COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2441 **Cir. Ct. No. 2010CV275**

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

JETT HOUSTON, A MINOR, APPEARING BY PATRICK STONEKING, GUARDIAN AD LITEM,

PLAINTIFF-APPELLANT,

V.

ALEX FREESE, A MINOR AND FARMINGTON MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

KYLE STELTER, GARY STELTER, KATHRYN STELTER AND STATE FARM FIRE AND CASUALTY COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Jett Houston appeals a summary judgment dismissing his negligence and recklessness claims against Alex Freese and Freese's insurer, Farmington Mutual Insurance Co.,[1] for injuries Houston suffered during a paintball game. The circuit court determined that paintball is a contact sport under WIS. STAT. § 895.525(4m)(a).[2] Therefore, Freese could only be liable if he was reckless, not merely negligent. Further, the court concluded Freese was not reckless based on undisputed facts. We affirm.

BACKGROUND

¶2 In July 2008, thirteen-year-old Jacob Stelter invited seven friends to his house to play paintball. Jacob's older brother, Kyle, was going to supervise the event. Kyle was an experienced paintball player and had constructed a paintball course with bunkers, pallets, and barricades in the woods near the family home.

¶3 Houston and Freese were among the friends invited. Both had played paintball before. Players wear special clothing and equipment, including a mask with reinforced goggles to protect the head, face, and eyes. Neither Houston nor Freese had their own paintball equipment, and they used the Stelters' protective masks, paintball guns, and paintballs.

¶4 Kyle instructed the boys how to play team elimination games. Once a player was hit, he was supposed to stop shooting, put his hands over his head,

[1] We refer to the parties collectively as Freese.

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

and walk out of the woods to wait for the game to finish. When all the players on one team had been hit, that particular game would end. Kyle made sure everyone wore safety masks, and he instructed the boys that they must not remove their masks even if they were exiting the field of play with their hands up.

¶5 The boys split into two teams and played a couple games before lunch. After finishing a game, the boys would change teams and mix players to keep the skill level between the teams even. During the first game, one of the boys called a time-out to allow a hit player to exit the playing field. The boys disagreed about whether calling a time-out was a good idea. Nevertheless, the boys sometimes called time-outs when a player had been hit. During these time-outs, some boys would wipe underneath their masks to remove sweat since it was hot outside.

¶6 After lunch, play resumed. Houston and Freese were on opposite teams. Houston's team had shot all of Freese's teammates and Freese was the last player on his team still in the game. All four players on Houston's team were still playing. Freese's teammate, Nate Orris, had just been shot and was exiting the woods. Freese was hiding behind a bunker.

¶7 At this time, Houston was behind a different bunker with his teammate, Michael Gaglio. The bunker was approximately forty to forty-five yards away from Freese's position. Houston looked at another bunker, which was parallel to his, and saw his other two teammates talking to Orris. All three had taken their masks off. Someone called a time-out. Houston and Gaglio took off their masks, and Houston stood up.

¶8 When Houston stood up, he heard a paintball gun fire and saw a paintball coming toward him. That shot missed. Houston tried to duck; however,

a second shot, immediately after the first, struck Houston in the eye. Five to thirty seconds elapsed between the calling of the time-out and the firing of the paintball that struck Houston.

¶9 Freese fired the paintball that struck Houston. He could see Houston and Gaglio in the bunker and noticed Gaglio had his mask on. Freese did not see any player with his mask off and had not heard anyone call a time-out. He was watching for movement, and when he saw someone pop up out of the bunker where Houston and Gaglio were hiding, Freese fired two shots in rapid succession.

¶10 After being hit, Houston's eye swelled and he could not see out of it. A doctor determined Houston had a detached retina.

¶11 Houston brought a negligence and recklessness suit against Freese and Freese's insurer.[3] Freese moved for summary judgment on the basis that he was immune from negligent liability under WIS. STAT. § 895.525(4m)(a), and that he was not reckless as a matter of law. The circuit court granted Freese's summary judgment motion and dismissed Houston's claims.

