COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2007AP1483 **Cir. Ct. No. 2005CV44**

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

ARIELLE MASON AND TODD MASON, BY THEIR GUARDIAN AD LITEM, LISLE W. BLACKBOURN,

PLAINTIFFS-RESPONDENTS,

RUSSELL MASON AND DEBORAH MASON,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

ACE AMERICAN INSURANCE COMPANY, INTERNATIONAL ASSOCIATION OF LIONS CLUBS, TODD CATLIN AND CHURCH MUTUAL INSURANCE COMPANY,

DEFENDANTS,

THE LIONS CLUB OF GLEASON AREA, INC. AND ZURICH AMERICAN INSURANCE COMPANY,

DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment and orders of the circuit court for Lincoln County: JAY R. TLUSTY, Judge. *Affirmed*.

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

¶1 PER CURIAM. The Lions Club of Gleason Area, Inc., and its insurer appeal a judgment, entered on a jury's verdict, in favor of Russell Mason and his family for injuries Mason sustained while at an event on the Club's property. The Club further appeals orders denying its motion for summary judgment and to change verdict answers. Mason[1] cross-appeals an order reducing to zero the amount of damages the jury awarded for Deborah Mason's nursing services.

Background

¶2 On August 28, 2004, the Masons attended a "mud bog" racing event held on the Club's property. A mud bog involves vehicles racing through a pit of mud as far and as fast as possible, sometimes at speeds up to forty-five miles per hour. Some vehicles make it through the pit; others get stuck in the mud.

¶3 Originally, when vehicles became stuck, a volunteer would wade into the mud and attach a chain to the vehicle so it could be towed from the pit. In 2001, a new procedure was implemented. At the starting area, one end of a 300-foot cable would be attached to the back of the racing vehicle. The other end, which includes a steel hook, would be dragged behind the vehicle during the race. If the vehicle became stuck, the free end could be attached to a "pole skidder"

[1] Although all four Masons are parties on appeal, we generally refer to Mason in the singular because only Russell was injured; his family's claims are derivative.

used to pull the vehicle from the pit. If the vehicle did not get stuck, it would either be driven back to the start position to return the cable or the cable would be removed from the race vehicle and attached to the skidder, which would pull the cable back to the starting position.

¶4 The skidder was owned and operated by Jim Forster. Forster remained in the driver's seat while an assistant hooked and unhooked the cable from the skidder.[2] On the day of Mason's injury, Forster and the assistant were working with Todd Catlin. Catlin had many duties during the races, including signaling drivers to the start position, attaching the cable to vehicles about to race, checking timing equipment, giving directions to Forster and the assistant, and signaling the race start.

¶5 Mason was injured when, for some reason, the cable did not remain free behind one of the racing trucks. It is unclear whether the cable remained hooked to the skidder when a new race began or if the cable had been loose on the ground but became caught on the skidder. As the driver raced, the cable became taut and snapped. The cable flew into the crowd, hitting Mason in the head. He suffered head, neck, and spinal injuries.

¶6 Mason brought suit for damages including past and future pain and suffering, past and future medical expenses, and loss of earning capacity. Deborah and the children brought loss of society and companionship claims. The suit initially named only the Club and its insurer, but later added Catlin and his insurer.

[2] This person's identity was unknown at trial. We refer to the individual as "the assistant."

¶7 The Club moved for summary judgment on the basis of recreational immunity. It asserted it was a non-profit owner and Mason was a spectator under the recreational immunity statute, WIS. STAT. § 895.52.[3] The court denied the motion, concluding recreational immunity did not apply because the Club did more than simply open its land to use.[4] The jury ultimately concluded the Club and the assistant were each fifty percent negligent. Further, the jury concluded that Catlin, Forster, and the assistant were all servants of the Club. The jury awarded approximately $210,543 to Mason, $2,978 to Deborah, and $1,000 to each of the children. The jury also awarded $10,000 for nursing services Deborah provided to Mason.

¶8 The Club filed a motion after verdict seeking to change the jury's answers on the master-servant questions relating to Catlin and the assistant. The court denied the motion. The Club also argued the court should find, as a matter of law, that recreational immunity applied. The court disagreed because it had already determined immunity was inapplicable and, the court opined, mud racing was not the type of activity contemplated by the legislature in enacting the recreational immunity statute. The court did, however, grant the Club's motion to vacate the award for Deborah's nursing services. The court concluded there was no evidence to support the award and reduced it to zero.

