COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-2643

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

JOHN ZINTER, JR., A MINOR, BY HIS GUARDIAN AD LITEM, THOMAS J. LYONS,

PLAINTIFF-APPELLANT,

V.

DARLENE OSWSKEY, ROBERT OSWSKEY AND AMERICAN STATES INSURANCE COMPANY, A WISCONSIN CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Douglas County: JOSEPH A. MCDONALD, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. John Zinter, Jr., a minor, appeals a summary judgment in favor of Darlene Oswskey, Robert Oswskey and American States Insurance Company (collectively, the Oswskeys). Zinter severed the tip of his finger while a guest at the Oswskey home. Zinter sued the Oswskeys, alleging that his finger was injured by the Oswskeys' rabbit "or some other mechanism of injury." The circuit court dismissed Zinter's claim after concluding that the Oswskeys were immune from liability pursuant to WIS. STAT. § 895.52(2)(b),[1] the recreational immunity statute.

¶2 Zinter contends that there are disputed issues of fact that preclude summary judgment and that the recreational immunity statute is inapplicable to his claims. We conclude that the statute is inapplicable to one of his claims, and may apply to his second claim, depending on the resolution of disputed material facts. We reverse the summary judgment and remand for further proceedings.

BACKGROUND

¶3 Many of the facts are undisputed. Zinter's father, John, Sr., asked the Oswskeys to watch his two children, John, Jr., age three, and Lindsay, age four, so that he could attend a funeral. Darlene Oswskey and her friend, Kay Bartz, were at home with John, Lindsay and Darlene's two children, ages twelve and three. While Darlene was making dinner in the kitchen, Bartz and the three youngest children were outside the house.

¶4 Bartz heard a scream and looked toward the source of the sound. She ran toward the scream and within three seconds, reached Zinter. He was

[1] All statutory references are to the 1999-2000 version unless otherwise noted.

walking toward her from an area by a rabbit cage and the garage. Zinter was holding out his right hand and crying. Bartz saw that Zinter's finger was bleeding and that the fingertip appeared to be missing. She carried him to the house where she met Darlene, who called the paramedics.

¶5 In her deposition Bartz testified that after Zinter was injured, he told her that "the rabbit did it" or "the rabbit bit it." Several adults, including law enforcement personnel, looked for the tip of Zinter's finger in and around the rabbit cage, but did not find it. Zinter was eventually taken to the hospital, where he underwent surgery to repair his finger. At the hospital, he again told at least one doctor that a rabbit had bit his finger.

¶6 Zinter, acting through his guardian ad litem, brought this action. His complaint alleged three claims: (1) the Oswskeys negligently supervised Zinter while he was in their care and custody; (2) the Oswskeys as landowners negligently kept the rabbit; and (3) the Oswskeys' liability insurance policy provided coverage for the Oswskeys' negligent acts.

¶7 The Oswskeys moved for summary judgment, contending that Zinter could not prove negligence. Specifically, they argued first that there was no evidence Darlene had negligently supervised Zinter. They explained:

> At the time the incident occurred, Ms. Oswskey was in the kitchen preparing dinner for the children. Ms. Oswskey had entrusted the children's supervision to her adult friend, Kay Bartz. The children were being supervised by a responsible adult while Ms. Oswskey was preparing dinner. Ms. Oswskey can in no way be found negligent in entrusting another adult to supervise the children for a short period of time while she made them dinner. [Zinter] cannot prove that this entrustment was a breach of her supervisory duties. Therefore, [Zinter] cannot show that Ms. Oswskey breached her duty of ordinary care to him. …

¶8 Second, the Oswskeys argued that they had not breached a duty to Zinter by keeping a rabbit on the property. They stated:

> At no time relative to the incident in question was the rabbit out of its cage. Additionally, [Zinter] has offered no proof that the rabbit itself inflicted the injury, other than what the three-year-old [Zinter] said following the incident. Defendants had no prior notice of any problems whatsoever with the rabbit biting or causing any problems to anyone.

In support of their contention that there was no proof the rabbit bit Zinter, the Oswskeys submitted medical reports that included statements from Zinter's doctors questioning whether a rabbit bite could have caused Zinter's specific injury. These reports suggested the injury could have been caused by a rabbit cage hinge or other mechanism.

