COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2303 **Cir. Ct. No. 2014CV5672**

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

THE ESTATE OF CLAUDIA SHEPPARD-BROWN, BY ITS SPECIAL ADMINISTRATOR, CHARLES BROWN AND CHARLES BROWN,

PLAINTIFFS-APPELLANTS,

US DEPARTMENT OF HEALTH AND HUMAN SERVICES, MEDICARE PARTS A & B,

INVOLUNTARY PLAINTIFF,

MANAGED HEALTH SERVICES INSURANCE CORPORATION, D/B/A MANAGED HEALTH SERVICES WI,

INVOLUNTARY PLAINTIFF-SECOND MORTGAGEE,

V.

THE CITY OF MILWAUKEE, GARFIELD AVENUE FESTIVALS, INC. AND ANDRE LEE ELLIS,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Reversed and cause remanded.*

Before Kessler, Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. The Estate of Claudia Sheppard-Brown and Charles Brown (collectively, the Estate) appeal from orders that dismissed their personal injury lawsuit and granted summary judgment to Garfield Avenue Festivals, Inc. and Andre Lee Ellis (the Garfield parties) and to the City of Milwaukee. The circuit court determined that recreational immunity shielded the Garfield parties and the City from the Estate's claims. We conclude that issues of material fact exist as to whether Claudia Sheppard-Brown was engaged in recreational activity when she was injured. Accordingly, we reverse the orders and remand for further proceedings.

BACKGROUND

¶2 Sheppard-Brown tripped and fell into an uncovered utility access opening on a Milwaukee street where the Garfield Avenue Festival was underway. She and her husband, Brown, filed suit alleging that they suffered injuries and damages due to the negligence of the Festival's organizer, Garfield Avenue Festivals, Inc., its principal, Ellis, and the City. Sheppard-Brown thereafter passed away, and the Estate of Claudia Sheppard-Brown was substituted as a plaintiff.

¶3 The circuit court granted a default judgment in favor of the Estate and against the Garfield parties when the latter failed to timely answer the complaint. The Estate then filed a motion to establish damages and, based on the motion and attachments, the circuit court entered a $75,000 money judgment against the Garfield parties.

¶4 Meanwhile, the remaining defendant, the City, moved for summary judgment on the ground that the Estate's claims were barred by the recreational immunity statute, WIS. STAT. § 895.52 (2015-16).[1] The circuit court agreed with the City, concluding that a document the Estate filed to establish the amount of damages owed by the Garfield parties demonstrated that Sheppard-Brown was taking part in a recreational activity when she fell. That document, prepared by the Estate's counsel, began with a narrative that included the statement: "[o]n July 16, 2011, Claudia Sheppard-Brown, along with her husband Charles Brown and her grandchildren, went to the 14th Annual Garfield Avenue Blues, Jazz, Gospel and Arts Festival ('the Festival')." The circuit court determined that the phrase '"went to' indicates ... that she went to the [F]estival to participate." Accordingly, the circuit court granted summary judgment to the City.

¶5 Following the City's successful motion, the Garfield parties moved both to reopen the default judgment against them and to grant summary judgment in their favor on the ground that they, like the City, were entitled to the protections of the recreational immunity statute. The Estate filed a response opposing both of the Garfield parties' motions, and the Estate contemporaneously moved to reconsider the decision granting summary judgment to the City. The Estate supported all of its contentions with an affidavit from Brown in which he averred that he and Sheppard-Brown "were not at the Festival to partake in the Festival's music, cultural or other attractions.... [Sheppard-Brown and Brown] were walking the [couple's grandchildren] to drop them off with their other grandmother and

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

had no intention of staying at the Festival once the children were in their grandmother's care."

¶6 The circuit court declined to consider Brown's affidavit for any purpose, deeming the affidavit untimely. The circuit court therefore denied as unsupported the Estate's request for reconsideration of the order granting summary judgment to the City. The circuit court then turned to the motions for relief filed by the Garfield parties. Having rejected the Brown affidavit, the court determined that "there was not one iota of evidence indicating ... anything but [that Sheppard-Brown] was there to enjoy the [F]estival." Accordingly, the circuit court ruled that the Estate's claims against the Garfield parties, like the Estate's claims against the City, were barred by the recreational immunity statute. The circuit court therefore vacated the default judgment against the Garfield parties and granted them summary judgment.

¶7 The Estate moved to reconsider the grant of summary judgment in favor of the Garfield parties on the ground that the Estate had submitted the Brown affidavit within the deadline established for responding to the Garfield parties' summary judgment motion. The circuit court reviewed the submission but denied relief, stating that the affidavit was "basically disingenuous," that it did not affect the applicable analysis, and that the court continued to believe that Sheppard-Brown was engaged in recreational activity when she fell. The Estate appeals.

