COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP762 **Cir. Ct. No. 2009CV141**

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

MARK E. KLEEMANN,

PLAINTIFF-APPELLANT,

DEAN HEALTH PLAN, INC. AND DELTA DENTAL OF WISCONSIN, INC.,

INVOLUNTARY-PLAINTIFFS,

V.

SCOTT EMERSON AND RURAL MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Iowa County: EDWARD E. LEINEWEBER, Judge. *Affirmed.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Mark E. Kleemann appeals from a summary judgment decision that dismissed his negligence action against Scott Emerson and

Emerson's insurer for injuries Kleemann suffered when a hockey puck shot by Emerson hit Kleemann in the face. Kleemann challenges the trial court's determination that the recreational immunity statute applied and its refusal to allow him to amend his complaint. We affirm for the reasons discussed below.

BACKGROUND

¶2 Kleemann and Emerson were among a group of people who went to a local hockey rink for the purpose of playing a pick-up game of hockey. Prior to the game, the entire group skated around on the ice to warm up. Emerson used this time to practice shooting the puck, because he had never played hockey on the ice before and had limited skating experience. While Emerson was practicing, he executed a quick maneuver, turning around and shooting toward the goal in one motion. Emerson did not look to see if anyone was in the path of his shot, and the puck struck Kleemann in the mouth, injuring him.

STANDARD OF REVIEW

¶3 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-23, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Id.***, ¶24. We view the materials in the light most favorable to the party opposing the motion. ***Id.***, ¶23.

DISCUSSION

¶4 The recreational immunity statute provides in relevant part:

> A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with the intent to cause injury.

WIS. STAT. § 895.525(4m)(a) (2007-08).[1] The requisite "physical contact" need not be aggressive in nature; it may include any touching of bodies. ***Noffke v. Bakke***, 2009 WI 10, ¶¶19, 28, 315 Wis. 2d 350, 760 N.W.2d 156. The term "sport" includes any "activity involving physical exertion and skill that is governed by a set of rules or customs," and does not need to be competitive in nature. ***Id.***, ¶¶31-32 (citation omitted). A "team" is merely a "group organized to work together." ***Id.***, ¶32 (citation omitted).

¶5 Kleemann first argues that Emerson was not engaged in a recreational "sport" at the time of the injury because the actual hockey game had not yet started. This argument is not tenable in light of WIS. STAT. § 895.525(2), which expressly defines recreational activity to include "practice." Both Kleemann and Emerson had donned their skates and were on the rink with sticks and at least one puck, preparing to play hockey—a team sport that Kleemann does not dispute involves at least some degree of physical contact, even when undertaken in a friendly pick-up game. Therefore, we conclude that Kleemann

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

and Emerson were participating in a recreational activity at the time of the incident.

¶6 Kleemann next argues that the informal nature of the group, which was not part of any sort of league, should not qualify as an amateur team. The statute, however, defines amateur teams to *include* various leagues. The use of the word amateur in WIS. STAT. § 895.525(4m)(a) differentiates it from § 895.525(4m)(b), which sets different immunity criteria for "persons in a sport involving professional teams in a professional league." A pick-up game clearly falls within the parameters of an amateur, rather than professional, recreational activity.

¶7 Kleemann focuses on the term "enterprises" in the statement of legislative purpose, arguing that a pick-up hockey game could hardly be an "enterprise." Yet he provides no authority for the proposition that "enterprise" does not include undertakings and systematic activities such as organizing a pick-up hockey game, and we see no reason why it should not.

¶8 Finally, Kleemann argues that the recreational immunity statute should not apply because Emerson's conduct went beyond negligence to recklessness. Emerson points out that Kleemann failed to plead recklessness, however, and contends that the trial court properly refused to allow the complaint to be amended. We agree that Kleemann's failure to plead recklessness was fatal to his cause of action, and that the trial court acted within its discretion in refusing to allow amendment of the complaint. *See generally* ***Nelson v. American Employers' Ins. Co.***, 262 Wis. 271, 274-75, 55 N.W.2d 13 (1952); ***Piaskoski & Associates v. Ricciardi***, 2004 WI App 152, ¶30, 275 Wis. 2d 650, 686 N.W.2d 675.

¶9 Kleemann did not ask to amend his complaint until the summary judgment hearing, well after the time to amend the pleadings set forth in the scheduling order had passed and after counsel had represented to the court that the complaint was in its final form. Moreover, the court noted that Kleemann had all the information he needed to amend the complaint before the summary judgment motion had been filed, and that the motion was a strategic response to that motion. In other words, the court properly balanced relevant factors in reaching its decision.

By the Court.—Judgment affirmed.

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