¶9 Third, the Oswskeys argued that with respect to both claims, Zinter was implicitly seeking application of the res ipsa loquitur doctrine. The Oswskeys disagreed that the doctrine was applicable, noting that children often injure themselves and those injuries are not necessarily caused by anyone's negligence.

¶10 Finally, the Oswskeys argued that public policy considerations preclude Zinter from recovering, stating that if Zinter was allowed to recover, the court "would be essentially holding a landowner strictly liable for any injury to any child on their land."

¶11 Zinter opposed the summary judgment motion, arguing that the Oswskeys had negligently left him unsupervised while he played in the yard. He also contended that he had been injured either by a rabbit bite or by cutting himself on the rabbit cage, and that the doctrine of res ipsa loquitur applied. He explained, "Regardless of which agent caused the injury … both of the agents

were in the exclusive control of [the Oswskeys] at the time of loss." Finally, Zinter submitted evidence and a veterinarian's opinion that his injury could have been caused by a rabbit bite.

¶12 The trial court considered the parties' arguments and issued an oral ruling, deciding the Oswskeys' motion on an issue not raised by the parties: application of the recreational immunity statute. The court explained that for purposes of deciding the summary judgment motion, it would assume those facts most beneficial to the plaintiff. The pertinent facts, the court concluded, were: (1) Zinter was a young child; (2) the caged rabbit severed the distal end of Zinter's finger; (3) Zinter's father placed him in the Oswskeys' custody for safekeeping; (4) Darlene was cooking supper with Bartz, who entered the kitchen, asked Darlene if she wanted help, and then returned outside when Darlene indicated no help was needed; and (5) the Oswskeys had kept the rabbit, along with some of its siblings, as a family pet for five or six years.

¶13 The trial court concluded that based on our supreme court's decision in ***Hudson v. Janesville Conservation Club***, 168 Wis. 2d 436, 484 N.W.2d 132 (1992), the Oswskeys were immune from liability. Specifically, the court held that Zinter had been injured by the rabbit, a "wild animal" pursuant to WIS. STAT. § 895.52(2)(b). The court granted summary judgment for the Oswskeys on all counts. This appeal followed.

STANDARD OF REVIEW

¶14 We review the trial court's grant of summary judgment de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). When reviewing the trial court's decision, we apply the same standards as the trial

court. *See* ***id.*** WISCONSIN STAT. § 802.08(2) sets forth the standard by which summary judgment motions are to be judged:

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion, ***L.L.N. v. Clauder***, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997); ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), and doubts as to the existence of a genuine issue of material fact are resolved against the moving party. ***L.L.N.***, 209 Wis. 2d at 684. The court takes evidentiary facts in the record as true if not contradicted by opposing proof. ***Id.***

DISCUSSION

I. Negligence claims

A. Negligence principles

¶15 Zinter's complaint alleges that the Oswskeys were negligent as babysitters and as landowners. In order to constitute a claim for negligence, there must exist: (1) a duty of due care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the plaintiff's injury; and (4) an actual loss or damage as a result of the injury. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶28, 241 Wis. 2d 804, 623 N.W.2d 751.

¶16 Negligence is ordinarily an issue for the fact-finder and not for summary judgment. ***Id.*** at ¶2. Summary judgment is uncommon in negligence

actions, because the court must be able to say that no properly instructed, reasonable jury could find, based on the facts presented, that the defendant failed to exercise ordinary care. *See* ***id.*** Ordinarily a court cannot so state. ***Id.*** Even where historical facts are concededly undisputed, the peculiarly elusive nature of the term "negligence" and the necessity that the trier of fact pass upon the reasonableness of the conduct makes it uncommon for personal injury cases to be decided on summary judgment. *See* ***id.*** (citing ***Gauck v. Meleski***, 346 F.2d 433, 437 (5th Cir. 1965)).

B. Negligence as babysitters

¶17 Zinter's complaint alleges that the Oswskeys negligently "failed to supervise" Zinter while he was in their care and custody. This is not, however, a "negligent supervision" claim nor a "negligent failure to control" claim as those terms are used in Wisconsin negligence law.

