COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 19, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0670-FT

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

CHARLENE M. POTKAY,

Plaintiff-Appellant,

v.

CITY OF MARINETTE, a municipal corporation, and WAUSAU INSURANCE COMPANIES, a corporation,

Defendants-Respondents.

MARINETTE JAYCEES, INC., a nonprofit corporation, SCOTTSDALE INSURANCE, a corporation, and ANSUL FIRE PROTECTION MEDICAL AND DENTAL PLAN,

Defendants.

APPEAL from a judgment of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Affirmed.*

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

PER CURIAM. Charlene Potkay appeals a summary judgment dismissing her personal injury claims against the City of Marinette and its insurer, Wausau Insurance Companies.[1] Potkay was injured in a city park while attending a Jaycees-sponsored outdoor event that included a concert. The trial court determined that as a matter of law, the City was immune from suit under the recreational immunity statute, § 895.52, STATS.

Potkay argues that the trial court erroneously applied the recreational immunity statute because there are disputed issues of material fact bearing on the issue whether the purpose of the event was commercial, not recreational, in nature. Because the undisputed facts lead only to one reasonable inference that the event was recreational in nature, and because the claim of negligence arose out of the City's function as landowner, we affirm.[2]

The record describes the following facts.[3] Charlene was injured at an event called "Celebrate '91" at a city park in Marinette. The Jaycees worked with the City to organize the event. From revenue the Jaycees charged for general admission, the Jaycees reimbursed the City for City police officers whose duties included crowd control. The Jaycees charged an $8 admission fee.

The event included carnival entertainment, puppet shows, veterans recognition, food booths, a parade, a recreational run, water ball competition, fireworks and sky divers. A principal attraction was music groups hired to perform concerts. In 1991, Gary Lewis and the Playboys were performing, and Potkay was waiting in a large crowd to see them. The concert area was cordoned off by yellow police tape stretched across a fence opening.

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[1] This is an expedited appeal under RULE 809.17, STATS.

[2] Potkay states that the Jaycees did not raise immunity as an affirmative defense in its answer, yet used it as a basis for its summary judgment motion. Potkay does not develop this statement as an issue on appeal and therefore we do not address it. *See* ***State v. Gulrud,*** 140 Wis.2d 721, 730, 412 N.W.2d 139, 142 (Ct. App. 1987). Potkay also argues that the trial court erroneously failed to examine the surrounding facts and circumstances and recite its findings as to the alleged recreational nature of the event. Because no findings of fact are to be made on summary judgment, the trial court did not err when it failed to articulate its findings. ***State Bank v. Elsen***, 128 Wis.2d 508, 515-16, 383 N.W.2d 916, 919 (Ct. App. 1986).

[3] The City does not dispute these facts for purposes of summary judgment.

When a Jaycees member gave the signal that the concert was to start, two uniformed City police officers told the crowd to break through the police tape. During the rush to enter, Potkay became entangled in the tape, was pushed and injured.

Potkay settled her claims with the Jaycees and brought this action against the City. The City brought a motion for summary judgment, arguing that it was entitled to immunity under the recreational immunity statute, § 895.52, STATS. The trial court agreed and entered summary judgment dismissing Potkay's complaint.

In enacting § 895.52, STATS., the legislature "granted immunity to landowners with respect to the condition of the land and to the landowners' (or its employees') actions with respect to the land." ***Linville v. Janesville,*** 184 Wis.2d 705, 718, 516 N.W.2d 427, 431 (1994). Section 895.52(2), STATS., provides in part:

> [With certain exceptions not pertinent here] 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) ... [N]o 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 ....

There is no dispute that the City is an owner under this section.[4] The test to determine whether an event is "recreational" requires examination of all aspects of the activity. "The intrinsic nature, purpose and consequence of the

[4] Section 895.52(1)(d), STATS., states in part: "'Owner' means either of the following: 1. A person, including a governmental body or nonprofit organization, that owns, leases or occupies property."

activity are relevant. While the injured person's subjective assessment of the activity is relevant, it is not controlling. ... Thus, whether the injured person intended to recreate is not dispositive ... but why he was on the property is pertinent." ***Linville,*** 184 Wis.2d at 716, 516 N.W.2d at 430 (quoting ***Linville v. Janesville***, 174 Wis.2d 571, 579-80, 497 N.W.2d 465, 469 (Ct. App. 1993)).

The legislature's intent in enacting § 895.52, STATS., was to limit the liability of property owners toward others who use the property for recreational activity "under circumstances in which the owner does not derive more than a minimal pecuniary benefit. While it is not possible to specify in a statute every activity which might constitute a recreational activity, this act provides examples of the kinds of activities that are meant to be included ...."[5] 1983 Wis. Act 418.

