COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2455 **Cir. Ct. No. 2015CV40**

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

TRAVIS R. MUELLER,

PLAINTIFF-APPELLANT,

V.

MARK P. PALAN D/B/A PALAN'S OUTPOST SPORTING GOODS, BARBARA C. PALAN D/B/A PALAN'S OUTPOST SPORTING GOODS, ACUITY AND EUGENE J. VAN DYCK,

DEFENDANTS-RESPONDENTS,

BLUE CROSS BLUE SHIELD OF WISCONSIN D/B/A ANTHEM BLUE CROSS AND BLUE SHIELD,

DEFENDANT.

APPEAL from orders of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Travis Mueller was injured while operating an all-terrain vehicle (ATV). Mueller was helping to assemble fish cribs on the frozen surface of Blackhawk Lake as part of a volunteer project organized by Wisconsin Department of Natural Resources Fisheries Biologist Eugene Van Dyck and Palan's Outpost Sporting Goods and its owners Mark Palan and Barbara Palan. Mueller filed a complaint alleging that his injuries resulted from the negligence of Van Dyck and the Palan defendants.[1] The circuit court dismissed Mueller's complaint against Van Dyck and the Palans on the ground that Van Dyck and the Palans are immune from liability under Wisconsin's recreational immunity statute, WIS. STAT. § 895.52 (2013-14).[2] Mueller appeals, arguing that the recreational immunity statute does not apply because the allegations of the complaint make it clear that he was not engaged in a recreational activity when he was injured, and the Palans were not "owners" of the lake as that term is used in the recreational immunity statute. We reject Mueller's arguments and affirm.

BACKGROUND

¶2 The complaint alleges the following facts.

¶3 The Palans developed plans and provided funding for a project to place fifty new fish cribs, comprising trees inserted into concrete culverts, in Blackhawk Lake. The project was a joint project between the Palans and the Wisconsin Department of Natural Resources. Department Fisheries Biologist

[1] We generally refer to the Palan defendants, which include the Palans' insurer Acuity, collectively as the Palans for ease of discussion.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Eugene Van Dyck assisted the Palans in the planning and supervision of the project and obtained permits for the project. The Palans recruited seventy-five volunteers, including Mueller, to participate in the project.

¶4 In February 2013, Mueller was assisting other volunteers in assembling the fish cribs on the frozen surface of Blackhawk Lake under the Palans' supervision and instruction. Mueller was using an ATV to pull a metal wire attached to one end of a cement culvert in one direction while another volunteer used an ATV to pull a tree through the culvert in the opposite direction. While Mueller was using the ATV to pull the culvert, the culvert broke and a piece of cement struck Mueller's face.

¶5 Mueller filed a complaint alleging that his injuries resulted from the negligence of Van Dyck and the Palans. Van Dyck and the Palans moved to dismiss the complaint for failure to state a claim on the ground that Van Dyck and the Palans are immune from suit under the recreational immunity statute, WIS. STAT. § 895.52. The circuit court granted the motions, concluding that Van Dyck and the Palans are entitled to recreational immunity from liability for Mueller's injuries under WIS. STAT. § 895.52.

DISCUSSION

¶6 We review de novo the circuit court's decision granting a motion to dismiss for failure to state a claim, taking as true the allegations of the complaint and all reasonable inferences from those allegations. *See* ***Casteel v. McCaughtry***, 176 Wis. 2d 571, 578, 500 N.W.2d 277 (1993). "[A] complaint should be dismissed as legally insufficient if it is clear from the facts as pleaded and the inferences reasonably derived therefrom that under no circumstances can the

non-moving party prevail." ***Turkow v. WDNR***, 216 Wis. 2d 273, 280, 576 N.W.2d 288 (Ct. App. 1998).

¶7 This appeal concerns whether it is clear from the allegations in the complaint that Van Dyck and the Palans are entitled to recreational immunity under WIS. STAT. § 895.52. We review the interpretation and application of a statute de novo. ***Roberts v. T.H.E. Ins. Co.***, 2016 WI 20, ¶19, 367 Wis. 2d 386, 879 N.W.2d 492. We construe statutory language based on its common and ordinary meaning. ***Barritt v. Lowe***, 2003 WI App 185, ¶6, 266 Wis. 2d 863, 669 N.W.2d 189. If the language is plain and unambiguous, our analysis stops there. ***Kangas v. Perry***, 2000 WI App 234, ¶8, 239 Wis. 2d 392, 620 N.W.2d 429. In conducting this analysis, we read statutory language not in isolation but as it relates to the statute as a whole. ***Id.***

