COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2008

David R. Schanker
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. 2007AP45 **Cir. Ct. No. 2005CV145**

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

NELLY DE LA TRINIDAD, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ELIZABETH CALLEJAS-DE LA TRINIDAD, DECEASED, VICTOR LEONARDO AGUILAR-HERNANDEZ, LUZ MARIA TORRES-SANCHES, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF MARISOL AGUILAR-TORRES, DECEASED,

PLAINTIFFS-APPELLANTS,

V.

CAPITOL INDEMNITY CORPORATION, A WISCONSIN INSURANCE CORPORATION, HALTER WILDLIFE, INC., AND RACHEL PROKO,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Snyder, JJ.

¶1 BROWN, J. Elizabeth Callejas-De La Trinidad and Marisol Aguilar-Torres drowned in 2002 while at a picnic held on the property of Halter Wildlife, Inc, a hunting club in Pleasant Prairie. The Plaintiffs are the parents of the girls and the administrators of their estates, and the Defendants are Halter, its insurer, and the on-duty lifeguard. Defendants moved for summary judgment, claiming recreational immunity under WIS. STAT. § 895.52 (2005-06).[1] The circuit court granted the motion. The only issue before us is whether Halter is a "nonprofit organization" as that term is defined in § 895.52(1)(c).

¶2 Although Halter's articles of incorporation identify it as a nonprofit corporation, Plaintiffs argue that it is not for two reasons. First, Halter is organized under WIS. STAT. ch. 180 and has stockholders, which Plaintiffs argue is not legal for a nonprofit corporation. Second, picnics like the one at which the girls drowned generate revenue for the club that offsets members' dues. Plaintiffs argue that because the picnics' purpose was to benefit the members of the club, and because the picnics were unrelated to the club's purpose of offering hunting to its members, the club did not "conduct itself as a nonprofit" in charging for picnics on its grounds. We reject Plaintiffs' arguments. Halter may or may not be incorporated under the correct statute, but the question under the recreational immunity law is whether it is "organized or conducted for pecuniary profit." Halter plainly is not, a fact recognized by the IRS and the state. Plaintiffs' second argument simply misreads cases to create a requirement not in the statute. A nonprofit need not be a charity to claim recreational immunity, nor must income it earns be generated by activities related to its purpose. We affirm.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 Halter's restated articles of incorporation, filed in 1984, state that it is incorporated "pursuant to the authority and provisions of Chapter 180" as a "non-profit corporation which is to be formed not for private profit but exclusively for educational, benevolent, fraternal, social and athletic purposes within the meaning of Section 501(c)(7) of the Internal Revenue Code of 1954 and in this connection, to promote a hunt and sportsman club … but not for the pecuniary profit or financial gain of its directors or officers." The articles elsewhere state that "no part of the assets, income or profit of the corporation is distributable to, or inures to the benefit of, its officers or directors, except to the extent permitted under Wisconsin law." The articles authorize Halter to issue 44,000 shares at $1 par value.

¶4 Halter collects dues from its hunting members, but it supplements its budget by offering its grounds to be rented for picnicking and recreation during summer, the hunting off-season. Thus, any money earned from renting out the grounds has the effect of reducing dues for the hunting club's members.

¶5 WISCONSIN STAT. § 895.52 grants immunity to property owners for injury and death arising out of recreational use of their property. *See* § 895.52(2). Whether a property owner is entitled to immunity depends in part on what sort of entity the owner is. Of particular relevance to this case, immunity does not apply to a private property owner who collects money for the use of the property for the recreational activity during which the death or injury occurs, if during the year of the death or injury the owner has collected more that $2000 for the recreational use of the property. Sec. 895.52(6)(a). This exception to immunity does not apply, however, if the property owner is a nonprofit organization. *See* § 895.52(1)(e) ("private property owner" defined to exclude nonprofit organizations). Halter collected well over $2000 for the recreational use of its

property during 2002 and collected money for the picnic at which the girls drowned, so only if Halter is a "nonprofit organization" under the statute can it claim immunity.[2]

¶6 Plaintiffs first note that by the terms of its articles of incorporation, Halter is organized under WIS. STAT. ch. 180. Plaintiffs point out that ch. 180 defines "corporation" as "a corporation for profit," *see* § 180.0103(5), and argue that a nonprofit thus may not organize under ch. 180. They further argue that nonprofits are properly organized under WIS. STAT. ch. 181, titled "Nonstock Corporations." Plaintiffs rely on an opinion of the attorney general stating that "it is my opinion that a nonprofit stock corporation cannot be lawfully organized under ch. 180 subsequent to July 1, 1953." 47 Wis. Op. Att'y Gen. 78, 81 (1958). Attorney general opinions, while not precedent for the courts, may be considered persuasive authority. ***FAS, LLC v. Town of Bass Lake***, 2007 WI 73, ¶18, 301 Wis. 2d 321, 733 N.W.2d 287.

