COURT OF APPEALS
DECISION
DATED AND RELEASED

January 30, 1997

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. 96-1299

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

BREIANNE S. JOHNSON, a minor child by her parent and guardian, Julie Steinhoff and by SHERI LOCANTE, court-appointed Guardian ad Litem for Breianne S. Johnson; JULIE STEINHOFF, CRAIG STEINHOFF and FORREST JOHNSON,

Plaintiffs-Appellants,

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,

Intervening Plaintiff,

v.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, MURIEL FINCH and SECURA INSURANCE,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Monroe County: STEVEN L. ABBOTT, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Eich, C.J., Vergeront, and Roggensack, JJ.

EICH, C.J. Six-year-old Breianne Johnson sustained serious injuries when a draft horse on exhibit at the Monroe County Fair kicked her in the head while she was walking down the aisle of an open-air horse barn[1] where exhibit animals were stabled. Johnson and her parents (collectively "Johnson") sued National Fire Insurance Company, which insured the Monroe County Agricultural Society (the fair operator), Muriel Finch (the horse's owner), and Finch's insurer. Both Finch and National moved for summary judgment on grounds that they were immune from suit under the provisions of the recreational immunity law, § 895.52, STATS.[2] The trial court granted the motions and dismissed Johnson's action, concluding that because Johnson was engaged in a "recreational activity" when the injury occurred and because Finch and the Society were entities entitled to immunity under the statute, Johnson's lawsuit was barred.

Johnson appeals from the summary judgment dismissing her action, arguing that the trial court erred in concluding that she was participating in a recreational activity when injured, and that Finch was an "owner," under the law.[3] She also claims that insofar as the statute grants immunity to either Finch or the Society on the facts of this case, it is unconstitutional. We conclude that Johnson waived the constitutional argument by failing to raise it in the trial court. We also conclude that, while Johnson was engaged in a recreational activity when she was injured, Finch was not an "owner" within the meaning of the statute. We therefore reverse the judgment insofar as it dismisses the action against Finch and remand for further proceedings consistent with this opinion. In all other respects, we affirm.

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[1] The horse barn was roofed, but open-sided.

[2] The statute, with limited exceptions not applicable here, provides that "no owner ... owes to any person who enters the owner's property to engage in a recreational activity ... [a] duty to keep the property safe for recreational activities ... [a] duty to inspect the property ... [or] [a] duty to ... warn[] of an[y] unsafe condition, use or activity on the property." Section 895.52(2), STATS.

[3] Johnson does not challenge the trial court's ruling as to the immunity of the Monroe County Agricultural Society.

I. Preliminary Considerations

Summary judgment is appropriate in cases in which no genuine issue of material fact exists and the moving party has established his or her entitlement to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis.2d 293, 296, 349 N.W.2d 733, 735 (Ct. App. 1984). In reviewing a summary judgment, we apply the same methodology as the trial court, ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987), and where, as here, the issues involve the interpretation and application of statutes, only legal questions are raised, which we review *de novo*. ***Silingo v. Village of Mukwonago***, 156 Wis.2d 536, 539, 458 N.W.2d 379, 380 (Ct. App. 1990).

II. "Recreational Activity"

The first question is whether Johnson was engaged in a "recreational activity" within the meaning of § 895.52, STATS., as she walked through the horse barn. Section 895.52(1)(g) defines the term as "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure," and it 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.

Id.

In setting forth this list, the legislature stated that its intent was to "provide[] examples of the kinds of activities that are meant to be included [within the definition of recreational activity]," and that "where substantially

similar circumstances or activities exist, this legislation should be liberally construed in favor of property owners to protect them from liability." 1983 Wis. Act. 418, § 1.

In determining whether an activity not specifically set forth in the statute is "recreational," we employ an objective test which considers "*all social and economic aspects*" of the particular activity. ***Silingo***, 156 Wis.2d at 544, 458 N.W.2d at 382. "Relevant considerations on this question include ... the intrinsic nature of the activity, the type of service or commodity offered to the public, and the activity's purpose and consequence." ***Id.*** Applying this test, we conclude that the trial court did not err in holding that Johnson was engaged in a recreational activity as a matter of law.

In ***Hall v. Turtle Lake Lions Club***, 146 Wis.2d 486, 488, 431 N.W.2d 696, 697 (Ct. App. 1988), we held that a fair sponsored by a local service club involved activities "substantially similar" to the statutory listing of "nature study," "sight-seeing" and other "educational activity," as to make it a recreational activity under § 895.52, STATS. Johnson attempts to distinguish the fair in ***Hall*** based on its "hometown" nature as "an agricultural show involving cattle, carnival rides and booths," ***id.***, asserting that the Monroe County Fair—which she claims is a large-scale event with gross receipts in excess of $500,000—is much more of a commercial enterprise. And she suggests that, at a minimum, a factual issue exists as to whether the Monroe fair was something altogether different from a local "fair": in other words, a "pure money-making" activity.

