COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 15, 1995

No. 95-0544

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

BETTY PICHELMAN, WILLIAM PICHELMAN, AND JEROME FOODS,

Plaintiffs-Appellants,

v.

ARNOLD BARFKNECHT, SYLVIA BARFKNECHT, AND ALDEN AND BLACK BROOK MUTUAL INSURANCE COMPANY,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed.*

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

LaROCQUE, J. Betty and William Pichelman appeal a summary judgment dismissing their claim that arose when "Babe," a pet raccoon, bit Betty's finger as she was delivering groceries to the home of her friend, Sylvia Barfknecht. The circuit court ruled Sylvia and her husband Arnold immune

from liability under § 895.52, STATS.,[1] as interpreted by our supreme court in ***Hudson v. Janesville Conservation Club***, 168 Wis.2d 436, 484 N.W.2d 132 (1992). ***Hudson*** held that a captive wild animal is still within the immunity granted to property owners by § 895.52(2)(b), providing that "no owner ... is liable ... for any injury resulting from an attack by a wild animal." ***Id***. at 443-44, 484 N.W.2d at 135. Because the Barfknechts' raccoon is a wild animal under the statute as interpreted in ***Hudson***, they are immune from liability and any negligence on their part is irrelevant. We therefore affirm the summary judgment dismissing the Pichelmans' lawsuit.

Our review of summary judgment is de novo, that is, without deference to the circuit court's decision. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We follow the same methodology as the circuit court. ***Id***.

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[1] The relevant portion of the recreational immunity statute reads as follows:

(2) No duty; immunity from liability. (a) Except as provided in subs. (3) to (6), 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).

3. A duty to give warning of an unsafe condition, use or activity on the property.

(b) Except as provided in subs. (3) to (6), no owner and no officer, employe or agent of an owner is liable for any injury to, or any injury caused by, a person engaging in a recreational activity on the owner's property or for any injury resulting from an attack by a wild animal.

....

(6) Liability; private property. Subsection (2) does not limit the liability of a private property owner or of an employe or agent of a private property owner whose property is used for a recreational activity if any of the following conditions exist:

....

(d) 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 any of the following:

....

2. Residential property.

Hudson pointedly stated:

> In addition, although the question is not presented here, sec. 895.52(2)(b) would also provide a property owner with immunity from liability to anyone injured by a person engaging in a recreational activity, regardless of whether the injured person was also engaged in a recreational activity at the time of the injury. If the legislature had intended that all injured persons be engaged in recreational activity at the time of receiving their injury before immunity would be provided property owners by sec. 895.52, the legislature could have done so.

Id. at 444, 484 N.W.2d at 135.[2]

The two-member dissent in ***Hudson*** underscores the fact that the majority meant what it said. The only dispute among the justices was whether animals kept in captivity are "wild animals." Justice Bablitch wrote:

> I have no quarrel with the majority's conclusion that the injured person does not have to be engaged in "recreational activity" in order for a property owner to be immune from liability for injury caused by a wild animal. ... The majority shields the property owner from a duty of reasonable care by reading the words "in captivity" into the immunity statute .... Given the purpose of the statute, a captive animal should not be considered "wild" simply because other members of its species run free and are perceived as being unpredictable at times ....

[2] Presumably, the question of recreational immunity was not presented in ***Hudson v. Janesville Conservation Club***, 168 Wis.2d 436, 484 N.W.2d 132 (1992), because the plaintiff was helping his uncle perform his chores as caretaker of a deer park for whom he was employed. Similarly, it is undisputed in this case that Betty was not engaged in recreational immunity when she delivered groceries at her friend's request.

Id. at 451, 484 N.W.2d at 138.[3]

The Barfknechts and their insurer concede that their raccoon was a "wild animal" according to ***Hudson***: "The fact that Babe was something of a pet does not take him out of the category of ferae naturae. A normally wild animal, even when held in captivity, is still a wild animal within the meaning of the statute."

Hudson interpreted § 895.52(2)(b), STATS., which provides in relevant part:

Recreational activities; limitation of property owners' liability. ...

....

(2) No duty; immunity from liability. ...

....

(b) Except as provided in subs. (3) to (6), no owner and no officer, employe or agent of an owner is liable for any injury to, or any injury caused by, a person engaging in a recreational activity on the owner's property *or for any injury resulting from an attack by a wild animal.* (Emphasis added.)

