COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1013 **Cir. Ct. No. 2010CV207**

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

TASHA WALLER AND MAKAYLEE CLEGG, BY HER GUARDIAN AD LITEM, BENJAMIN C. WELCH,

PLAINTIFFS-APPELLANTS,

STATE OF WISCONSIN DEPARTMENT OF HEALTH SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

ZURICH INSURANCE COMPANY AND MENARD, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Langlade County: JAMES R. HABECK, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Tasha Waller and Makaylee Clegg (collectively, Waller) appeal a summary judgment in favor of Menard, Inc. and Zurich Insurance Company (collectively, Menard). The circuit court concluded Menard was entitled to recreational immunity under WIS. STAT. § 895.52 for injuries Clegg sustained from a fall off a swing set display in one of Menard's stores.[1] We conclude Clegg was engaged in a recreational activity and neither the profit nor social guest exceptions to the immunity statute apply. Accordingly, we affirm.

BACKGROUND

¶2 The pertinent facts are undisputed. On June 23, 2010, six-year-old Makaylee Clegg slipped off some monkey rings on a swing set display in Menard's store in Antigo, Wisconsin. She broke her wrist as she fell to the mulch below.

¶3 The swing set, which consisted of swings, slides, climbing devices, and the monkey rings, was located in Menard's garden center, a large steel structure partially protected from the elements by a roof and directly attached to the main store. The garden center was stocked with products for sale on shelves. The display was intended to make customers aware of Menard's products and generate sales. Menard offered for sale every piece of equipment displayed in the garden area. It did not charge a fee to use the swing set, nor did it require a purchase.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶4 Waller filed suit after the accident, raising a number of negligence claims. Menard responded by asserting it was immune from liability under Wisconsin's recreational immunity statute. Eventually, Menard moved for summary judgment on that ground.[2] The circuit court concluded that Clegg was engaged in a recreational activity, and that neither the social guest nor profit exceptions to the immunity statute applied. Accordingly, it granted Menard's motion for summary judgment.

DISCUSSION

¶5 We review a grant of summary judgment de novo, using the same methodology used by the circuit court. ***Crowbridge v. Village of Egg Harbor***, 179 Wis. 2d 565, 568, 508 N.W.2d 15 (Ct. App. 1993). We first review the complaint to determine whether a claim for relief has been stated, and then determine whether any factual disputes exist. ***Id.*** Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶6 Menard asserts the circuit court properly granted summary judgment because there is no genuine issue of material fact and it is entitled to judgment as a matter of law on its recreational immunity defense. "Immunity under WIS. STAT. § 895.52 is a defense to a negligence claim that might entitle a moving party to judgment." ***Leu v. Price Cnty. Snowmobile Trails Ass'n***, 2005 WI App 81, ¶6,

[2] Menard also sought summary judgment on the ground that Waller failed to establish the duty and breach elements of negligence. The circuit court did not address this argument, and we have no need to reach the issue because we conclude the circuit court properly granted summary judgment on the ground of recreational immunity. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate court should decide cases on the narrowest possible grounds).

280 Wis. 2d 765, 695 N.W.2d 889. Interpretation and application of the recreational immunity statute are questions of law. ***Milton v. Washburn Cnty.***, 2011 WI App 48, ¶7, 332 Wis. 2d 319, 797 N.W.2d 924, *review denied*, 2011 WI 86, 335 Wis. 2d 148, 803 N.W.2d 850.

¶7 Recreational immunity is conferred by WIS. STAT. § 895.52. As relevant here, the statute immunizes any owner of property for injury to "a person engaging in a recreational activity on the owner's property …." WIS. STAT. § 895.52(2)(b). Thus, for summary judgment purposes, Menard must show that there is no genuine issue of material fact as to whether Clegg engaged in a "recreational activity" on Menard's property.[3]

¶8 A "recreational activity" is the lynchpin of immunity under WIS. STAT. § 895.52. The statute contains a lengthy definition of "recreational activity." This definition is divided into three parts, as our supreme court explained in ***Sievert v. American Family Mutual Insurance Co.***, 190 Wis. 2d 623, 629, 528 N.W.2d 413 (1995):

> (1) a broad definition stating that a recreational activity is "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure," (2) a list of 28 specific activities denominated as recreational,[4] and (3) a second broad definition, directing that a recreational activity can be "any other outdoor sport, game or educational activity."

