COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 1998

Marilyn L. Graves
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* § 808.10 and RULE 809.62, STATS.

No. 98-0322

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

TAYLOR VINCENT POWERS, BY HIS GUARDIAN AD LITEM, C.M. BYE, AND KENNETH AND DIANE POWERS,

PLAINTIFFS-APPELLANTS,

V.

TERRY DACHEL, KRISTEEN DACHEL, AND CITIZENS SECURITY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

GROUP HEALTH COOPERATIVE OF EAU CLAIRE,

DEFENDANT.

APPEAL from a judgment of the circuit court for Chippewa County: THOMAS J. SAZAMA, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

MYSE, J. Taylor Powers and his parents, Kenneth and Diane Powers, appeal the summary judgment dismissal of their negligence complaint against Terry and Kristeen Dachel and the Dachels' insurer, Citizens Security Mutual Insurance Company. The trial court dismissed this action after concluding that the Dachels, as landowners of the property where Taylor was injured, were immune under the Wisconsin Recreational Immunity Statute, § 895.52, STATS. The appellants contend that the trial court erred by entering summary judgment because the negligence complained of is unrelated to the condition or maintenance of the land which renders the recreational immunity statute inapplicable, and alternatively because there is a material factual dispute as to whether the social guest exception to the statute applies. Because we conclude that the alleged negligence is sufficiently related to the land to invoke the recreational immunity statute, and because the appellants have waived their argument concerning the social guest exception, the judgment is affirmed.

The material facts underlying this appeal are undisputed. Shannon Moeller was using a ladder to climb a tree on her mother's property.[1] As Shannon was reaching for a higher step she fell and landed on four-year-old Taylor Powers, who was playing near the ladder. The impact caused injuries to Taylor, including a broken leg.

According to depositions, all the neighborhood children would gather to play at the Dachel property. The Powers children, who lived across the street, would often join the Dachel children and other friends there. On occasion,

[1] Shannon Moeller is the daughter of Kristeen Dachel and the step-daughter of Terry Dachel. For the sake of convenience, all of Kristeen and Terry Dachel's children will be referred to jointly as the Dachel children in this opinion.

the Powers children first would ask permission or would be expressly invited by the Dachel children. On the day that Taylor was injured, however, no child could remember either having asked permission or having been invited. Further, Kristeen Dachel entered a sworn affidavit stating that she had not expressly invited Taylor that day, nor was she even aware that he was present until his injury.

The Dachels moved for summary judgment, claiming that they were immune from suit under the Wisconsin Recreational Immunity Statute.[2] In their response brief, the appellants argued that the statute was inapplicable first because the negligence was not sufficiently connected with the land, and second because Taylor was a social guest.[3] The appellants reasoned that Taylor was a social guest based on the fact that the Dachel children often invited the Powers children to play and that they were frequent playmates.

At the summary judgment motion hearing, the trial court discussed the applicability of the "social guest" exception. It noted that the appellants would

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[2] Section 895.52(2)(a), STATS., provides that, with certain exceptions

> no owner and no officer, employe 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).
>
> A duty to give warning of an unsafe condition, use or activity on the property.

[3] Under § 895.52(6)(d), STATS., there is an exception to the immunity statute when:

> The death or injury occurs on property owned by a private property owner to a social guest who has been expressly and individually invited by the private property owner for the specific occasion during which the death or injury occurs, if the death or injury occurs on any of the following:
> ….
> 2. Residential property.

have to demonstrate not only that the children were social guests, but also that they were expressly and individually invited by the private property owner for the specific occasion. In response, the appellants stated, "Your Honor, I think the facts don't establish that they were. … I would agree they are not a social guest of the Dachels." No further argument was advanced on this issue, and judgment ultimately was entered for the Dachels.

The appellants first contend that the trial court erred by applying the recreational immunity statute. The appellants argue that the Dachels' alleged negligent supervision is not related to the condition or maintenance of the land, and that under ***Linville v. City of Janesville***, 184 Wis.2d 705, 516 N.W.2d 427 (1994), the statute is therefore inapplicable.

We review the trial court's grant of summary judgment by applying the standards set forth in § 802.08(2), STATS., in the same manner as the trial court. ***Id***. at 714, 516 N.W.2d at 430. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id***.