¶8 WISCONSIN STAT. § 895.52(2) provides in pertinent part that a property owner is "immune from liability for injuries to any person engaged in recreational activities on the owner's property." ***Auman v. School Dist. of Stanley-Boyd***, 2001 WI 125, ¶7, 248 Wis. 2d 548, 635 N.W.2d 762. Under the statute, "at least two conditions must exist for immunity to apply: the alleged injuries must have occurred while the injured party was engaged in a 'recreational activity,' and the allegedly negligent party must be an 'owner' of the property on which the injury occurred." ***WEA Prop. & Cas. Ins. Co. v. Krisik***, 2013 WI App 139, ¶10, 352 Wis. 2d 73, 841 N.W.2d 290.[3]

[3] If a party is an owner under the statute, then there is also the condition that the party's alleged negligence must be associated with a condition of the land. *See* ***Roberts v. T.H.E. Ins. Co.***, 2016 WI 20, ¶4 n.4, 367 Wis. 2d 386, 879 N.W.2d 492. We do not address this condition because the parties do not raise it as an issue.

¶9 Mueller argues that recreational immunity does not apply to bar his claims because it is clear from the allegations of his complaint and the reasonable inferences from those allegations that when he was injured he was not engaged in a recreational activity, and the Palans were not owners of the lake. We address and reject each argument in turn.

I. Whether Mueller was engaged in a "recreational activity" when he was injured

¶10 As stated, the first condition for recreational immunity to apply is that the injuries must have occurred while the injured party was engaged in a recreational activity. WISCONSIN STAT. § 895.52(1)(g) sets forth a three-part definition of recreational activity:[4]

> The first part of the section defines recreational activity as "any outdoor activity undertaken for the purpose of exercise, relaxation or pleasure, including practice or instruction in any such activity." The second part of the statutory definition of recreational activity lists 29 specific

[4] WISCONSIN STAT. § 895.52(1)(g) provides:

> "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 hunting, fishing, trapping, camping, picnicking, exploring caves, nature study, bicycling, horseback riding, bird-watching, motorcycling, operating an all-terrain vehicle or utility terrain vehicle, operating a vehicle, as defined in s. 340.01(74), on a road designated under s. 23.115, recreational aviation, 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, participating in an agricultural tourism activity, sport shooting and any other outdoor sport, game or educational activity. "Recreational activity" does not include any organized team sport activity sponsored by the owner of the property on which the activity takes place.

> activities denominated as recreational, including [fishing and operating an all-terrain vehicle]. The third part of the statutory definition broadly adds "and any other outdoor sport, game or educational activity."

Auman, 248 Wis. 2d 548, ¶8.

¶11 As we explain, we conclude that Mueller was injured while he was engaged in a recreational activity because he was engaged in the enumerated activity of operating an ATV.

¶12 Mueller alleged that he was injured while operating an ATV to assemble a fish crib. Operating an ATV is an enumerated recreational activity under WIS. STAT. § 895.52(1)(g). Accordingly, under the plain language of the statute, Mueller was engaged in a recreational activity when he was injured.

¶13 Mueller argues that such a plain language interpretation is wrong because he was operating the ATV not "to recreate or have fun," but "for the sole purpose of working as a volunteer, building fish cribs at the direction and supervision of Van Dyck and the Palan[s]." "However, in cases where an individual was injured while engaging in an activity specifically enumerated under the statute, we have concluded that the activity was 'recreational' without examining the various aspects or the purposes of the activity." ***Krisik***, 352 Wis. 2d 73, ¶18.

¶14 So, in ***Krisik***, where a person was injured while cutting branches from a tree "as a favor to his relative," we held that the purpose was irrelevant because "[t]he statute plainly states that the definition of 'recreational activity' includes 'cutting or removing wood.'" ***Id.***, ¶¶11, 14. We reasoned that "[b]y including 'cutting or removing wood' within the definition of 'recreational activity,' the legislature made a policy choice that engaging in the activity of

'cutting or removing wood' *is* a recreational activity." ***Id***, ¶14 (emphasis in original)**.** Accordingly, ***Krisik*** holds that we do not examine purpose where "an activity specifically enumerated under the statute" is at issue. ***Id.***, ¶18. Applying that rule here, Mueller's operation of an ATV is a recreational activity and no further analysis is needed.