When reviewing summary judgment, our analysis is independent of the trial court's determination. We apply the standards set forth in § 802.08(2), STATS., in the same manner as the trial court. ***Ervin v. Kenosha,*** 159 Wis.2d 464, 479, 464 N.W.2d 654, 660-61 (1991). On summary judgment, the court does not decide issues of fact, rather it decides whether there is a dispute of material fact. ***Id.*** at 478, 464 N.W.2d at 660.

Potkay argues that the facts raise conflicting inferences that the event was commercial in nature instead of purely recreational, citing ***Silingo v. Mukwonago,*** 156 Wis.2d 536, 458 N.W.2d 379 (Ct. App. 1990). We conclude

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[5] Section 895.52(1)(g), STATS., defines recreational activity as follows:

> "Recreational activity" means any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity. "Recreational activity" includes, but is not limited to, hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle, ballooning, hang gliding, hiking, tobogganing, sledding, sleigh riding, snowmobiling, skiing, skating, water sports, sight-seeing, rock-climbing, cutting or removing wood, climbing observation towers, animal training, harvesting the products of nature and any other outdoor sport, game or educational activity, but does not include any organized team sport activity sponsored by the owner of the property on which the activity takes place.

here that no conflicting inferences are raised. In ***Silingo***, this court reversed a summary judgment and remanded for trial the fact issue whether the use of a public park for a "flea market" constituted recreational activity within the meaning of § 895.52, STATS. ***Silingo***, 156 Wis.2d at 544-45, 458 N.W.2d at 383. In ***Silingo,*** the American Legion conducted an event known as "Maxwell Street Days," an outdoor flea market where vendors sell antiques and other items. After paying a $50 deposit to the village, the Legion leased over 100 park sites to vendors at a cost of $20 per site. ***Id.*** at 539, 458 N.W.2d at 380. This court determined that facts suggested that the intrinsic nature was to offer the vendors' merchandise for sale to the public and its purpose was to transact business. ***Id.*** at 544-45, 458 N.W.2d at 383. On the other hand, the community flavor of the event suggested a recreational purpose. ***Id***. at 545, 458 N.W.2d at 383. The ultimate determination required a full trial to explore the issues. ***Id.***

Here, Celebrate '91 included fireworks, a parade, sky divers as well as a concert. No separate admission fee was charged for the concert or other events. A recreational event, as defined in § 895.52(1)(g), STATS., is "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure ...." There is no dispute the concert was outdoors and held for pleasure. *Cf.* ***Hall v. Turtle Lake Lions Club,*** 146 Wis.2d 486, 488, 431 N.W.2d 696, 697 (Ct. App. 1988) ("We conclude that a fair is 'substantially similar' to several 'examples of the kinds of activities' enumerated in the definition of recreational activity ...."). Using an objective test, the intrinsic nature, purpose and consequences of Celebrate '91 and the outdoor concert support the determination that the events were for the purposes of "relaxation or pleasure." The facts do not raise conflicting inferences. The City and Potkay do not dispute what the City's conduct was in this case, but rather the legal implications of that conduct. We conclude as a matter of law that Potkay attended a recreational rather than commercial event within the meaning of § 895.52, STATS.

Potkay argues that there is a factual dispute whether the event was recreational because (1) an $8 admission fee was charged; (2) between 8,000 and 10,000 people attended the event; (3) the concert was cordoned off from the remainder of the park; and (4) the City was paid for providing officers for crowd control from funds derived from admission revenues. We conclude that none of Potkay's arguments raises a material issue of fact with respect to the recreational nature of the event.

There is no dispute that the Jaycees, not the City, charged the admission fee.[6] Consequently, the fact that an admission fee was charged by the Jaycees does not have a bearing on the recreational nature of the activity. *Cf.* ***Kloes v. Eau Claire Cty. Cavalier Baseball Ass'n***, 170 Wis.2d 77, 85, 487 N.W.2d 77, 80 (Ct. App. 1992) ("[T]he fact that the association charged admission does not affect the city's immunity.").

Potkay does not offer authority for the proposition that § 895.52, STATS., limits the number of persons the immune landowner may permit on his land. Indeed, to interpret the statute to encompass such a limitation would be contrary to the legislative purpose to encourage open lands for public use. Potkay argues that no legislative purpose is served by encouraging lands already public, such as parks, to be open to the public by immunizing the municipality and, therefore, we should construe the statute narrowly with respect to concerts in the park. We disagree. First, by including municipalities within its definition of landowners, the legislature has evinced its intent to encourage municipalities to keep its lands open to the public. Section 895.52(1)(d), STATS. Second, to construe the statute narrowly would be contrary to express legislative intent. "This legislation should be liberally construed in favor of property owners to protect them from liability." 1983 Wis. Act 418. Consequently, we conclude that the large number of persons attending the event does not disqualify it as a recreational activity.