¶18 Our supreme court in ***Gritzner v. Michael R.***, 2000 WI 68, 235 Wis. 2d 781, 611 N.W.2d 906, explained that Wisconsin has recognized a tort of negligent supervision relating to an employer's "negligent supervision" of its employees, pursuant to which the injured party seeks to hold an employer liable for an employee's wrongful acts. *See* ***id.*** at ¶45 n.13; ***Doyle v. Engelke***, 219 Wis. 2d 277, 287, 580 N.W.2d 245 (1998). ***Gritzner*** additionally noted that Wisconsin courts have also recognized the claim of "failure to control" a minor child, which encompasses both failure to control and failure to supervise the conduct of a child. *See* ***Gritzner***, 2000 WI 68 at ¶45 n.13.

¶19 In the case of both "negligent supervision" and "negligent failure to control" claims, the issue is the alleged tortfeasor's liability for the wrongful acts of the employee or child. Here, there is no allegation that Zinter harmed anyone

but himself. Thus, we construe Zinter's first count as a claim for general negligence. *See* ***Stauss v. Oconomowoc Residential Programs, Inc.***, 2000 WI App 269, ¶13, 240 Wis. 2d 265, 621 N.W.2d 917 (An adult who voluntarily takes on the supervision, custody or control of a visiting child stands in a "special relationship" to such child for purposes of the child's protection.).

¶20 The trial court dismissed Zinter's complaint, including the negligence claim related to babysitting, based on the recreational immunity statute. We conclude that this count should not have been dismissed for two reasons: (1) the recreational immunity statute does not provide immunity for alleged negligence as a babysitter; and (2) there are disputed issues of material fact whether the Oswskeys were negligent babysitters.

¶21 First, the Oswskeys have not provided this court with any authority to support the proposition that the recreational immunity statute bars a claim for negligent babysitting. The recreational immunity statute, discussed in more detail later in this opinion, provides immunity to landowners in limited situations. *See* WIS. STAT. § 895.52. We conclude that a tortfeasor who is immune from liability as a landowner nonetheless may be liable under other legal theories, such as negligent babysitting.[2]

¶22 The following hypothetical situation illustrates the point. A babysitter takes a walk in a forest privately owned by a third person. The babysitter's charge, a small child, wanders off and is attacked by a bear. The

[2] As evidenced by our supreme court's recent opinions in ***Minnesota Fire & Cas. Ins. Co v. Paper Recycling***, 2001 WI 64; ***Urban v. Grasser***, 2001 WI 63; ***Waters v. Pertzborn***, 2001 WI 62, whether a landowner is immune under the recreational immunity statute is often difficult to determine and can require a fact-intensive inquiry.

recreational immunity statute may provide the landowner with immunity from suit for the injury that occurred on the property. *See* WIS. STAT. § 895.52; ***Hudson***, 168 Wis. 2d at 444. However, the babysitter is still potentially liable for negligently allowing the child to wander away. *See* ***Stauss***, 2000 WI App 269 at ¶13. We are unconvinced that the result should be any different if the babysitter also happens to own the land on which the child is walking. Accordingly, we conclude that the trial court erred when it dismissed Zinter's negligence claim on grounds that the recreational immunity statute immunized the Oswskeys from liability for negligent babysitting.

¶23 The Oswskeys argue that in the alternative, summary judgment on count one is appropriate because Zinter cannot prove the necessary elements to support his negligent babysitting claim. We have reviewed the pleadings, affidavits, depositions and other materials submitted to the trial court. Based on our review, we conclude that there are disputed issues of material fact that preclude summary judgment on count one.

¶24 For example, the parties disagree whether Darlene Oswskey was properly supervising Zinter at the time of the accident. The Oswskeys assert, "[T]here is no evidence that Mrs. Oswskey was negligent in her supervision." Zinter, on the other hand, contends that his injury "occurred while he was unsupervised by the Oswskeys." Bartz testified that she was having a cigarette and checking on the children when she heard Zinter scream. We conclude that whether Bartz was supervising the children, whether she was doing so properly, and whether it was reasonable for Darlene to be in the kitchen while Zinter was outside playing are issues for the jury to decide. *See* ***Kaczmarczyk***, 2001 WI 25 at ¶2.

