COURT OF APPEALS
DECISION
DATED AND FILED

March 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1499-CR **Cir. Ct. No. 2011CT263**

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

TODD M. ANDERSON,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Reversed and cause remanded.*

¶1 GUNDRUM, J.[1] The State of Wisconsin appeals from a judgment dismissing charges against Todd M. Anderson for operating a motor vehicle while

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

intoxicated (OWI) third offense, contrary to WIS. STAT. § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration (PAC) third offense, contrary to § 346.63(1)(b). Noting that under WIS. STAT. § 346.61,[2] Wisconsin's drunken driving laws are applicable "upon all premises held out to the public for use of their motor vehicles," the State argues that the circuit court erred in concluding frozen Lake Winnebago is not a "premises." We agree and reverse.

¶2 On January 30, 2011, Anderson was a passenger in a sport utility vehicle (SUV) in which he and companions were doing "donuts" and "hav[ing] fun" on Lake Winnebago's frozen surface. The SUV became stuck on the ice. Anderson and his companions tried to free the SUV, with Anderson in the driver's seat operating the controls of the vehicle while his companions pushed the vehicle from the outside. Winnebago county sheriff's deputies eventually arrived on the scene. In interacting with Anderson, a sheriff's deputy observed various indicia of intoxication. Anderson admitted to operating the SUV in attempting to free it from the ice. The deputy arrested Anderson for OWI, and a subsequent blood test result showed a blood alcohol content of .365 percent.[3] Anderson was charged with OWI third offense and operating with a PAC third offense.

¶3 The State first attempted to prosecute Anderson by alleging he violated Wisconsin's OWI laws on a "highway." The circuit court rejected this

[2] WISCONSIN STAT. § 346.61 addresses the applicability of Wisconsin's drunken driving statutes and provides in relevant part: "In addition to being applicable upon highways, [WIS. STAT. §§] 346.62 to 346.64 are applicable upon all premises held out to the public for use of their motor vehicles…."

[3] The facts are drawn either from the criminal complaint or Anderson's own admissions in briefs.

theory and dismissed the complaint, concluding frozen Lake Winnebago did not qualify as a "highway."

¶4 The State refiled the complaint, this time under the theory that, pursuant to WIS. STAT. § 346.61, frozen Lake Winnebago qualified as a "premises held out to the public for use of their motor vehicles," and, thus, that Anderson violated Wisconsin's OWI laws on this premises. Anderson moved to dismiss, arguing that the Wisconsin Supreme Court in ***City of Kenosha v. Phillips***, 142 Wis. 2d 549, 419 N.W.2d 236 (1988), limited the locations covered by § 346.61 to "parcel[s] of land or real estate, including any appurtenances thereon." Anderson contended that a frozen lake should not be considered a "premises" because it is neither a parcel of land nor real estate. The circuit court granted Anderson's motion to dismiss, concluding that frozen Lake Winnebago was held open to the public but was not a "premises" under § 346.61. The State appeals.

¶5 Because Anderson agrees with the circuit court's conclusion that frozen Lake Winnebago was held open to the public,[4] we need only decide whether the frozen lake constituted a "premises" under WIS. STAT. § 346.61.[5]

[4] In his appellate brief, Anderson admits, "Yes, the ice is open to the public, for anyone to drive on it."

[5] We briefly address Anderson's statement on appeal that he was "not driving at all" but simply "went behind the wheel to get [] unstuck from the ice." To be found guilty under WIS. STAT. § 346.63, it is not necessary that Anderson *drove* the vehicle; he need only have *operated* it. *See* § 346.63(3)(b). In his brief in support of his motion to dismiss, Anderson admitted that he operated a motor vehicle: "Mr. Anderson concedes that he indeed was operating a motor vehicle ... which he was attempting to rock free from the ice." In his appellate brief, Anderson also makes factual statements which, together with the obvious inferences therefrom, indicate he was operating the vehicle while his companions pushed on it from the outside. In addition, for purposes of the motion to dismiss, the complaint, by incorporation of the documents attached to it, alleged Anderson admitted to operating the controls of the vehicle while attempting to get the vehicle unstuck from the ice. We address this issue no further.

¶6 Whether frozen Lake Winnebago qualifies as a "premises" under WIS. STAT. § 346.61 is a question of statutory construction we review de novo. *See* ***City of La Crosse v. Richling***, 178 Wis. 2d 856, 858, 505 N.W.2d 448 (Ct. App. 1993). When interpreting a statute, our goal is to ascertain and give effect to the intent of the legislature. ***State v. Parmley***, 2010 WI App 79, ¶7, 325 Wis. 2d 769, 785 N.W.2d 655.

¶7 On appeal, Anderson argues that "premises" in WIS. STAT. § 346.61 "does not apply to frozen lakes" because "[a]ccording to [§] 346.61, the term premises states, 'classes of buildings and facilities'" and "[t]here were no buildings or facilities even close." Anderson is wrong. We conclude that frozen Lake Winnebago qualifies as a "premises" under § 346.61.

¶8 Contrary to Anderson's claim, WIS. STAT. § 346.61 does not define "premises" as classes of buildings and facilities. In fact, § 346.61 does not define premises at all. It is possible that Anderson, who is pro se on appeal, may have been thinking of the description of "premises" provided by the ***Phillips*** court and relied on by his trial counsel, which stated "[t]he term, 'premises,' ... appears to mean any parcel of land or real estate, including any appurtenances thereon." *See* ***Phillips***, 142 Wis. 2d at 556. Regardless, ***Phillips*** is of little help to Anderson because the issue in ***Phillips*** was not whether the area on which the alleged offense was committed was a "premises," but whether the premises at issue was "held out" for public use. *See* ***id.*** at 556-57.