¶7 Defendants dispute that Halter's organization under WIS. STAT. ch. 180 is improper. They differ with Plaintiffs over the meaning of the attorney general opinion. They also point out that Halter received a certificate of incorporation from the state recognizing it as a "stock, not-for-profit corporation," that the IRS recognizes its nonprofit status, and that the state Department of Financial Institutions explicitly recognized it as a not-for-profit entity in 2005. They note that under WIS. STAT. § 180.0203(2), the state's acceptance of articles of incorporation "is conclusive proof that the corporation is incorporated under

[2] It is undisputed that the girls drowned while engaging in a recreational activity as that term is defined under the statute. *See* WIS. STAT. § 895.52(1)(g).

this chapter, except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation." This means, Defendants argue, that Halter's status as a nonprofit organization cannot be challenged by private plaintiffs.[3]

¶8 We conclude that we need not address whether a nonprofit corporation may lawfully have stockholders or organize under WIS. STAT. ch. 180, because whether Halter's form of organization is lawful or not is not the issue in this case. Rather, the issue is whether Halter is a "nonprofit organization" as the term is defined in WIS. STAT. § 895.52(1)(c). That definition is quite simple: a nonprofit organization is one that is "not organized or conducted for pecuniary profit." Plaintiffs' argument is essentially that because Halter is incorporated under a statutory chapter reserved for for-profit entities, it is "organized … for pecuniary profit." While not quite a play on words, the argument is tenuous. There is no reference in § 895.52(1)(c) to WIS. STAT. chapters 180 or 181, and there is no reason to think that the legislature defined "nonprofit" with reference to those chapters. Plaintiffs' argument depends on reading the phrase "organized for pecuniary profit" to mean "incorporated under chapter 180," rather than "designed or intended to make a profit." If the legislature had wished to define nonprofit this way, it would have been easy to do so, but it did not. Halter's articles of incorporation declare that it exists to provide hunting to its members, along with various other purposes, and explicitly forswear any financial profit for its members or anyone else. Plaintiffs do not allege that Halter has ever declared a profit or

[3] Defendants also point to WIS. STAT. § 891.20, making a certificate of organization "presumptive evidence … of the facts stated therein."

paid one to its members. We conclude that Halter is not "organized for pecuniary profit."

¶9 Plaintiffs next contend that Halter did not "conduct" itself as a nonprofit with respect to the picnics on its grounds. *See* WIS. STAT. § 895.52(1)(c). They contend that "Halter's members received pecuniary benefits in the form of lower membership fees because of funds generated from picnics that had nothing to do with Halter's nonprofit purpose (i.e., '[t]o promote a hunt and sportsman club…')." They claim that, under various cases, "an organization does not conduct itself as a nonprofit organization when its members receive pecuniary benefits from activities that have nothing to do with the purposes for which the nonprofit organization is formed."

¶10 Simply put, there is no support for this proposition in the cases Plaintiffs cite. They rely primarily on ***Szarzynski v. YMCA, Camp Minikani***, 184 Wis. 2d 875, 888, 517 N.W.2d 135 (1994). Specifically, they quote that case to say that "to the 'extent [a nonprofit organization] generates funds,' the money must be generated for the 'purposes … for which [the nonprofit organization] is formed.'" We first note that the quoted language comes from a discussion of the constitutionality of the recreational immunity statute, and is thus of questionable relevance here. But more importantly, while the quote as rendered by Plaintiffs could be read to say that any funds must be generated *from* activities in keeping with the organization's purpose, a fuller quotation belies this reading:

> The profit it seeks is for the purpose of passing a benefit on to those for whom the organization exists. Normally, the reason a private or governmental enterprise charges admission to spectators is for pecuniary profit. [A] nonprofit organization may profit monetarily from the same, but the profit is intended and must benefit the charitable purposes for which it was formed.