We are not persuaded. First, the fact that the Monroe County Fair turned a profit does not in itself convert what may otherwise be a recreational activity into a commercial enterprise for purposes of the recreational immunity statute. ***Fischer v. Doylestown Fire Dep't***, 199 Wis.2d 83, 90, 543 N.W.2d 575, 578 (Ct. App. 1995). Second, the activities at the Monroe fair included animal exhibits, 4-H and natural science displays, carnival rides, home furnishing exhibits and cooking contests. On this record, we conclude, as we did in ***Hall***, that the activities undertaken at the Monroe fair are sufficiently similar to the examples set forth in the statute to render the fair—and Johnson's attendance thereat—sufficiently similar to the statutory examples to meet the "recreational activity" test.

Johnson disagrees. Stressing the "outdoor activity" language in the statute, she claims that because she was inside a structure at the time of the accident, our decision in ***Lee v. Elk Rod & Gun Club, Inc.***, 164 Wis.2d 103, 473 N.W.2d 581 (Ct. App. 1991), confirms the existence of a factual issue as to whether her walk through the horse barn was an indoor or outdoor activity, and the case is thus inappropriate for resolution on summary judgment.

First, whether one is engaged in a recreational activity at a given time is, as Johnson herself acknowledges, a question of law for the court. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis.2d 426, 435, 509 N.W.2d 75, 80 (Ct. App. 1993), *aff'd*, 190 Wis.2d 623, 528 N.W.2d 413 (1995). Second, her reliance on ***Lee*** is misplaced. The issue in that case was whether a man patronizing a commercial gambling enterprise at the site of an ice fishing contest was engaged in a recreational activity. We held that he was not, concluding that an illegal activity such as gambling could not be "recreational" as a matter of law. ***Id***. at 109, 473 N.W.2d at 584. We never considered in ***Lee*** the point for which Johnson cites the case to us here: whether the plaintiff's gambling activities were "sufficiently distinguishable from the fishing contest so as to require a factual determination whether they constitute recreational activity." ***Id***.

Beyond that, we agree with Finch that neither § 895.52, STATS., nor relevant case law requires that the injury occur outdoors in order for the law to apply. The statute applies to "property" that is used for recreational activities, and § 895.52(1)(f) defines that term to include "buildings, structures and improvements." As we said in ***Kruschke v. City of New Richmond***, 157 Wis.2d 167, 171, 458 N.W.2d 832, 834 (Ct. App. 1990), by employing that definition, "the legislature has indicated its intent that activities are not to be excluded [from the coverage of the statute] merely because they involve facilities provided by the property owner."[4] Johnson's presence in the open-air horse barn at the fair did not change the otherwise recreational nature of her activity to something else.

[4] We have also recognized that the statute applies to both natural and artificially created conditions. ***Kruschke***, 157 Wis.2d at 171, 458 N.W.2d at 834; *see also* ***Sauer v. Reliance Ins. Co.***, 152 Wis.2d 234, 241, 448 N.W.2d 256, 259 (Ct. App. 1989).

III. Finch As an "Owner"

Johnson next argues that Finch should not be considered an "owner" within the meaning of the statute because she only leased a small "stall" area in the barn, and that limited occupancy did not extend into the aisle outside the stall where Johnson was standing when she was injured. As a result, says Johnson, the protections of § 895.52, STATS., do not extend to Finch.

"Owner," as defined in § 895.52(1)(d), STATS., includes any person who "owns, leases, or occupies property." Johnson, pointing out that she was not within the delineated boundaries of Finch's stall at the time she was injured, but was in an adjoining walkway three to four feet from its outer edge, argues that, on those facts, Finch cannot and should not be considered to have "occupied" the precise area where the injury occurred. Finch, on the other hand, contends that because the stall area she had been assigned was only eight feet deep, and because the horse was of such a size that it could be within the stall area and still strike someone standing in the adjoining aisle by extending its rear legs in a kicking motion, her "occupancy" of the stall must be construed as extending beyond the stall's boundaries to the limits of the horse's "reach." Again, Johnson claims that, at a minimum, this controversy raises factual issues best left for resolution at trial.

We disagree. We do not believe that Finch, as one of many exhibitors at the fair, can be considered an "owner" within the meaning of the recreational immunity law.

We begin with the "presum[ption] that the legislature intends for a statute to be interpreted in a manner that advances the purposes of the statute." ***Verdoljak v. Mosinee Paper Corp.***, 200 Wis.2d 624, 635, 547 N.W.2d 602, 606 (1996).

The underlying purpose of § 895.52, STATS., has been the subject of frequent comment in the cases and in legal periodicals. The law was enacted to "encourage landowners who might otherwise withhold their land from the use of others to make their land available [to the public] for recreational activities." ***Bystery v. Village of Sauk City***, 146 Wis.2d 247, 252, 430 N.W.2d 611, 613 (Ct. App. 1988). It represents an attempt by the legislature to influence the use of land by changing traditional tort-law principles, and its enactment was a

response to a "growing `crisis in outdoor recreation' within the state," Richard A. Lehmann, *Liability of Landowner to Persons Entering for Recreational Purposes,* 1964 WIS. L. REV. 705, 712-13 (quoted source omitted)—in particular, a recognition of "the continual shrinkage of the public's access to recreational land in an ever more populated world." ***Sievert***, 180 Wis.2d at 436, 509 N.W.2d at 80.

