat lift for Jankowski's use. Jankowski testified that he connected the rails leading into the

water and built the cradle to accommodate his boat per James' instructions. He further contends that James' lifetime experience with boats and his knowledge of boat lifts—in particular, his presumed knowledge that the boat lift was unsafe for Jankowski's motorboat—supports James' negligent conduct.

We conclude that even if the Hausmanns may be found negligent as Jankowski contends, Jankowski's negligent conduct exceeds the Hausmanns' negligence and Jankowski will be barred from recovery based on public policy considerations. *See* ***Coffey v. City of Milwaukee***, 74 Wis.2d 526, 542, 247 N.W.2d 132, 140 (1976) ("The application of public policy considerations is solely a function of the court … and does not in all cases require a full factual resolution of the cause of action by trial before policy factors will be applied by the court.") (quoted source omitted); ***Colla v. Mandella***, 1 Wis.2d 594, 599, 85 N.W.2d 345, 348 (1957). In particular, two public policy factors are applicable in this case: (1) the injury is too remote from the negligence, and (2) the injury is too wholly out of proportion to the culpability of the negligent tortfeasor. *See* ***Coffey***, 74 Wis.2d at 541, 247 N.W.2d at 140.

James' knowledge and experience with boats and boat lifts, including his familiarity with the size and weight of Jankowski's boat, are insignificant in a negligence comparison here because it is too remote from the fact that Jankowski operated the boat lift in a dangerous manner when he was injured. While Jankowski contends that the Hausmanns may be negligent because of a failure to maintain the boat lift in proper condition, he knew that the boat lift was in poor condition and specifically discussed with James the repairs that would be necessary, including repairs to the metal track and cradle, before it was usable to secure his boat. Jankowski was not only aware of the boat lift's initial faulty condition, he had made repairs and used the boat lift four times prior to the

accident. Thus, any negligence attributable to the Hausmanns for failing to keep the boat lift in proper condition is too remote from and too out of proportion to Jankowski's undisputed negligence in operating the boat lift.

Jankowski finally contends that the Hausmanns were negligent because of the inadequate instructions provided on how to repair the boat lift. While James gave Jankowski basic information on how to fasten the metal tracks together and how to restructure the cradle to fit Jankowski's boat, the adequacy of that information is of little consequence when measured against the overwhelming intentional disregard for his own safety that Jankowski displayed in operating the boat lift on the night he was injured.

CONCLUSION

In sum, while we agree with Jankowski that it is possible for a jury to find that the Hausmanns were negligent with respect to Jankowski's use of the boat lift, we conclude that no jury could reasonably find that the Hausmanns' negligence exceeded the negligence of Jankowski. Accordingly, we agree with

the trial court and hold as a matter of law that Jankowski was more negligent than the Hausmanns. Jankowski's action is barred under § 895.045, STATS.[1]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[1] Because we affirm the trial court on the issue of comparative negligence, we need not address the applicability of the recreational immunity statute. We are not required to address each issue raised by the parties and should decide the case on the narrowest possible grounds. *See* ***State v. Castillo***, 213 Wis.2d 488, 492, 570 N.W.2d 44, 46 (1997); *see also* ***Kramschuster v. Shawn E.***, 211 Wis.2d 699, 704, 565 N.W.2d 581, 583 (Ct. App. 1997) (affirming the trial court's order of summary judgment on the issue of negligence while declining to address other grounds asserted in support of the trial court's holding).