¶15 Mueller does not point to any case in which a court has held that an injured person who was participating in an enumerated activity was *not* engaged in a recreational activity. Rather, Mueller cites two cases in which the injured person was *not* participating in an enumerated activity—***Auman***, 248 Wis. 2d 548, ¶9 (sliding down a snow pile); and ***Kosky v. International Ass'n of Lions Clubs***, 210 Wis. 2d 463, 472, 565 N.W.2d 260 (Ct. App. 1997) (cleaning firing tubes to assist in the production of a fireworks display)—but those cases are inapposite precisely because they do not involve participation in an enumerated activity. Mueller also cites to two non-Wisconsin cases involving paid employees carrying out their duties, without explaining how the facts in those cases are similar to the facts here or how the statutory schemes in those states compare to Wisconsin's. We are not persuaded by those cases.

¶16 Mueller argues that, regardless of the ***Krisik*** rule, the recreational immunity statute does not apply to his operation of the ATV because he was "working on a project that could, some day in the future, provide *another person* fishing enjoyment." Essentially, Mueller asks that we amend the statute based on policy considerations akin to the "Good Samaritan" considerations at play in ***Schultz v. Grinnell Mut. Reinsurance Co.***, 229 Wis. 2d 513, 515, 520, 600 N.W.2d 243 (Ct. App. 1999) (rejecting a Good Samaritan exception to recreational immunity where Schultz was injured when trying to subdue a runaway steer while attending a county fair). As in ***Schultz***, we adhere to our role as "an

error-correcting court. Our function does not include amending statutes." ***Id.*** at 520 (citations omitted). Accordingly, we reject Mueller's invitation to amend WIS. STAT. § 895.52 here.

¶17 Mueller argues that application of the ***Krisik*** rule would lead to absurd results. Mueller provides examples of paid workers engaged in enumerated activities—ranchers using ATVs to herd cattle, farm hands using ATVs to transport hay, and Department of Natural Resources agents using ATVs to conduct patrols; police officers riding horses on mounted patrol; field workers harvesting potatoes; and utility company workers cutting branches away from utility lines—and argues that no one can reasonably argue that these workers are engaged in recreational activities. We note that all of Mueller's examples involve paid workers carrying out their duties in the course of their employment, and we question their relevance to our analysis.[5] Regardless, Mueller effectively asks us to overrule ***Krisik***, which we may not do. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997).

¶18 Finally, Mueller argues that the circuit court erroneously based its conclusion that he was engaged in a recreational activity on its speculation as to what Mueller "perceived or thought he was doing that day." Mueller argues that the circuit court cannot add these speculative findings to the allegations of the complaint. We need not address this argument, because we independently

[5] The recreational immunity statute expressly does not apply to employees acting within the scope of their duties on their employers' property. WIS. STAT. § 895.52(6)(e). Mueller identifies no case that applies Wisconsin's recreational immunity statute to employees acting within the scope of their duties on others' property.

conclude that Mueller was engaged in a recreational activity for the reasons set forth above without considering these asserted findings.

II. Whether Van Dyck and the Palans were "owners" of the lake when Mueller was injured

¶19 The second condition for recreational immunity is that the negligent party be an owner—or an officer, employee, or agent of an owner—of the property on which the complainant is injured. WIS. STAT. § 895.52(2)(b). The statute defines "[o]wner" as "[a] person, including a governmental body or nonprofit organization, that owns, leases or occupies property." WIS. STAT. § 895.52(1)(d)1. As we explain, Mueller concedes that Van Dyck was an "owner" of the lake, and we conclude that the Palans "occupied" the lake, under the statute.

A. Van Dyck as "owner" of the lake

¶20 Mueller concedes that the State of Wisconsin was the "owner" of Blackhawk Lake under the statute. *See* WIS. STAT. § 895.52(1)(d) defining "[o]wner" as a "governmental body"; WIS. STAT. § 895.52(1)(ar)2. defining a "[g]overnmental body" as including the State; WIS. STAT. § 895.52(1)(f) defining "[p]roperty" as including the waters of the State; WIS. STAT. § 281.01(18) defining "[w]aters of the state" as including all lakes in Wisconsin; and ***Doane v. Helenville Mut. Ins. Co.***, 216 Wis. 2d 345, 353-54, 575 N.W.2d 734 (Ct. App. 1998) (stating that the State is the owner of the lake at issue in that case "by virtue of its role as a trustee of navigable bodies of water"). Nor does Mueller dispute that Van Dyck, an employee of the State, was an employee of the owner of the property where Mueller's injury occurred. Accordingly, because we have concluded that Mueller was engaged in a recreational activity on the lake when he

was injured, the circuit court properly dismissed Mueller's claims against Van Dyck as an owner of the lake under the recreational immunity statute.