The supreme court in ***Linville*** set forth the test to follow in deciding whether the recreational immunity statute applies in the present controversy. First, we must determine whether Taylor was engaged in a recreational activity at the time of his injury. *See* ***id***. at 716, 516 N.W.2d at 431. This requirement does not appear to be disputed. Taylor's injuries arose while he was playing on the Dachels' property. This activity appears to be sufficiently close to the examples of recreational activities provided for in § 895.52(1)(g), STATS., such as outdoor sports and outdoor games, to fall within the purview of the statute.

As the appellants argue, however, the fact that the user was engaged in recreational activities is not dispositive. *See* ***Linville***, 184 Wis.2d at 716-18, 516 N.W.2d at 431. "The legislature, in sec. 895.52, Stats., granted immunity to landowners with respect to the condition of the land *and to the landowners'* (or its employees') *actions with respect to that land.*" ***Id***. at 718, 516 N.W.2d at 431 (emphasis added). In other words, the landowners' actions must have some connection with their land before immunity attaches.

This court has previously addressed the issue of whether one who negligently supervises others on his or her property is immune from lawsuit under § 895.52, STATS. In ***Johnson v. City of Darlington***, 160 Wis.2d 418, 466 N.W.2d 233 (Ct. App. 1991), the court considered an argument that the City was negligent for failing to supervise three on-duty lifeguards. None of the lifeguards was at his or her assigned station, and all failed to save an eight-year-old drowning victim. ***Id***. at 421-22, 466 N.W.2d at 234. The ***Johnson*** court summarily concluded that the statutory language granting immunity from a "duty to keep the property safe for recreational activities," under § 895.52(2)(a)(1), STATS., plainly encompassed the supervision of properly trained lifeguards. ***Johnson***, 160 Wis.2d at 426, 466 N.W.2d at 236.

We acknowledge that the ***Johnson*** court appears to have left unresolved the question of whether a landowner may still be liable for negligent supervision if the landowner also failed to properly train its supervisors. We believe, however, that any opening created by ***Johnson*** was closed by the supreme court in ***Ervin v. City of Kenosha***, 159 Wis.2d 464, 464 N.W.2d 654 (1991). In ***Ervin***, the supreme court held that a landowner is immune from negligence for failing to properly train lifeguards. We therefore conclude that under both ***Johnson*** and ***Ervin*** a landowner is immune from any type of negligent supervision

occurring on his or her land when the injury and the landowner's acts of negligence are sufficiently connected with the land, barring the applicability of one or more statutory exceptions.

The appellants contend that Dachels' negligent supervision is not sufficiently connected with their land. We disagree. First, the complaint alleges that the Dachels were negligent for failing to supervise their own children while all the children were recreating on the Dachels' land. This shows a direct connection between the alleged negligence, the land, and the resulting injury. By way of contrast, we note that this is not a case where the alleged negligent supervision causes injury to a person who is neither recreating nor on the land in question.

Second, Taylor's injury grew out of the children's recreational activities. When Shannon fell on Taylor, she was using a ladder to climb a tree. This fact shows a direct connection between the actions of those who allegedly were improperly supervised and the resulting injury. This is therefore not a case where the landowner's child injures another while engaging in activity outside the scope of recreation. *See* ***Linville***, 184 Wis.2d at 721, 516 N.W.2d at 432 (holding that the City was not immune from liability for actions taken by its employees whose scope of employment was not connected with the recreational activity).

The appellants next argue that construing the recreational immunity statute to grant immunity to parents for negligent supervision lawsuits would lead to absurd results. The appellants contend that such a construction creates limitless immunity and encompasses even the most horrific acts. While we agree that a court should refrain from construing a statute in a way that leads to absurd results, ***Jelinek v. St. Paul Fire & Cas. Ins. Co.***, 182 Wis.2d 1, 12, 512 N.W.2d 764, 768

(1994), we are also bound by prior decisions of both the supreme court and the court of appeals. *See* ***Cook v. Cook***, 208 Wis.2d 166, 189, 560 N.W.2d 246, 256 (1997). Therefore, even if we agreed that absurd results could ensue from the statutory construction we apply in this case, we are not at liberty to construe the statute differently than the courts did in ***Johnson*** and ***Ervin***.

The appellants' final argument is that there is a disputed issue of material fact with respect to whether Taylor was a social guest. Relying on such facts as the numerous prior invitations extended to the Powers children, the frequency with which Taylor played with Shannon, and an apparent request made by the Powers children to their mother to play at the Dachels, the appellants claim that a jury could reasonably infer that an express invitation was made to the Powers children for the specific occasion on which Taylor was injured. Because this argument was explicitly abandoned at the trial court level, however, we consider it waived and will not address it on appeal.

By the Court.—Judgment affirmed.

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