COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1177 **Cir. Ct. No. 2003CV1112**

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

REBA FARGO, BY HER GUARDIAN AD LITEM, ATTORNEY ANNE MACARTHUR AND PAM FARGO,

PLAINTIFFS-RESPONDENTS,

V.

UNITED NATIONAL INSURANCE COMPANY AND ST. IGNATIUS CATHOLIC CHURCH,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County: ROBERT A. DE CHAMBEAU, Judge. *Affirmed*.

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. United National Insurance Company and St. Ignatius Catholic Church (collectively, "St. Ignatius") appeal a judgment awarding

Reba Fargo damages stemming from an injury she sustained on church property. St. Ignatius argues that it was entitled to recreational immunity under WIS. STAT. § 895.52 (2005-06).[1] We affirm.

¶2 Before trial the circuit court granted summary judgment on the immunity issue in favor of Reba Fargo, concluding that St. Ignatius Catholic Church was not entitled to immunity under the recreational immunity statute, WIS. STAT. § 895.52. The case was then tried to a jury on the issue of negligence. At the close of Fargo's case, St. Ignatius moved for dismissal as a matter of law based on § 895.52, which the circuit court denied. St. Ignatius raised the immunity argument for a third time in a motion after the verdict, which is deemed denied because the circuit court did not rule on the motion. *See* WIS. STAT. § 805.16(3).

¶3 St. Ignatius appeals the circuit court's denial of its motion for dismissal at the close of Fargo's case and its post-verdict motion. It does not appeal the denial of its summary judgment motion. In their arguments on appeal, both parties refer to summary judgment submissions as well as to the trial evidence, even though the issue of recreational immunity was not tried to the jury. Neither party addresses whether it is appropriate to analyze the legal question presented on appeal based on both summary judgment submissions and trial evidence. However, because the respondent does not object, we analyze the legal question presented in light of both the summary judgment submissions and the trial evidence.

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

¶4 The recreational immunity statute, WIS. STAT. § 895.52, "limit[s] the liability of property owners toward others who use their property for recreational activities.…" ***Weina v. Atlantic Mutual Ins. Co.***, 179 Wis. 2d 774, 778, 508 N.W.2d 67 (Ct. App. 1993). The statute defines recreational activity to include "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure…." Section 895.52(1)(g). The statute also lists twenty-nine specific activities that constitute recreational activities. ***Id.*** The statute "should be liberally construed in favor of property owners to protect them from liability." ***Weina***, 179 Wis. 2d at 778 (citation omitted).

¶5 To determine whether a person was engaged in a recreational activity under the statute, a court should consider the totality of circumstances surrounding the activity. ***Auman v. School Dist. of Stanley-Boyd***, 2001 WI 125, ¶12, 248 Wis. 2d 548, 635 N.W.2d 762. A court should look at the intrinsic nature of the activity, the purpose of the activity, including the injured person's subjective assessment of the activity, and consequences of the activity. ***Id.*** A court should also consider the nature of the property, including whether the owner intended the property to be used for recreational activities, and the reason the injured person is on the property. ***Id.***; ***Minnesota Fire & Cas. Ins. Co. v. Paper Recycling of La Crosse***, 2001 WI 64, ¶25, 244 Wis. 2d 290, 627 N.W.2d 527.

¶6 St. Ignatius argues that it was entitled to immunity because Fargo was injured while playing house with a friend on church property and this is a recreational activity. Assuming for the sake of argument that playing house is a recreational activity, we conclude that Fargo was not injured while playing house. She was injured when she pushed a large bell, which fell on her foot. Fargo's act of pushing the bell was not related to the game she had been playing. Even though Fargo characterized her actions as play, her subjective intent is but one

consideration. *See* ***id.*** Viewing the activity objectively, Fargo was attempting to move a large, stationary object by pushing very hard. We conclude that this independent act was, by its nature, mischievous because Fargo was trying to move an object that was not designed to move. *See* ***Minnesota Fire***, 244 Wis. 2d 290, ¶25 (mischievous conduct is not a recreational activity). Turning to the nature of the property, St. Ignatius is a church, not a playground or other place where recreational activity would usually occur. The church made attempts to limit children playing on its property which, while not determinative, is an appropriate factor bearing on our analysis. *See* ***id.*** Considering these factors together, we conclude that Fargo was not engaged in a "recreational activity," as that term is used in WIS. STAT. § 895.52, when she was injured and that St. Ignatius was thus not entitled to immunity.

By the Court.—Judgment affirmed.

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