ANALYSIS

¶8 In this court, the Estate does not challenge the circuit court's decision to vacate the default judgment against the Garfield parties. The Estate

challenges only the decisions to grant summary judgment in favor of the City and the Garfield parties.[2]

¶9 "[A] circuit court's decision to grant summary judgment is a question of law that th[is] court reviews independently." ***Strasser v. Transtech Mobile Fleet Serv., Inc.***, 2000 WI 87, ¶28, 236 Wis. 2d 435, 613 N.W.2d 142. Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* WIS. STAT. § 802.08(2). A court considering a motion for summary judgment construes all facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *See* ***Thomas v. Mallett***, 2005 WI 129, ¶4, 285 Wis. 2d 236, 701 N.W.2d 523.

¶10 We review an order granting a motion for summary judgment using the same methodology as does the circuit court. *See* ***Strasser***, 236 Wis. 2d 435, ¶30. When, as in this case, no dispute exists that the plaintiff's complaint states a claim for relief, a court examines the moving party's submissions to determine whether that party made a *prima facie* case for summary judgment. *See* ***Dow Family, LLC v. PHH Mortg. Corp.***, 2013 WI App 114, ¶13, 350 Wis. 2d 411, 838 N.W.2d 119. If so, the court examines the opposing party's submissions to determine whether material facts are in dispute requiring a trial. *See* ***id.***

[2] The Garfield parties elected not to participate in this appeal. Accordingly, we could summarily reverse as to those respondents, *see* ***State ex rel. Blackdeer v. Township of Levis***, 176 Wis. 2d 252, 259-60, 500 N.W.2d 339 (Ct. App. 1993), while addressing the merits of the Estate's claims in regard to the City. Because the Estate seeks reversal as to all respondents on substantially similar grounds, however, we have reviewed the merits of the entirety of the issues presented to ensure an outcome fair to all parties.

¶11 The Estate argues that the summary judgment motions fail to show that Sheppard-Brown was engaged in recreational activity when she fell, and therefore the motions do not demonstrate that either the City or the Garfield parties are entitled to have the protections of the recreational immunity statute. Interpretation and application of the recreational immunity statute are also questions of law for our independent review. *See* ***Milton v. Washburn Cty.***, 2011 WI App 48, ¶7, 332 Wis. 2d 319, 797 N.W.2d 924.

¶12 WISCONSIN STAT. § 895.52 immunizes a property owner from liability for injury to a person engaged in recreational activity on the owner's property.[3] *See* ***Wilmet v. Liberty Mut. Ins. Co.***, 2017 WI App 16, ¶7, 374 Wis. 2d 413, 893 N.W.2d 251. As relevant here, "recreational activity" is statutorily defined as "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure." *See* WIS. STAT. § 895.52(1)(g). The determination of whether an activity is recreational within the meaning of § 895.52 involves numerous considerations. These include: '"the intrinsic nature of the activity, the purpose of the activity, the consequences of the activity, and the intent of the [property] user.'" *See* ***Rintelman v. Boys & Girls Clubs of Greater Milwaukee, Inc.***, 2005 WI App 246, ¶7, 288 Wis. 2d 394, 707 N.W.2d 897 (citation omitted). Further, "[a] court must consider the nature of the property, the nature of the owner's activity, and the reason the injured person is on the property." ***Auman v. School Dist.***, 2001 WI 125, ¶12, 248 Wis. 2d 548, 635 N.W.2d 762. The supreme court characterizes the inquiry as "intensely fact-driven." *See* ***id.***

[3] No party disputes that for purposes of WIS. STAT. § 895.52, the City and the Garfield parties are all "owners" of the street where Sheppard-Brown fell. *See* § 895.52(1)(d)1. (defining "owner").

¶13 We first examine whether the City was entitled to summary judgment. We limit our review to the materials before the circuit court when it granted the City's motion. We do so because the Estate does not challenge the circuit court's interrelated decisions refusing both to reconsider the order granting summary judgment to the City and to review the affidavit offered in support of the Estate's reconsideration request. We understand the absence of any such challenge as a concession, and we accept that concession. *See* ***State v. Dartez***, 2007 WI App 126, ¶6 n.3, 301 Wis. 2d 499, 731 N.W.2d 340 (we may treat as conceded a proposition that a party fails to dispute).

¶14 The question is thus whether the record—limited as described—shows as a matter of law that Sheppard-Brown was injured while engaged in recreational activity. As the Estate points out, the City did not offer any depositions, affidavits, or other evidentiary materials to support such a conclusion. The circuit court nonetheless ruled that the City was entitled to summary judgment in light of a document in which the Estate's counsel said Sheppard-Brown "went to the 14th Annual Garfield Avenue ... Festival." The circuit court determined that "'went to' indicates ... that she went to the [F]estival to participate." To support the circuit court's ruling on appeal, the City additionally directs this court's attention to medical records the Estate filed as proof of Sheppard-Brown's injuries. Those records, the City emphasizes, include statements by Sheppard-Brown's doctors that she was "attending" the Festival when she fell.