We further conclude that the fact that the concert area was cordoned off from the rest of the park until the concert starting time does not suggest that the event was not recreational in nature. Also, in absence of any showing that the City benefited from reimbursement for the extra man hours the police officers worked at the park, no material inference is raised to detract from the recreational nature of the event.

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[6] There is no dispute that the Jaycees is a nonprofit organization and whether its decision to charge an entrance fee affects its immunity is not before us. Section 895.52(5), STATS., does not limit the revenue that a nonprofit organization may generate with respect to a recreational activity, as it does for state property, *see* § 895.52(3)(a), STATS., and private property, *see* § 895.52(6)(a), STATS. The legislature's lack of revenue restriction for nonprofit organizations indicates its intent that nonprofit organizations may charge admission fees without transforming the recreational nature of an activity.

Potkay argues that § 895.52, STATS., should not shield the City from liability for failing to properly exercise crowd control functions simply because the event was held on City property. We interpret this contention as an argument under ***Linville***, 184 Wis.2d at 717-18, 516 N.W.2d at 431.[7] In ***Linville,*** our supreme court held that a determination that the event the injured party attended was recreational in nature does not end the inquiry under § 895.52. The court must next determine whether the landowner was functioning in a capacity apart from its role as land owner at the time of the event giving rise to injury. ***Id***. at 718, 516 N.W.2d at 431. "Extending immunity to landowners for negligently performing in a capacity unrelated to the land or [extending immunity] to their employees whose employment activities have nothing to do with the land will not contribute to a landowner's decision to open the land for public use." ***Id.*** at 719, 516 N.W.2d at 432. If the landowner's activities giving rise to the claim of negligence are separate and unrelated to the safe condition of the land, it is not immune from the claim.[8]

Linville considered the city's immunity for claims arising out of drownings at a city fishing pond. The court acknowledged that the city was immunized against claims arising out of its ownership of the pond. "In this role, it is entitled to immunity from suits claiming that the Pond was negligently maintained or that the City's or its employees' (whose employment is connected to the Pond) actions with respect to the Pond were negligent." ***Id***. at 720, 516 N.W.2d at 432. The court observed that its decision was consistent with ***Ervin***, which held that § 895.52(2), STATS., immunized the City of Kenosha from liability for negligently hiring and improperly training lifeguards for its public beach at which two children drown.

However, the ***Linville*** pleadings also claimed that the City's paramedics were negligent in their rescue attempts and as providers of medical services. ***Id.*** at 712, 516 N.W.2d at 429. The court concluded that the

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[7] Potkay did not cite our supreme court's decision in ***Linville v. Janesville***, 184 Wis.2d 705, 516 N.W.2d 427 (1994); rather, it cited the court of appeals decision, ***Linville v. Janesville***, 174 Wis.2d 571, 497 N.W.2d 465 (Ct. App. 1993), which was based on different reasoning.

[8] We observe that our supreme court's opinion in ***Linville v. Janesville***, 184 Wis.2d 705, 516 N.W.2d 427 (1994), limited its discussion to recreational immunity under § 895.52, STATS. and did not address sovereign immunity under § 893.80, STATS. Although Potkay discusses § 893.80 immunity, the City responds that it did not bring a summary judgment motion on that basis. Our decision makes it unnecessary to address sovereign immunity.

recreational immunity statute, § 895.52, STATS., does not address claims of immunity arising out of negligent rescue and medical treatment. Accordingly, it held that summary judgment in favor of the city was improperly granted.

Here, the facts are closer to those alleged in ***Ervin*** than those alleged in ***Linville.*** The City is entitled to immunity from Potkay's claims that its employees, whose employment was connected with the park, were negligent. Potkay's claims arise out of allegedly negligent crowd control. Potkay contends that the police officers negligently permitted the crowd to break through the police tape at the entrance to the concert area, thus causing a stampede for the best seats. Potkay's claims are based upon the officers' methods of permitting the crowd to assemble and enter the concert area. Permitting the crowd to assemble and "opening the gates" for them to enter is intricately connected to the crowd's use of the park. Like the lifeguards in ***Ervin,*** who were present to protect the public from the dangers of swimming, the City's employees were present to protect against the dangers associated with the public attending park functions. Because the event was recreational, and the officers were acting in a capacity related to the park, the City is immunized from liability under § 895.52, STATS.

By the Court. – -Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.