¶9 Unlike the ***Phillips*** court, our task is to determine whether the area on which the alleged offense was committed was a "premises." To begin, we note that the ***Phillips*** court's description of "premises" as "appear[ing] to mean any parcel of land or real estate," *see* ***id.*** at 556, does not exclude a lake as a

"premises." In fact, submerged land covered by the waters of a lake was identified as "premises" by our supreme court well before ***Phillips***. *See* ***Illinois Steel Co. v. Bilot***, 109 Wis. 418, 428, 84 N.W. 855 (1901).

¶10 Our interpretation that "premises" in WIS. STAT. § 346.61 includes a frozen lake like frozen Lake Winnebago is also consistent with a more recent decision by another district of this court, ***Mooney v. Royal Ins. Co. of Am.***, 164 Wis. 2d 516, 520, 476 N.W.2d 287 (Ct. App. 1991). While the issues in ***Mooney*** differed from the issue in the case at bar, the ***Mooney*** court's identification of a frozen lake as a "premises" suggests it shares our interpretation. ***Id.*** at 520, 524. ***Mooney*** involved a snowmobile accident on frozen Lake Minocqua in which a snowmobiler struck a snow mound left on the lake by a snowmobile club five days after the conclusion of an event the club had held there. ***Id.*** at 519-20. In determining the club was not entitled to immunity under the recreational immunity statute, the ***Mooney*** court explicitly referred to frozen Lake Minocqua as a "premises": "We conclude that the club was not an occupant at the time of the accident because they had finished cleaning up and had left *the premises* with no intent to return." ***Id.*** at 520 (emphasis added).[6]

[6] Common sense also dictates the conclusion that if one is on a frozen lake which is within the boundaries of a larger area, one does not cease being on the premises simply because they are on the frozen lake portion of the premises. Similarly, as we conclude here, the area of the frozen lake itself, even if not within the boundaries of a larger area, is itself a "premises." Whether the premises is one a person can drive a car on, however, will be dictated largely by the weather. *See, e.g.*, *Most vehicles to break through ice: Wisconsin fishing event sets world record*, WORLDRECORDSACADEMY.ORG, http://www.worldrecordsacademy.org/transport/most vehicles to_break_through_ice_Wisconsin_fishing_event_sets_world_record_112751.html (last visited Mar. 8, 2012), *and No contest: Lake Winnebago swallows sturgeon fishermen's vehicles*, JSONLINE.COM, http://www.jsonline.com/news/wisconsin/no-contest-lake-winnebago-swallows-sturgeon-fishermens-vehicles-dg4be6q-140485133.html (last visited Mar. 8, 2012) (Last month, thirty-six vehicles broke through the ice on Lake Winnebago during an ice fishing contest—setting the world record for the most vehicles to break through ice, according to World Records Academy.).

¶11 Further, while there are many different ways in which "premises" may be defined, Black's Law Dictionary explains that when "premises" is used in a property and estates context, it is "an elastic and inclusive term, and it does not have one definite and fixed meaning; its meaning is determined by its context and is dependent on circumstances in which used, and may mean ... any definite area." BLACK'S LAW DICTIONARY 1180-81 (6th ed. 1990) (citing ***Allen v. Genry***, 97 So. 2d 828, 832 (Ala. Ct. App. 1957)).

¶12 Black's contextual approach for ascertaining the meaning of "premises" comports with Wisconsin's approach for ascertaining the meaning of statutory language. *See* ***State ex rel. Kalal v. Circuit Court***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. "Context is important to meaning.... Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.*** Ultimately, "the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." ***Id.***, ¶44.

¶13 Before enactment of WIS. STAT. § 346.61, the protection of Wisconsin's drunken driving laws was limited to highways, in the absence of an express provision. ***Phillips***, 142 Wis. 2d at 554. By enacting § 346.61, the legislature also prohibited drunken driving upon areas not previously captured under WIS. STAT. §§ 346.62 to 346.64. Section 346.61 expanded the reach of our drunken driving laws to not only protect the public from impaired drivers on Wisconsin highways, but to also protect them in other places held out to the public for use of their motor vehicles: "In addition to being applicable upon highways, [§§] 346.62 to 346.64 are applicable upon *all premises* held out to the public for use of their motor vehicles …." Sec. 346.61 (emphasis added). Referencing a

committee note to § 346.61 which stated that the newly adopted statute gave "a broader applicability" to our drunken driving and reckless driving laws "in the interest of public safety," the ***Phillips*** court itself confirmed: "By the adoption of [§] 346.61, the drunken driving and reckless driving laws were indeed given 'broader applicability.'" ***Phillips***, 142 Wis. 2d at 555.

¶14 Considering this context, WIS. STAT. § 346.61 was not enacted with an eye toward limiting application of WIS. STAT. §§ 346.62 to 346.64 to reckless driving or drunken driving occurring only on certain types of surfaces, but was enacted to give "broader applicability" to our drunken and reckless driving laws "in the interest of public safety." *See* ***Phillips***, 142 Wis. 2d at 555. The legislature chose broad terminology, "all premises," in order to more broadly protect the public from drunken and reckless drivers in other areas, besides just highways, which are navigable by motor vehicles, so long as those areas are held out to the public for use of their motor vehicles. Consistent with this purpose, we conclude "premises" in § 346.61 includes a frozen lake like frozen Lake Winnebago.

¶15 For the foregoing reasons, the State's prosecution of Anderson under WIS. STAT. § 346.63 was appropriate. We therefore reverse and remand for further proceedings not inconsistent with this opinion.

By the Court.—Judgment reversed and cause remanded.

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