DISCUSSION

¶12 We review summary judgment decisions de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). The summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. A party

[3] He also brought a negligence claim against the Stelters and their insurer. The claim involving the Stelters is not before this court.

is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We view the materials in the light most favorable to the party opposing the motion. ***Lambrecht***, 241 Wis. 2d 804, ¶23.

I. Negligence Claim

¶13 A participant in a recreational activity is liable for negligent conduct unless the participant is engaged in a contact sport. *See* WIS. STAT. § 895.525(4m). In that case, a participant is only liable for reckless or intentional conduct. ***Id.*** Houston argues the paintball game was not a contact sport, so Freese is liable in negligence.

¶14 WISCONSIN STAT. § 895.525(4m)(a) provides:

> A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury.

¶15 Statutory interpretation begins with the language of the statute. ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning of the statute is plain, we ordinarily stop the inquiry and give the language its "common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Id.*** Further, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.***, ¶46.

¶16 Houston first argues WIS. STAT. § 895.525(4m)(a) is inapplicable because paintball does not involve "physical contact between persons." He contends § 895.525(4m)(a) requires "a coming together of the bodies" as opposed to physical contact made with objects or instruments. In support, he relies on ***Noffke v. Bakke***, 2009 WI 10, 315 Wis. 2d 350, 760 N.W.2d 156.

¶17 In ***Noffke***, our supreme court determined that cheerleading involved "physical contact between persons." ***Id.***, ¶18. The court first noted that "it is undeniable that cheerleaders touch one another, i.e., they have physical contact with one another during the course of their activity." ***Id.*** The court observed that THE AMERICAN HERITAGE DICTIONARY defined:

> "[C]ontact" as follows: "1.a. A coming together or touching, as of objects or surfaces. b. The state or condition of touching or of immediate proximity." … The same dictionary defines "physical" as follows: "1.a. Of or relating to the body as distinguished from the mind or spirit … b. Involving or characterized by vigorous bodily activity: a physical dance performance."

Id., ¶19 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 406, 1366 (3d ed. 1992)). The court concluded that cheerleading "involves a significant amount of contact among the participants that at times can produce a forceful interaction between the cheerleaders when one person is tossed high into the air and then caught by those same tossers." ***Id.***, ¶23.

¶18 Houston argues that ***Noffke*** imposed a body-to-body requirement in WIS. STAT. § 895.525(4m)(a). We disagree. Nothing in the court's decision imposes such a requirement. Moreover, nothing in § 895.525(4m)(a) requires that the physical contact between persons involve body-to-body contact.

¶19 In paintball, the physical contact between persons occurs when participants fire upon and strike each other with paintballs. The mere fact that the physical contact is made by an extension of the participant's body, i.e., his or her pulling of the trigger to fire paintballs at another participant, does not make WIS. STAT. § 895.525(4m)(a) inapplicable. Moreover, similar to dodge ball, a snowball fight, or a water balloon fight, the purpose of paintball is to physically strike opponents. It would be absurd to hold cheerleading is a contact sport but paintball is not. We conclude paintball involves "physical contact between persons."

¶20 Further, the legislative purpose of WIS. STAT. § 895.525 is to "decrease uncertainty regarding the legal responsibility for deaths or injuries that result from participation in recreational activities." WIS. STAT. § 895.525(1). To conclude that a recreational activity, in which participants fire at and strike each other with objects, does not fall under § 895.525(4m)(a) because the physical contact is not made in a certain manner creates uncertainty and undermines the purpose of the statute.

¶21 Houston next argues WIS. STAT. § 895.525(4m)(a) cannot apply to the paintball event because the event did not involve an "amateur team." Section 895.525(4m)(a) provides immunity only to participants in "a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues …."

¶22 Houston points out that, in ***Noffke***, the court observed that "team" is defined as "'[a] group organized to work together.'" ***Noffke***, 315 Wis. 2d 350, ¶17 (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1842 (3d ed. 1992)). He contends the group of boys in this case did not have the requisite level of organization or formality to qualify as a team. Specifically, he

argues there was no league, coach, referee, uniforms, or schedule, and he contends the "group of boys is not an 'amateur team' on par with a high school or college team."