¶15 We agree with the Estate that its counsel's narrative statement that Sheppard-Brown "went to" the Festival is insufficient to support summary judgment in the City's favor, and we further agree that statements by her doctors that she was "attending" the Festival do not add any heft to the summary judgment claim. ***Rintelman*** is instructive. There, we considered whether a circuit court

properly concluded that a plaintiff's claims were barred by WIS. STAT. § 895.52 where the record showed that the plaintiff fell while walking at a camping facility hosting a school field trip. *See* ***Rintelman***, 288 Wis. 2d 394, ¶¶1, 4. In reversing a grant of summary judgment, we explained that "[a]lthough most if not all of the other persons attending [the event] may have been there at least in part to participate in recreational activities, the summary-judgment record is devoid of any evidence that that is why [the plaintiff] was there." ***Id.***, ¶17. ***Rintelman*** thus demonstrates that showing no more than that a plaintiff "went to" or "attended" an event does not reveal whether the plaintiff "participate[d] in any of the recreational activities." *See* ***id.*** Further, ***Rintelman*** holds that a property owner does not earn the protections of § 895.52 by pursuing summary judgment based only on a showing that an injured plaintiff "went to" or "attended" an event. To the contrary, "[m]ere presence on property suitable for recreational activity when a plaintiff is injured does not, *ipso facto*, make applicable [] § 895.52. Indeed, the statute *in haec verba* requires that the 'person ... enter [] the owner's property *to engage in a recreational activity*.'" ***Id.***, ¶18 (citations omitted, one set of brackets added).

¶16 The City asserts, however, that the words "went to" and "attended" permit only a single inference, specifically, that Sheppard-Brown was at the Festival for a recreational purpose. According to the City, alternative inferences are unreasonable because if Sheppard-Brown was at the Festival for some reason other than recreation, "then the phrase 'went to' the Festival with her grandchildren would make no sense based on normal usage of those words in the

English language."[4] (Punctuation as in original). We are not persuaded. In this court's experience, the words "went to" are a normal and acceptable preface to a statement about an activity that is not recreational in nature. There is nothing awkward or nonsensical in the remark that a woman "went to the Festival to drop off her grandchildren," or, for that matter, "went to the Festival to look for work," or "went to the Festival to ask for directions."

¶17 "As proponents of interposing WIS. STAT. § 895.52 as a barrier to [] liability for [the plaintiff's] injuries, the defendants had the burden to present in support of their motion for summary judgment evidence that would, if believed, sustain their burden at trial." ***Rintelman***, 288 Wis. 2d 394, ¶17. The City did not carry that burden here. The City showed at most that Sheppard-Brown was present at an event associated with recreational activity. As ***Rintelman*** explains, such a showing is insufficient to demonstrate that, as a matter of law, she was herself engaged in recreational activity. *See* ***id.***, ¶18. Summary judgment in the City's favor therefore was not appropriate.

¶18 As to the Garfield parties, they moved for summary judgment on the same grounds and for the same reasons as did the City. As we have explained, those grounds were inadequate. For the sake of completeness, we supplement our discussion to address the facts unique to the Garfield parties' motion.

¶19 To avoid summary judgment, the Estate filed an affidavit from Brown explaining why he and his wife were at the Festival: to drop off their grandchildren with another family member but not to participate in the Festival

[4] The City does not tell us where in the record we may find a statement by the Estate or its representative that Sheppard-Brown "went to the Festival with her grandchildren," and we have not independently located such a statement.

events. After initially declining to consider Brown's affidavit for any purpose, the circuit court reconsidered in so far as the affidavit responded to the Garfield parties' motion. On reconsideration however, the circuit court concluded that the averments in the affidavit were "disingenuous" and did not affect the circuit court's conclusions about why Sheppard-Brown was on the Festival grounds. The circuit court opined that Sheppard-Brown "was there to enjoy the [F]estival and with other guests, and that's why [she] went to [the Festival], not because [she was] going to pass through it."

¶20 On summary judgment, a court is not to find facts, weigh the credibility of witnesses, or choose between competing inferences. *See* ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991). Rather, a "court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment." ***Pluemer v. Pluemer***, 2009 WI App 170, ¶8, 322 Wis. 2d 138, 776 N.W.2d 261. Here, Brown's affidavit states a reason other than recreation that Sheppard-Brown was at the Festival. Accordingly, a factual issue exists as to whether recreational immunity shields the Garfield parties from liability for her injuries. *See* ***Rintelman***, 288 Wis. 2d 394, ¶18.

¶21 When the record reflects a genuine issue of material fact, summary judgment must be denied. ***Pluemer***, 322 Wis. 2d 138, ¶8. Accordingly, the circuit court should not have granted summary judgment here. For all the foregoing reasons, we reverse and remand for further proceedings.

By the Court.—Orders reversed and cause remanded for further proceedings.

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