B. The Palans as "occupiers" of the lake

¶21 Mueller argues that the Palans were not owners of the lake under the recreational immunity statute, and that they therefore are not entitled to recreational immunity even if we conclude that Mueller was engaged in a recreational activity when he was injured.

¶22 As noted above, the statute's definition of an "[o]wner" of property includes one who "occupies" property. WIS. STAT. § 895.52(1)(d)1. Our supreme court has held that a party that is responsible for organizing an event and bringing people onto a property for the event, occupies the property under the statute and is entitled to recreational immunity. *See* ***Roberts***, 367 Wis. 2d 386, ¶30 ("Wisconsin courts have concluded that private organizations hosting an event on land they did not own [occupied the land and] are entitled to recreational immunity."). In ***Roberts***, the court held that a vendor providing hot air balloon rides at a charity event was not immune under the recreational immunity statute because the vendor was not the title owner of the land on which the event was held, and did not occupy the land as the event organizer responsible for opening up the land to the public. ***Id.***, ¶¶33, 36, 39. The court concluded that the recreational immunity statute does not apply to parties that are "not responsible for opening up the land to the public [for the activity at issue]." ***Id.***, ¶33.

¶23 The ruling in ***Roberts*** controls this case. It is clear from the allegations in the complaint that the Palans organized the event that opened up the lake to the public *for the purpose of assembling fish cribs*. The Palans developed and funded the fish crib assembly project, recruited volunteers for the project, and

organized the project with Department of Natural Resources Fisheries Biologist Van Dyck, who obtained the permits for the project. These allegations establish that the Palans organized the fish crib assembly project for participation by the public and were responsible, along with Van Dyck, for opening up the lake to the public for the project. Accordingly, under ***Roberts***, the Palans occupied the lake and are entitled to recreational immunity.

¶24 The facts in ***Roberts*** can be distinguished on the basis that the property in that case was privately owned, while the lake in this case is publicly owned. However, that is a distinction without a difference under the law as set forth in ***Roberts***. While the lake in this case was already open to public use, the Palans were responsible for planning the fish crib project and for recruiting members of the public to participate in the project. Under ***Roberts***, as the parties responsible for opening up the lake to the public for the project that involved the ATV operation in which Mueller was engaged when he was injured, the Palans occupied the lake and are entitled to recreational immunity.

¶25 Mueller makes two arguments in support of his position that the Palans did not occupy Blackhawk Lake. First, Mueller argues that the allegations of the complaint establish that the Palans were on the lake only on the day that Mueller was injured, and that "[u]nder Wisconsin law, one-time usage of property, without evidence of an intent to control the property, does not make one an 'owner' or 'occupier' under the Recreational Immunity Statute." In support of his argument, Mueller cites ***Doane***, 216 Wis. 2d at 354, in which this court concluded that an owner of a portable fish shanty "was merely a user of the lake," with no control transferred from the lake's owner, the State. Here, in contrast, the State did transfer control to the Palans by authorizing opening up a certain part of a specific lake to the public for the fish crib assembly project that involved the ATV

operation in which Mueller was engaged when he was injured.[6] Similarly, in ***Roberts***, the property owner allowed the organizer to hold the one-day charity event on the property, and the court ruled that the organizer was responsible for opening the land and indicated that the organizer therefore occupied the land under the recreational immunity statute. ***Roberts***, 367 Wis. 2d 386, ¶¶7, 33, 37. Regardless of whether the fish crib assembly project was undertaken on only one day, under ***Roberts*** the duration of the activity is not dispositive. In sum, the Palans were not mere users of the lake like the fish shanty owner in ***Doane***.

¶26 Second, Mueller argues that the circuit court erroneously based its conclusion that the Palans occupied Blackhawk Lake on its findings that the Palans "serve as a supplier to the users" and "have an interest in promoting fishing." Mueller argues that these findings as to "the nature, purpose or intent" of the Palans' business neither make the Palans "owners" of the lake under the recreational immunity statute nor have any basis in the allegations of the complaint. We need not address this argument, because we independently conclude that the Palans did occupy the lake for the reasons set forth above without considering these asserted findings.

CONCLUSION

¶27 For the reasons stated, we conclude that under WIS. STAT. § 895.52, Van Dyck and the Palans are entitled to recreational immunity from liability for

[6] We note that while the fish shanty owner may have had a fishing permit, that permit would have been usable throughout the State. Here, however, the permits for the Palans' project limited the Palans and the volunteers to the specific fish crib assembly on a specific part of Blackhawk Lake.

Mueller's injuries, and therefore we affirm the orders dismissing Mueller's complaint.

By the Court.—Orders affirmed.

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