> There are good public policy reasons for limiting the liability of nonprofit organizations more so than governmental or private interests. The main reason is that a nonprofit organization does not normally have the kind of money the latter typically have to cover expenses. In any event, to the extent it generates funds, it is for the purposes-the charitable purposes-for which it is formed. [4]

Id. at 888. The point of the quotation is that the funds brought in by a nonprofit are *used for* the nonprofit's purposes (as they must be, since nonprofits may not distribute income)—not that they must be *generated from* activities related to the nonprofit's purpose. That is, of course, just what happened here—Halter used the money it generated from the picnics "to promote a hunt and sportsman club."

¶11 Plaintiffs also cite to ***Bethke v. Lauderdale of La Crosse, Inc.***, 2000 WI App 107, ¶¶3-4, 235 Wis. 2d 103, 612 N.W.2d 332, in which one of the plaintiffs was injured while crossing the common area maintained by the defendant condominium association. Plaintiffs note that in that case, there was a "nexus between the corporation's stated purpose and the activities that [plaintiff] claimed his injuries resulted from." That is true, but there is no suggestion in the opinion that this fact was relevant to the result. The rule Plaintiffs claim to find in ***Bethke*** and ***Szarzynski*** is simply not there.

¶12 In fact, ***Bethke*** serves well as a counterexample to Plaintiffs' final argument. Plaintiffs claim that the immunity in this case is contrary to the statute because "the tenor of [the recreational immunity statute] is to accord immunity to gratuitous uses for recreational purposes and to find liability for profit-making uses, whether the profit results from direct charges for the recreational activity, or

[4] We have since clarified that an organization need not have a "charitable purpose" to qualify as a nonprofit for recreational immunity. *See* ***Bethke v. Lauderdale of La Crosse, Inc.***, 2000 WI App 107, ¶¶17-18, 235 Wis. 2d 103, 612 N.W.2d 332

indirectly, from a pecuniary benefit accruing to the owner from the recreational activity." ***Douglas v. Dewey***, 154 Wis. 2d 451, 462, 453 N.W.2d 500 (Ct. App. 1990). Plaintiffs take this to mean that because the funds earned from picnics benefited Halter's members by lowering their dues, Halter is unworthy of the protection afforded nonprofits under the recreational immunity statute.

¶13 We first note that the issue in ***Douglas*** was whether swimming indirectly generated revenue for the defendant resort, despite the fact that the resort did not specifically charge for swimming. ***Id.*** at 456, 459. The resort was undisputedly a for-profit entity. *See* ***id.*** at 457. ***Douglas*** thus lends no support to Plaintiffs' claim that courts must police an organization's budget to see whether its *members* receive "indirect benefits."

¶14 But more importantly, as ***Bethke*** demonstrates, even nonpublic-service-oriented nonprofits receive nonprofit immunity under the statute. In ***Bethke***, (as in ***Szarzynski***) the court upheld the nonprofit recreational immunity statute against an equal protection challenge. *See* ***Szarzynski***, 184 Wis. 2d at 884-889; ***Bethke***, 235 Wis. 2d 103, ¶¶14-19. ***Bethke*** specifically rejected the argument that a nonprofit must to be charitable to claim the benefit of recreational immunity. ***Id.***, 235 Wis. 2d 103, ¶17. In ***Bethke***, as noted above, the defendant was a condominium association, ***id.***, ¶5, and its revenues were presumably used solely for the benefit of the few people who happened to live in the condominium development.

¶15 Thus it is the language of the statute, and not anyone's ideas of what is a worthy or unworthy cause, that controls whether an entity has nonprofit recreational immunity. In this case, though Halter's charter lists various laudable and public-spirited purposes, it is plain that the main reason for its existence is to

provide recreation to the select few who pay the expensive dues. This is not to say that Halter does not serve at least some of the objectives of the recreational immunity statute; as Halter noted at oral argument, the land it holds remains mostly in a natural state, when it might otherwise be developed. Further, as the existence of the picnics shows, it is not exclusively Halter's membership that benefits. But most importantly, Halter is not organized to distribute profits to anyone, and it does not do so. It is thus a nonprofit organization under the statute. As such, the fact that it collected money for the picnics it hosted does not remove it from the protection of the recreational immunity law.[5]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[5] Perhaps the law should be that nonprofits may retain their immunity only when the revenue they collect from recreational activities is spent to improve the recreational land they own—much like private property owners get to keep their immunity if they plow the proceeds back into property regardless of whether the aggregate yearly proceeds are over $2000. *See* WIS. STAT. § 895.52(6)(a)1.-4. But that question is for the legislature to debate, not the courts.