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

[4] The court also concluded there was a question of fact as to whether the racing was a team sport, *see* WIS. STAT. § 895.52(1)(g), but this determination is irrelevant to our decision on appeal.

Discussion

I. Recreational Immunity

¶9 The first question is whether the Club is entitled to recreational immunity under WIS. STAT. § 895.52(2)(b), which provides, in relevant part: "Except as provided in subs. (3) to (6), no owner and no officer, employee or agent of an owner is liable for the death of, any injury to, or any death or injury caused by, a person engaging in a recreational activity on the owner's property ...." The Club asserts the statute "provides blanket immunity to land owners who open up their land for recreational purposes." It contends Mason "would have to show that the cable break and his subsequent injury was the direct result of some malicious act of the Lions Club"[5] or that the injury was not caused by a recreational activity. Mason asserts recreational immunity only applies when negligent conduct relates to the condition of the land itself and the Club is reading only an isolated part of the statute.

¶10 Whether the recreational immunity statute applies to bar Mason's claim is a question of law we review de novo. ***Kosky v. International Ass'n of Lions Clubs***, 210 Wis. 2d 463, 470, 565 N.W.2d 260 (Ct. App. 1997). Contrary to the Club's assertion, the statute is not an automatic blanket grant of immunity to be defeated. Instead, because the Club proposed applying recreational immunity as a barrier to liability, it has the burden of demonstrating the statute applies. ***Rintelman v. Boys & Girls Clubs***, 2005 WI App 246, ¶17, 288 Wis. 2d 394, 707 N.W.2d 897.

[5] WISCONSIN STAT. § 895.52(5) provides that subsec. (2) does not limit non-profit organizations' liability if the injury is caused by a malicious act.

¶11 The recreational immunity statute exists to encourage landowners "to open their property to the public for recreational use" as public access to recreational land shrinks in an increasingly crowded world. ***Held v. Ackerville Snowmobile Club, Inc.***, 2007 WI App 43, ¶8, 300 Wis. 2d 498, 730 N.W.2d 428. While the statute is to be liberally construed in favor of immunity, there are some circumstances under which immunity will not apply. ***Id.*** For example, immunity will not apply if a negligent act causing injury is unrelated to the condition or maintenance of the land.[6] ***Id.***, ¶9.

¶12 The Club argues there is no distinction between "passive" or "condition of the land" negligence and "active" negligence. *See* ***Ervin v. City of Kenosha***, 159 Wis. 2d 464, 473, 464 N.W.2d 654 (1991). Therefore, the Club asserts, the cause of the injury is irrelevant if the injured person has been engaging in a recreational activity.[7] However, our supreme court recognized that extending immunity to landowners "for negligently performing in a capacity unrelated to the land … will not contribute to a landowner's decision to open the land for public use." ***Linville v. City of Janesville***, 184 Wis. 2d 705, 719, 516 N.W.2d 427 (1994). That is, refusing to grant immunity where a negligent act is unrelated to the land does not defeat the legislative purpose underlying recreational immunity.[8]

[6] We focus on this aspect because it is undisputed that the Club owns the property in question and that the mud bog race itself was a recreational activity.

[7] This is not an entirely accurate distinction between active and passive negligence. *See, e.g.*, ***Held v. Ackerville Snowmobile Club, Inc.***, 2007 WI App 43, ¶13, 300 Wis. 2d 498, 730 N.W.2d 428 (claim based on passive failure to retrieve equipment from trail as viable as claim based on active decision to leave equipment there).

[8] To the extent there is any conflict between ***Ervin v. City of Kenosha***, 159 Wis. 2d 464, 464 N.W.2d 654 (1991), and ***Linville v. City of Janesville***, 184 Wis. 2d 705, 516 N.W.2d 427 (1994), the latter controls as the more recent pronouncement. *See* ***Kramer v. Board of Educ.***, 2001 WI App 244, ¶20, 248 Wis. 2d 333, 635 N.W.2d 857.

See, e.g., ***id.*** at 720-21 (immunity for injury from recreational use of property distinct from liability for negligent provision of medical services by rescue personnel on that property).

¶13 Here, Mason's injury had nothing to do with the maintenance or condition of the Club's property. He did not, for example, slip and fall in the mud. Instead, Mason was injured because of negligent organization, supervision, and execution of a race. The cable that injured Mason has no connection to the maintenance or condition of the land: it exists solely because of the race, solely to rescue racing vehicles. *Cf.* ***Kosky***, 210 Wis. 2d at 475-77 (activities giving rise to injury not related to condition of land, but to detonation of fireworks). The cable's negligent use should not, therefore, be protected by the recreational immunity doctrine.