The first, and broadest, part of the definition encompasses "nearly every human activity that can be undertaken outdoors," and therefore must be "anchored to its

[3] There is no dispute that Menard is an "owner" of "property" within the meaning of WIS. STAT. § 895.52(1)(d) and (1)(f).

[4] The legislature has since added "sport shooting" to the list of specified activities, bringing the total number of enumerated activities to twenty-nine.

statutory context and construed in light of the statute's list of specific recreational activities as well as the second broad definition." ***Id.***

¶9 We conclude that playing on a swing set is a "recreational activity" that may entitle a property owner to immunity. This type of activity traditionally occurs in backyards, parks, and other outdoor settings for exercise or pleasure. *See* WIS. STAT. § 895.52(1)(g). In ***Kruschke v. City of New Richmond***, 157 Wis. 2d 167, 168, 171, 458 N.W.2d 832 (Ct. App. 1990), we concluded that "playground swinging is included within" § 895.52(1)(g)'s definition of a recreational activity. Playing on monkey rings, like swinging, is a form of "child's play" that can constitute a recreational activity. *See* ***Minnesota Fire & Cas. Ins. Co. v. Paper Recycling of La Crosse***, 2001 WI 64, ¶¶30-31, 244 Wis. 2d 290, 627 N.W.2d 527 (distinguishing such recreational child's play from mischievous child's play like crawling through stacks of baled paper while lighting matches and starting fires).

¶10 This conclusion is consistent with our legislature's expressed intention that "'where substantially similar circumstances or activities exist, this legislation should be liberally construed in favor of property owners to protect them from liability.'" ***Linville v. City of Janesville***, 184 Wis. 2d 705, 714-15, 516 N.W.2d 427 (1994) (quoting 1983 Wis. Act 418). Playing on a swing set is not included in the list of enumerated activities under WIS. STAT. § 895.52(1)(g). However, property owners are nonetheless entitled to immunity when the activity in question is "substantially similar" to an enumerated activity "or when the activity is undertaken in circumstances substantially similar to the circumstances of a recreational activity." ***Paper Recycling***, 244 Wis. 2d 290, ¶20 (alterations omitted).

¶11 To determine whether an activity is substantially similar to the activities or circumstances identified in WIS. STAT. § 895.52(1)(g), we apply what has become known as the ***Linville*** test. This is an objective test that examines all aspects of an activity, including its nature, purpose, and consequences. ***Linville***, 184 Wis. 2d at 713. Children use swing sets for play or exercise, and often for no reason other than to have fun. Thus, we consider Clegg's activity on the display to be essentially recreational in nature. Although our supreme court views such children's activities with disapproval for recreational immunity purposes when undertaken during the school day, *see* ***Auman v. School Dist. of Stanley-Boyd***, 2001 WI 125, ¶16, 248 Wis. 2d 548, 635 N.W.2d 762, "[w]ith limited exception, all outdoor activities that children engage in during their idle hours might constitute a recreational activity under § 895.52(1)(g)," ***id.***, ¶10 (citing ***Paper Recycling***, 244 Wis. 2d 290, ¶43 (Bradley, J., concurring)).

¶12 Waller contends the recreational immunity statute does not apply because the activity here took place indoors. In other words, she contends that an activity is not a "recreational activity" unless it occurs outside. Waller's interpretation of the statute places far greater importance on the nature of the property than is warranted by our case law. "As ***Linville*** teaches, the test to determine whether an activity is recreational focuses on the 'nature of the activity,' not the nature of the property." ***Sievert***, 190 Wis. 2d at 632 (quoting ***Linville***, 184 Wis. 2d at 716). Although the nature of the property is one factor among many that may be considered in determining whether an activity is

"substantially similar" to those listed in the statute, it is not dispositive. ***Paper Recycling***, 244 Wis. 2d 290, ¶24.[5]

¶13 We disagree with Waller's assertion that the swing set was located indoors. The area is partially protected from the elements but has one open side and is not temperature controlled. In this sense, the structure is similar to those identified by our supreme court as "other buildings that one *does* enter for purposes of engaging in outdoor recreational activity: open air park pavilions, observation towers, gazebos, or screen houses used for picnics, and so on."[6] ***Peterson v. Midwest Sec. Ins. Co.***, 2001 WI 131, ¶24 n.9, 248 Wis. 2d 567, 636 N.W.2d 727. While perhaps less common than the examples cited by ***Peterson***, the activity in this case similarly appears to be an outdoor activity that happened to take place within a structure or building.