> At [the time the law was enacted] there was insufficient public recreational land to meet an increasing demand. This demand came both from the growing metropolitan population of Wisconsin and from recreational visitors from neighboring states whose tourist business the legislature naturally wanted to foster. The Wisconsin [L]egislature hoped that enacting a recreational use statute would encourage Wisconsin's many private landowners to open their land for public recreation.

Stuart J. Ford, *Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges*, 1991 WIS. L. REV. 491, 499.

Section 895.52, STATS., attempts to achieve that goal by granting owners or occupiers of land immunity from liability for personal injuries suffered by those who are pursuing recreational activities on that land. Its underlying theory is, of course, that a landowner is more likely to welcome public recreational users when he or she knows that the recreational users are there at their own risk. 1991 WIS. L. REV. at 491.

It is true, as Finch points out, and as we have noted above, that in amending the law in 1984, the legislature added a statement of intent indicating that it is to be "liberally construed in favor of property owners to protect them from liability," 1983 Wis. Act 418, § 1. But we do not consider that language to control the outcome of this case. First, considered in context, the "liberal construction" admonition appears to relate solely to the inquiry into whether a particular activity is "recreational"[5]—a separate issue which we have already

[5] The legislative statement, in full, reads as follows:

> The legislature intends by this act to limit the liability of property owners toward others who use their property for recreational

resolved. Additionally, one commentator pointed out that the provision is unique among all similar legislation in the United States and it has been criticized as "misdirect[ing] ... attention away from ... the very policy that justifies the statute's existence," which is, of course, "to encourage private landowners to open land for recreational use." 1991 WIS. L. REV. at 499, 502.[6]

In this case, the public-policy considerations underlying § 895.52, STATS., would not be advanced one whit by extending its coverage to an exhibitor who leases an eight-foot horse stall from the operators of a county fair—whether the injury complained of occurred precisely inside the leased space or in an area immediately adjacent thereto. Such an exhibitor is simply not the type of person or entity the legislature intended to immunize from liability for negligent acts in exchange for permission to allow members of the public to engage in recreational activities on his or her property. Johnson was injured while she was attending the Monroe County Fair, and while we have not been informed of the identity of the owner of the underlying land, there is

(..continued)

> activities 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, and the legislature intends that, where substantially similar circumstances or activities exist, this legislation should be liberally construed in favor of property owners to protect them from liability.* The act is intended to overrule any previous Wisconsin supreme court decisions interpreting section 29.68 of the statutes if the decision of more restrictive than or inconsistent with the provisions of this act.

1983 Wis. Act. 418, § 1 (emphasis added).

[6] Ford notes that, in several instances,

> the unique and sweeping statement of legislative intent enacted with the statute has caused troubling, and arguably unfair, decisions in the courts. A class of recreational plaintiffs is emerging to whom denial of a cause of action against a landowner's [or occupier's] negligence is not clearly furthering the policy objectives of recreational use legislation.

1991 WIS. L. REV. at 493.

no question that the enterprise "occupying" the property—the fair—was the Monroe County Agricultural Society.

We emphasize that we are not asked on this appeal to determine whether the Society is an "owner" or "occupant" within the meaning of the statute, and we do not decide that question. The Society's immunity was resolved in the trial court and is not before us here. We make the point simply to emphasize that immunizing a fair exhibitor—who paid the fair operator for the privilege of being there—from responsibility for negligent acts bears no relation to the purposes of the recreational immunity law. And it bears noting that, in ***Hall***, we held that an entity in much the same position as the Society occupies in this case—a local service club sponsoring a "fair" on city-owned land—was an "occupier" of that land within the meaning of the law. ***Hall***, 146 Wis.2d at 490, 431 N.W.2d at 698.

We conclude, therefore, that Finch was not an "owner" under the statute and reverse the trial court's contrary determination.

IV. Constitutional Challenge

Finally, Johnson argues that, as applied, the statute is unconstitutional on equal protection grounds. She never raised the issue in the trial court, however, and we generally decline to consider arguments raised for the first time on appeal. ***Evjen v. Evjen***, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992).[7] No costs are awarded to either party on this appeal.

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[7] We see no reason to depart from that rule in this case. Johnson concedes that the supreme court rejected an equal protection challenge to the recreational immunity law in ***Szarzynski v. YMCA, Camp Minikani***, 184 Wis.2d 875, 517 N.W.2d 135 (1994), expressly holding that "[i]nclusion of nonprofit organizations in ... sec. 895.52, Stats., is not a violation of the equal protection clauses of the United States and Wisconsin Constitutions ...." ***Id***. at 879-81, 517 N.W.2d at 136-37 (footnote omitted). Johnson's argument appears to us to be that, despite ***Szarzynski***, the statute ought not to be applied *to this particular* nonprofit organization; yet she puts forth no facts to support the argument other than the attendance and gross receipts figures for the 1992 Monroe County Fair.

Johnson has waived her constitutional argument and she has not persuaded us that she should be relieved of that waiver.

By the Court.—Judgment affirmed in part and reversed in part and cause remanded.

Recommended for publication in the official reports.