II. Master-Servant Relationship

¶14 The Club also argues there was insufficient evidence to give the master-servant question to the jury, much less to sustain its verdicts. Jury instruction is committed to the trial court's discretion. ***White v. Leeder***, 149 Wis. 2d 948, 954, 440 N.W.2d 557 (1989). We will not reverse the decision to give an instruction to the jury absent an erroneous exercise of that discretion. ***Id.*** at 954-55. We affirm the choice of instruction if the instruction accurately states the law and comports with the facts of record. ***Id.*** We conclude the court properly exercised its discretion because the same evidence supporting the verdicts supports the decision to issue the instruction in the first place.

¶15 A servant is one "employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control." ***Kerl v. Dennis***

Rasmussen, Inc., 2004 WI 86, ¶19, 273 Wis. 2d 106, 682 N.W.2d 328 (citation omitted). The master is the principal who controls or has the right to control the physical conduct of the servant, and may be liable for the servant's torts regardless of whether the master's own conduct is tortious. ***Id.***, ¶¶19, 21. A person need not be under a formal contract to perform work, nor is it necessary for the person to be paid, in order to be considered a servant. ***Id.***, ¶22.

¶16 The concept of the master's liability springs from the notion that, within the time of service, the master has control over the servant's physical activities. ***Id.***, ¶25. "The assumption of control is a usual basis for imposing tort liability when the thing controlled causes harm." ***Id.*** (citation omitted). Only a master with the requisite degree of control or right of control will be vicariously liable. ***Id.***, ¶27.

¶17 Here, the jury found that Catlin and the assistant were servants of the Club.[9] There is evidence supporting the finding that Catlin and the assistant were servants, as well as evidence supporting a finding they were not. We do not disturb a jury's verdict if any credible evidence supports it. ***Johnson v. Neuville***, 226 Wis. 2d 365, 378, 595 N.W.2d 100 (Ct. App. 1999). It does not matter if contradictory evidence is stronger or more convincing. ***Wisconsin Cent. Farms v. Heartland Agric. Mktg., Inc.***, 2006 WI App 199, ¶17, 296 Wis. 2d 779, 724 N.W.2d 364. If more than one reasonable inference may be drawn from the evidence, we accept the inference that supports the verdict, and we look for credible evidence supporting that determination. ***Johnson***, 226 Wis. 2d at 378.

[9] The determination that the assistant, who was found 50% negligent, is a servant of the Club effectively made the Club liable for 100% of the damages.

¶18 In this case, signs advertised the mud bog race as "sponsored by" the Lions Club, or stated that the Club "presents" the bog. People in the community knew the event as the Lions Club Mud Bog. In fact, the minutes of some Club meetings refer to it as "our" bog. The Club collected admission to the races and sold concessions there. The Club had also erected the spectator area and owned the cable in question. From this evidence, the jury could infer that the Club sponsored the event and made the rules, and thus controlled the people working at the bog, such as Catlin and the assistant, and could have directed Catlin to stop using the cable in an unsafe manner. The evidence sufficiently warranted the master-servant instruction, and adequately supported a finding that Catlin and the assistant were servants.

III. Cross-Appeal on Nursing Services

¶19 The jury awarded $10,000 for nursing services Deborah provided to Mason. The court struck the award after concluding Mason provided no evidence on which to base the award. Mason asserts the jury is entitled to rely upon its common knowledge. We disagree.

¶20 For certain pecuniary losses, such as the value of housekeeping or cooking, it appears that juries are not held to hard and fast methods of calculating these services' values, but instead may use common knowledge and judgment. ***Redepenning v. Dore***, 56 Wis. 2d 129, 135-36, 201 N.W.2d 580 (1972). However, the $10,000 was awarded for nursing services, not housekeeping. The measure for services like Deborah's nursing services "is what these services would reasonabl[y] and customarily cost" in the community. ***Id.*** at 137. Put another way, the amount is not to exceed the value "for which [the party] could have employed others to do the work." WIS JI—CIVIL 1820.

¶21 Here, there is no evidence of the value of nursing services or the cost of employing others. This is a particularly complicating factor here because, while the accident occurred in rural Lincoln County, the Masons lived in Elkhorn, close to Madison and Milwaukee. Even if common knowledge were an appropriate measure, a Lincoln County jury is not likely to have common knowledge of nursing salaries in the Masons' community. Because there was no evidence offered on the value of Deborah's nursing services, an award cannot be sustained.

By the Court.—Judgment and orders affirmed.

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