Hudson held 5-2 that the statute "unambiguously insulates property owners from liability 'for any injury resulting from an attack by a wild animal.'" ***Id.*** at 444, 484 N.W.2d at 135. The court further stated that a person need not be engaged in a recreational activity when injured by a wild animal in order for the property owner to be immune from liability. ***Id.***

In this case, the Pichelmans attempt to distinguish ***Hudson*** on grounds that the court had no occasion to apply the exceptions to immunity found in subs. (3) to (6) of § 895.52, STATS., and seek to apply subs. (6)(d)2 to the facts. The latter subsection excepts from immunity injuries on private residential property to a social guest who has been expressly and individually

[3] Because ***Hudson v. Janesville Conservation Club***, 168 Wis.2d 436, 484 N.W.2d 132 (1992), extends immunity to property owners, whether Betty was contributorily negligent when she allegedly twice shook the bag at Babe before he bit her is not relevant.

invited by the owner for the specific occasion during which the injury occurs.[4] In order to qualify for this "social guest" exception to immunity, the Pichelmans contend that the exceptions apply to all property owners, without the necessity that the injured party engage in recreational activity. We disagree.

The introductory language to subs. (6) setting forth the exceptions to immunity provides in plain language:

> Liability; private property. Subsection (2) does not limit the liability of a private property owner or of an employe or agent of a private property owner *whose property is used for a recreational activity* if any of the following conditions exist[.]

The Pichelmans would interpret the phrase "whose property is used for a recreational activity" to apply only to the employe or agent of a property owner and not to the private property owner individually. This is an untenable construction of the statute. Under their interpretation, a property owner who invited a social guest to the premises under para. (d), would lose immunity even where the injured party was engaged in no recreational immunity; the employes or agents of that same property owner would be liable under the same facts. Absent any reasonable explanation, we decline to interpret the legislative intent to hold employes and agents liable where their employer or principals are immune.

Further, such an interpretation is contrary to the statement in ***Hudson*** that the result would be the same "regardless of whether the injured party was also engaged in recreational activity at the time of the injury." ***Id.*** at 444, 484 N.W.2d at 135.

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[4] Because we reject the Pichelmans interpretation of the statute, we need not address the potential factual dispute whether Betty was a social guest when she came upon the premises. Apparently she was delivering milk and cookies purchased pursuant to a "share" program whereby the members obtained groceries at a reduced price. Sylvia was a member and Betty worked at the store from which the groceries were purchased. The principals, however, were also social friends.

Because the Pichelmans' reading of the exception language is contrary to its plain meaning, and because ***Hudson*** declared that immunity applies to all owners where the injury is the result of an injury caused by a wild animal, including those held in captivity, the circuit court properly granted summary judgment.

We recognize that the statute holding a property owner who keeps a wild animal in captivity immune may grant greater protection to that person than is accorded the keeper of a domestic animal. We note, however, that there is no constitutional attack upon the statute as interpreted in ***Hudson***. If, as the Pichelmans argue, it is bad policy to render a negligent keeper of a wild animal immune from negligence for injuries caused a social guest not engaged in recreational activity, we respectfully suggest the only remedy is a change in legislation or the holding in ***Hudson***, a decision binding upon this court.[5]

By the Court. – Judgment affirmed.

Not recommended for publication in the official reports.

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[5] The Pichelmans make reference to ***Ollhoff v. Peck***, 177 Wis.2d 719, 503 N.W.2d 323 (Ct. App. 1993). That case upheld a jury verdict finding a plaintiff 90% causally negligent for injuries he suffered when he reached into a pond to pet a musky at a petting zoo and was bitten. ***Id.*** at 722, 503 N.W.2d at 324. ***Peck*** did not address ***Hudson v. Janesville Conservation Club***, 168 Wis.2d 436, 484 N.W.2d 132 (1992), and makes no mention of the provisions of § 895.52, STATS. Presumably the issue was not raised by the parties in the trial court or on appeal. Further, if the issue had been raised, it would appear that the musky was a wild animal in captivity and, according to ***Hudson***, the result would have been the same.

We noted in ***Peck*** the treatises and foreign state case law that indicates that the possessors of wild animals are strictly liable for physical harm caused by the animals. ***Id.*** at 723, 503 N.W.2d at 324.