¶23 However, WIS. STAT. § 895.525(4m)(a) does not require that a team must have a coach, a referee, uniforms, or a schedule. Further, although the statute "includ[es] … leagues," that provision does not mean the statute applies exclusively to leagues. *See* ***Wisconsin Citizens Concerned for Cranes & Doves v. DNR***, 2004 WI 40, ¶17 n.11, 270 Wis. 2d 318, 677 N.W.2d 612 ("Generally, the word 'includes' is to be given an expansive meaning, indicating that which follows is but a part of the whole."). We conclude the boys qualified as a "team" under WIS. STAT. § 895.525(4m)(a). They organized themselves into separate groups and each group worked together to try to win by eliminating players from the opposing group.

¶24 Houston nevertheless asserts that if the informal and unsupervised event falls within WIS. STAT. § 895.525(4m)(a), it renders the "amateur" requirement meaningless. We disagree. As Houston acknowledges, an amateur is someone who is not a professional. The "amateur" requirement in § 895.525(4m)(a) distinguishes that paragraph from § 895.525(4m)(b), which governs immunity for "professional teams." Here, the boys were not professional paintball players—they were amateurs, and therefore, fall under the ambit of § 895.525(4m)(a).

¶25 Because paintball involves "physical contact between persons" and the sport, in this case, involved amateur teams, we conclude WIS. STAT. § 895.525(4m)(a) immunizes Freese from Houston's negligence suit.

II. Recklessness Claim

¶26 Houston argues the court erred by concluding that Freese was not reckless. A participant who is reckless is not entitled to immunity under WIS. STAT. § 895.545(4m)(a). "Recklessness 'contemplates a conscious disregard of an unreasonable and substantial risk of serious bodily harm to another.'" ***Noffke***, 315 Wis. 2d 350, ¶36 (citations omitted). The pattern jury instruction provides:

> A participant acts recklessly if [his] conduct is in reckless disregard of the safety of another. It occurs where a participant engages in conduct under circumstances in which [he] knows or a reasonable person under the same circumstances would know that the conduct creates a high risk of physical harm to another and [he] proceeds in conscious disregard of or indifference to that risk. Conduct which creates a high risk of physical harm to another is substantially greater than negligent conduct. Mere inadvertence or lack of skill is not reckless conduct.

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¶27 Houston argues there is a genuine issue of material fact as to whether Freese recklessly shot him. Specifically, he asserts there is a factual dispute as to whether Freese should have been aware of the time-out and whether he could see players with masks off before he fired the paintball gun. Freese responds that, the facts show, at most, "mere inadvertence, lack of skillfulness or failure to take precautions," and they do not establish a conscious disregard of an unreasonable and substantial risk of serious bodily harm to another.

¶28 In ***Noffke***, our supreme court determined a cheerleader, who was supposed to, but failed to, catch a fellow cheerleader was not reckless as a matter of law. ***Noffke***, 315 Wis. 2d 350, ¶¶35, 37. The court observed that the cheerleader moved to the front of the stunt instead of to the back and, when people yelled for him to move to the back, he froze and was not in position to catch the

cheerleader when she fell. ***Id.***, ¶37. The court reasoned that nothing in the record showed the defendant consciously disregarded the risk of harm. ***Id.***

¶29 As in ***Noffke***, the record in this case does not support a claim that Freese was reckless. The facts show that while hiding behind a bunker, someone near Houston called a time-out and Houston took off his mask and stood up. Freese, the only player left on his team, was hiding behind a different bunker that was forty to forty-five yards away and immediately fired two shots when Houston exposed himself. The participants were not supposed to remove their masks in the playing field. Freese testified he never heard anyone call time-out. One of Houston's teammates testified that, given Freese's distance, he very well could have not heard the call for the time-out. Between five and thirty seconds elapsed from when the time-out was called and when Houston stood up and was struck. Freese testified he never saw any players with their masks off. Nothing in the record indicates that Freese consciously disregarded the risk of serious bodily harm to Houston when he fired the two shots.

By the Court.—Judgment affirmed.

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