¶14 In any event, the classification of property as "indoor" or "outdoor" is largely irrelevant. As ***Paper Recycling*** makes clear, the "nature of the property" inquiry measures the owner's intent and use of the property. *See* ***Paper Recycling***, 244 Wis. 2d 290, ¶25. We have not used it to dispense with immunity for

[5] In ***Minnesota Fire & Casualty Insurance Co. v. Paper Recycling of La Crosse***, 2001 WI 64, ¶24, 244 Wis. 2d 290, 627 N.W.2d 527, our supreme court stated that the nature of the property "can be a significant factor" in determining whether an activity is recreational, though it appears the court stopped short of requiring that this factor take precedence over any other. Indeed, our supreme court reiterated that the nature of the property is not dispositive, meaning the nature of the property provides insufficient justification, standing alone, to deem an activity recreational (or nonrecreational). *See id.* At bottom, the crucial factor in ***Paper Recycling*** was not the nature of the property, but the nature of the activity—mischievous boys lighting stacks of baled paper on fire.

[6] We presume that the supreme court did not by this statement intend to change the well-settled rule that a court must give primary consideration to "the nature and the purpose of the activity without being controlled by the property user's subjective intent." ***Linville v. City of Janesville***, 184 Wis. 2d 705, 716, 516 N.W.2d 427 (1994). This rule "comports with the focus of the statute which is the user's activity rather than the user's state of mind." ***Id.***

activities occurring within the confines of a structure. Further, the recreational immunity statute makes clear that an outdoor recreational activity may take place inside a building or structure. Were this not so, the legislature would have had no reason to include "real property *and buildings, structures and improvements thereon*" in WIS. STAT. § 895.52's definition of "property." *See* WIS. STAT. § 895.52(1)(f) (emphasis added).

¶15 In addition, the recreational immunity statute makes no distinction between indoor and outdoor activities in the enumerated list of recreational activities. As just one example, the statute cites "rock-climbing" as a "recreational activity," which means that, by definition, it must be an "outdoor activity undertaken for the purpose of exercise, relaxation or pleasure …." WIS. STAT. § 895.52(1)(g). The statute broadly immunizes property owners for injuries sustained by individuals while rock-climbing, regardless of whether the activity occurs outdoors on a natural rock surface or indoors on an artificial rock wall. In the past, our courts have never deemed recreational immunity to turn on whether a specifically enumerated activity actually occurred outdoors. *See* ***Peterson***, 248 Wis. 2d 567, ¶13 (undisputed that hunter was engaged in a recreational activity even though he was stationed on a deer stand); ***Doane v. Helenville Mut. Ins. Co.***, 216 Wis. 2d 345, 351, 575 N.W.2d 734 (Ct. App. 1998) (undisputed that ice fisherman was engaged in recreational activity even though injury occurred in portable ice shanty); *see also* ***Lee v. Elk Rod & Gun Club, Inc.***, 164 Wis. 2d 103, 109, 473 N.W.2d 581 (Ct. App. 1991) (gun club entitled to immunity if warming tent in which injury occurred was part of recreational activity of ice fishing, but case decided on other grounds). We therefore conclude Waller places too great an emphasis on the indoor/outdoor distinction.