¶25 Finally, we decline the parties' invitation to address whether the doctrine of res ipsa loquitur would apply in this case. In addition to the fact that the trial court did not base its decision on this issue, we conclude that the record is insufficiently developed to determine whether the doctrine would apply.

C. Negligence as landowners

¶26 Zinter's second claim is against the Oswskeys as landowners. Although the Oswskeys did not plead the recreational immunity statute, WIS. STAT. § 895.52, as a defense, the trial court concluded the Oswskeys were immune under § 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 or for any death or injury resulting from an attack by a wild animal.

Specifically, the court found that Zinter's injury resulted from an attack by a wild animal.[3]

¶27 The trial court concluded that the Oswskeys were immune from liability as landowners by application of the recreational immunity statute. We conclude that summary judgment should not have been granted because: (1) there are disputed issues of fact whether Zinter was bitten by the rabbit; and (2) there are insufficient facts in the record to determine whether the rabbit was of a

[3] The trial court did not address whether Zinter was engaging in a recreational activity, and on appeal the Oswskeys do not raise this as another potential theory of immunity under the recreational immunity statute. Thus, we do not address whether the Oswskeys are potentially immune for injury caused when Zinter was "engaging in a recreational activity on the owner's property." *See* WIS. STAT. § 895.52(2)(b).

domesticated species or wild species, which affects whether the recreational immunity statute bars liability for the landowner.

1. Disputed issue of fact whether Zinter was bitten by the rabbit

¶28 The trial court in its oral decision indicated that it was assuming the facts in a light most favorable to Zinter. However, several of the facts the trial court chose to accept were disputed by, and ultimately not favorable, to Zinter. Specifically, Zinter submitted evidence suggesting the rabbit bit him, but also pled and argued that "some other instrumentality" may have injured him. The Oswskeys submitted evidence suggesting Zinter's injury could not have been caused by the rabbit.

¶29 The trial court based its decision on a defense not raised by the Oswskeys: the recreational immunity statute. Given the court's ruling, it is now in the Oswskeys' best interest to acknowledge the rabbit bit Zinter, while Zinter emphasizes that the rabbit or another instrument caused his injury. Zinter stresses, "[n]either party knows how the injury occurred," while the Oswskeys argue this court should hold Zinter to the facts he originally presented to the trial court, even though those same facts ultimately resulted in the dismissal of all claims.

¶30 Based on our review of the record, we conclude that there is evidence supporting and refuting the theory that Zinter's finger was bitten by a rabbit. For instance, Zinter made statements immediately after the injury and at the hospital indicating that the rabbit had bitten his finger. There is also a report from a veterinarian opining that a rabbit could have caused Zinter's injury. Conversely, one treating physician doubted whether a rabbit could have caused such a "sharp-edged" cut. We conclude that whether the rabbit bit Zinter's finger is an issue for the fact finder to determine.

¶31 If the fact finder determines that the rabbit bit Zinter's finger, then the trial court must consider whether the recreational immunity statute bars liability. To aid the court in its analysis, we address whether a rabbit constitutes a "wild animal" as that term is used in WIS. STAT. § 895.52(2)(b).

2. Whether a rabbit is a "wild animal"

¶32 In ***Hudson***, our supreme court interpreted the recreational immunity statute, WIS. STAT. § 895.52, which provides in relevant part:

> **Recreational activities; limitation of property owners' liability**. …
>
> ….
>
> **(2)** NO DUTY; IMMUNITY FROM LIABILITY. …
>
> ….
>
> (b) Except as provided in subs. (3) to (6), no owner and no officer, employe 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 *or for any death or injury resulting from an attack by a wild animal*. (Emphasis added.)[4]

¶33 ***Hudson*** held that the statute "unambiguously insulates property owners from liability 'for any injury resulting from an attack by a wild animal.'" ***Hudson***, 168 Wis. 2d at 444. The court further stated that a person need not be engaged in a recreational activity when injured by a wild animal in order for the property owner to be immune from liability. ***Id.***

[4] WISCONSIN STAT. § 895.52(2)(b) was amended after ***Hudson v. Janesville Conservation Club***, 168 Wis. 2d 436, 484 N.W.2d 132 (1992), by 1995 Wis. Act 223, §1, to include the term "death." The statutory amendment does not affect our analysis.

