COURT OF APPEALS
DECISION
DATED AND RELEASED

September 26, 1996

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.

NOTICE

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

No. 95-2807

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

PAO MOUA and CHIA VANG as Co-Personal Representatives and PAU MOUA and CHIA VANG, Individually,

Plaintiffs-Appellants,

v.

CITY OF LA CROSSE, a Municipal Corporation, and CITIES AND VILLAGES MUTUAL INSURANCE COMPANY,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed*.

Before Eich, C.J., Vergeront, J., and Robert D. Sundby, Reserve Judge.

PER CURIAM. Pao Moua and Chia Vang appeal from a summary judgment dismissing their complaint against the City of La Crosse and its insurer. The appellants commenced this wrongful death action after their eight-year-old daughter, Mai Kou Moua, drowned at a public beach in La Crosse. The trial court granted summary judgment under the recreational immunity statute, § 895.52, STATS. The issue is whether a trier of fact could reasonably infer from the submissions in opposition to summary judgment that La Crosse was liable under the malicious acts exception to recreational immunity. Because we conclude that no such inference is available, we affirm.

Under the appellants' version of the incident, Mai Moua Vang, then six, accompanied Mai Kou to the beach on the day of the accident. At some point, Mai Moua noticed that Mai Kou was having difficulty in the water. She approached a City of La Crosse lifeguard and asked the lifeguard to help Mai Kou. The lifeguard responded "just a minute." Mai Kou continued to have problems in the water and Mai Moua again went to get the lifeguard, but could not find her. Mai Kou was later removed from the water unconscious, and subsequently died. According to Mai Moua, the beach was open and there were other people on the sand and in the water when Mai Kou drowned.

The City submitted testimony and affidavits from the lifeguards on duty that day who denied all aspects of Mai Moua's version of the accident. According to the lifeguards, while they were present no children approached them for help, and none were ever observed having difficulty in the water. They testified that they had closed the beach early that day and had gone home well before the drowning occurred.

The complaint undisputedly states a claim. It is also undisputed that the City presented a prima facie case for dismissal on summary judgment, as its witnesses deny every material allegation against them. Therefore, under summary judgment methodology, the dispositive issue is whether the appellants' affidavits in opposition to summary judgment contain evidence that creates a genuine issue as to any material fact or allows reasonable conflicting inferences to be drawn from the undisputed facts. ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980). We determine this issue in the same manner as the trial court and without deference to its decision. ***In re Cherokee Park Plat***, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582 (Ct. App. 1983).

Taking all the appellants' facts as true, dismissal is still appropriate because the necessary inference of malice remains unavailable. An exception to recreational immunity applies if an injury is caused by a malicious act. Section 895.52(4)(b), STATS. A malicious act under that section is one that results from hatred, ill will, a desire for revenge, or is inflicted under circumstances where insult or injury was intended. ***Ervin v. City of Kenosha***, 159 Wis.2d 464, 485, 464 N.W.2d 654, 663 (1991). An act may be reckless, grossly negligent or willful, but not malicious. ***Id***. at 482, 464 N.W.2d at 662. Here, the appellants' submissions show, at best, grossly negligent behavior. There is no evidence that the City's lifeguard brushed off Mai Moua's request out of hatred, ill will, or desire to inflict injury or revenge. And that is not a reasonable inference from their momentary contact.

By the Court.—Judgment affirmed.

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