¶16 Waller also suggests that extending recreational immunity in this case is inconsistent with the legislature's intent in enacting WIS. STAT. § 895.52. The legislative policy behind the statute "is to encourage property owners to open their lands for recreational activities by removing a property user's potential cause of action against a property owner's alleged negligence." ***Linville***, 184 Wis. 2d at 715. Waller observes that Menard "is not opening up new recreational opportunities" in this case, but is instead "setting up playground equipment based on [financial] motivations." However, the statute's purpose is achieved even if a landowner seeking immunity in a particular case has not actually opened lands for recreational use. ***Verdoljak v. Mosinee Paper Corp.***, 200 Wis. 2d 624, 635-36, 547 N.W.2d 602 (1996). This is because owners would be encouraged to close all of their lands if they lost "the certainty that a true immunity statute like § 895.52 provides." ***Id.*** at 635. "Public policy is well-served by the current statute under which landowners are encouraged to allow public access to their property and those who take advantage of this access by recreating cannot sue for ordinary negligence." ***Id.*** at 635-36. A liberal construction of the statute is necessary to ensure an effective limit on the liability of Wisconsin property owners. Glenn M. Salvo, Minnesota Fire & Casualty Insurance Co. v. Paper Recycling of La Crosse*: Why Property Owners Should Fear the Mischief of Boys at Play and Wisconsin Supreme Court Justices at Work*, 2002 WIS. L. REV. 999, 1005-06 (2002).

¶17 Waller's legislative purpose argument foreshadows her next argument, which concerns the "profit" exception to recreational immunity. This statutory exception "provides that immunity will not apply for property owners who profit from another's recreational use of their property." ***Urban v. Grasser***, 2001 WI 63, ¶36, 243 Wis. 2d 673, 627 N.W.2d 511. Specifically, the statute

removes immunity if two conditions are met: first, the owner collects money, goods or services in payment for the use of the owner's property for the recreational activity during which the injury occurs; and second, the aggregate value of all payments received by the owner for the use of his or her property for recreational activities during the year in which the injury occurs exceeds $2,000. WIS. STAT. § 895.52(6)(a); *see also* ***Douglas v. Dewey***, 154 Wis. 2d 451, 458-59, 453 N.W.2d 500 (Ct. App. 1990).

¶18 In arguing for application of the profit exception, Waller again sees the forest but misses the trees. Waller correctly notes that the tenor of WIS. STAT. § 895.52(6)(a) 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 indirectly, from a pecuniary benefit accruing to the owner from the recreational activity." ***Douglas***, 154 Wis. 2d at 462. But this legislative purpose is fulfilled by showing that the two conditions expressed in the statute have been met.

¶19 Although Waller correctly identifies the legislature's purpose in enacting WIS. STAT. § 895.52(6)(a), her brief recites no facts that would preclude summary judgment. Waller contends she has met her burden under the statute by showing Menard's profit motive for placing the playground equipment. But this is not enough. Although Menard no doubt installed the equipment to drum up sales, Waller has not produced any evidence that the business actually collected even one dollar as a result of the display. Pecuniary benefits must be actual and supported by evidence. *See* ***Urban***, 243 Wis. 2d 673, ¶37. Waller has failed to create a genuine issue of material fact regarding both elements of the profit exception.

¶20 Finally, Waller contends that a second exception to recreational immunity applies: the social guest exception. Under the social guest exception, "invited social guests, unlike permitted entrants, may proceed against a landowner under certain circumstances when they are injured while engaged in a recreational activity." ***Waters v. Pertzborn***, 2001 WI 62, ¶40, 243 Wis. 2d 703, 627 N.W.2d 497. This statutory exception applies if the 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 … injury occurs," if the injury occurs on property within 300 feet of a building or structure on land that is zoned as commercial.[7] WIS. STAT. § 895.52(6)(d)3.

¶21 Again Waller fails to address the exception's core requirements. The statute requires that there has been an express and individualized invitation to the social guest. We agree with Menard's analysis: Waller has neither cited any fact nor developed an argument that these requirements have been satisfied. Instead, Waller generically states that Clegg was expressly and individually invited onto Menard's property. This is nothing more than an unsupported conclusion and does not satisfy Waller's burden under the recreational immunity statute. *See* ***Acuity Mut. Ins. Co. v. Olivas***, 2007 WI 12, ¶44, 298 Wis. 2d 640, 726 N.W.2d 258 (party seeking benefit of statutory exception bears the burden of proving the exception applies). It also does not create a genuine issue of material fact regarding the exception's applicability. *See* WIS. STAT. § 802.08(2).

By the Court.—Judgment affirmed.

[7] There is no dispute that Menard's store is located within a general commercial district zoned for business uses.

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