¶34 ***Hudson*** also provided guidance for evaluating whether an animal is "wild." The court explained:

> If a type of animal normally survives without human assistance in a state of nature, or is nondomesticated and usually is of outdoor habitation, or is of an untamable disposition, then we are of the opinion that the animal is probably wild, as that term is used in sec. 895.52(2)(b).

Id. at 447. The court concluded that a captive buck deer is a wild animal within the meaning of the statute, observing that deer survive abundantly in Wisconsin, are not generally selectively bred or otherwise domesticated, and have an untamable disposition. *See* ***id.*** at 447-48.

¶35 The parties disagree whether rabbits are wild animals, implying that there is only one type of rabbit. We do not agree. In ***Sprague-Dawley, Inc. v. Moore***, 37 Wis. 2d 689, 155 N.W.2d 579 (1968), a case cited with approval in ***Hudson***, our supreme court held that albino rats are not "wildlife" as that term was used in an unemployment compensation statute. *See* ***Sprague-Dawley***, 37 Wis. 2d at 695-96. Specifically, the court concluded that of the four species of rats found in the United States, the albino rat is a domesticated strain that does not survive in a state of nature. ***Id.*** at 696.

¶36 We conclude that a similar analysis is applicable to rabbits. Dictionary definitions suggest that rabbits may be domesticated or wild. The AMERICAN HERITAGE DICTIONARY 1074 (New College ed. 1975), defines rabbit as "Any of various long-eared, short-tailed, burrowing mammals of the family Leporidae, such as the commonly domesticated Old World species *Oryctolagus cuniculus*, or the cottontail." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1869 (3d ed. unabr. 1993), offers a similar definition: "A small

grayish brown mammal [that] has developed under domestication many varieties differing from the wild form in size, conformation, and coloring and variously adapted to the production of meat and fur or for pet and show stock."

¶37 Wisconsin's statutes and administrative code likewise recognize that there are both domesticated rabbits and wild rabbits. *See, e.g.*, WIS. STAT. § 174.001 (the term "livestock" includes domestic rabbits); WIS. STAT. § 29.977 (protected wild animals include rabbits); WIS. ADMIN. CODE § ATCP 160.18 (governing the showing of domesticated rabbits).

¶38 Thus, we conclude that rabbits may be of a domesticated species or wild species. We agree with the Oswskeys that determining whether their rabbit is of a domesticated species or wild species does not depend on whether the Oswskeys' rabbit was treated as a pet. If the rabbit is of a wild species and the Oswskeys simply caged it, it remains a "wild animal" as that term is used in WIS. STAT. § 895.52(2)(b).

¶39 There is insufficient information in the record to determine whether the Oswskeys' rabbit was of a domesticated species or wild species of rabbit; that issue will require resolution by the fact finder. If the Oswskeys' rabbit is of a domesticated species, then under the test articulated in ***Hudson***, the rabbit is not a wild animal as that term is used in § 895.52(2)(b). If the Oswskeys' rabbit is of a wild species, then it is a wild animal as that term is used in § 895.52(2)(b).

¶40 Finally, we note that the parties for the first time on appeal debate whether WIS. STAT. § 895.52(6)(d), the social guest exception to the recreational immunity statute, would nullify the Oswskeys' potential immunity under the statute. Because this issue was not addressed in the trial court, and may be irrelevant depending on the numerous resolutions of disputed fact that are

required, we decline to address this issue. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on narrowest possible ground).

II. Count three: insurance coverage

¶41 The third count alleges that the Oswskeys' liability insurance provides coverage for their alleged negligence. The parties did not raise the issue of the policy's applicability at the trial court or on appeal. It was dismissed on grounds that the recreational immunity statute provided the Oswskeys immunity. Because we have reversed summary judgment on the two negligence counts, we reverse judgment on this count, without commenting on the potential coverage issues.

By the Court.—Judgment reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.