COURT OF APPEALS
DECISION
DATED AND RELEASED

SEPTEMBER 11, 1996

No. 95-2795

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

DAVID L. MESSMAN,

Plaintiff-Appellant,

v.

KETTLE RANGE SNOW RIDERS, INC., and GENERAL CASUALTY COMPANY OF WISCONSIN,

Defendants-Respondents.

APPEAL from an order of the circuit court for Manitowoc County: FRED H. HAZLEWOOD, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

ANDERSON, P.J. David L. Messman appeals from an order for summary judgment dismissing his negligence action against Kettle Range Snow Riders, Inc., and its insurer, General Casualty Company of

Wisconsin (collectively, Kettle Range). The trial court concluded that Kettle Range was entitled to recreational immunity under § 895.52, STATS.,[1] and dismissed the action. We agree, and we therefore affirm.

The material facts are undisputed. On March 2, 1994, Messman was riding his snowmobile on the Manitowoc County snowmobile trail, east of County Highway O (the Manitowoc Trail). Messman's snowmobile struck portions of a fallen tree which extended onto the marked and groomed portion of the trail and he sustained injuries.

The Manitowoc Trail is located on property which is owned by the state of Wisconsin, and Manitowoc County has a land use agreement with the state regarding the trail. In turn, Manitowoc County had a contract with Kettle Range, a nonprofit corporation, for snowmobile trail maintenance services. The contract required Kettle Range to groom the trail, cut and contour roadside snowbanks, replace lost or damaged trail signs, and maintain and clean up the trail. Kettle Range was to receive payment for the maintenance services for the entire season at a cost not to exceed $4240. The contract was in effect from December 6, 1993, through March 31, 1994.

On March 8, 1995, Messman filed this action against Kettle Range and its insurer. Messman alleged that Kettle Range was negligent in failing to: (1) warn snowmobilers of the danger of the trail; (2) remove the danger from the

[1] Section 895.52, STATS., was amended effective May 1, 1996, by 1995 Wis. Act 223, § 1-7, to codify the decision of ***Moua v. Northern States Power Co.,*** 157 Wis.2d 177, 458 N.W.2d 836 (Ct. App. 1990). The amendments do not affect our analysis of the issues presented here for review.

snowmobile trail; (3) maintain the snowmobile trail in a safe condition; (4) adequately supervise the trail to prevent dangerous conditions; and (5) make the trail as safe as the nature of the premises would reasonably permit in violation of § 101.11, STATS.

Kettle Range denied the allegations and moved for summary judgment contending that there were no genuine issues of material fact. Kettle Range argued that it was immune from liability pursuant to § 895.52, STATS., Wisconsin's recreational immunity statute. The trial court agreed and granted Kettle Range's summary judgment motion and dismissed Messman's complaint with prejudice. Messman appeals.

On review of an order for summary judgment, the appellate court owes no deference to the trial court. ***Waters v. United States Fidelity & Guaranty Co.***, 124 Wis.2d 275, 278, 369 N.W.2d 755, 757 (Ct. App. 1985). Summary judgment methodology has been oft-repeated and we need not do so here. *See, e.g.,* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980).

Messman's complaint stated a claim for common law negligence against Kettle Range and Kettle Range's answer placed the claim in dispute. Kettle Range also asserted affirmative defenses, including an allegation that the claim was barred by § 895.52, STATS. Kettle Range submitted an affidavit in support of its claim and Messman submitted an affidavit in opposition.

The trial court concluded that Kettle Range was "an occupant or an owner … and entitled to the protection of the statute." The trial court reasoned that the immunity extended to contractors who perform recreational services for persons or entities who are clearly owners of the land.

Messman maintains that the trial court erroneously granted summary judgment to Kettle Range because the undisputed facts raise conflicting inferences as to whether Kettle Range was a private vendor performing fee-based contractual obligations, whether it had abandoned the recreational land under ***Mooney v. Royal Ins. Co.***, 164 Wis.2d 516, 476 N.W.2d 287 (Ct. App. 1991), or whether its conduct constituted a malicious failure to warn under § 895.52(5), STATS., thus precluding immunity. In the alternative, Messman argues that he is a third-party beneficiary to the contract and should be permitted to sue for breach of contract.[2]

Section 895.52(2)(a)1 and 3, STATS., provides, with certain exceptions, that "no owner … owes to any person … engage[d] in a recreational activity … [a] duty to keep the property safe for recreational activities … [or] to give warning of an unsafe condition, use or activity on the property."[3] An

[2] There is nothing in the record to indicate that a claim based upon malicious failure to warn or breach of contract was pleaded or argued below. A theory of relief neither pleaded nor argued to the trial court will not be considered on appeal. A party cannot attack an adverse summary judgment by attempting to amend its complaint on appeal. ***Stern v. Credit Bureau***, 105 Wis.2d 647, 654-55, 315 N.W.2d 511, 515-16 (Ct. App. 1981). We will not address Messman's contentions of malicious failure to warn or his breach of contract claim.

[3] Snowmobiling is a recreational activity under § 895.52(1)(g), STATS.

owner includes a nonprofit organization that occupies the property. Section 895.52(1)(d).

Messman argues that while Kettle Range was "a non-profit organization," it functioned like an independent contractor with a commercial interest because it "provid[ed] paid services at commercial rates under a written contract" and therefore it should not be permitted immunity. We disagree.

The supreme court has determined that despite any minimal pecuniary benefits received from a particular recreational activity, it is nevertheless rational to include nonprofit organizations under the cloak of recreational immunity because it serves to open more Wisconsin recreational land to the public. ***Szarzynski v. YMCA, Camp Minikani***, 184 Wis.2d 875, 888, 517 N.W.2d 135, 140 (1994). The reason for limiting the liability of a nonprofit organization is that

it … is not formed for the purpose of pecuniary profit. The profit it seeks is for the purpose of passing a benefit on to those for whom the organization exists. … [A] nonprofit organization may profit monetarily … but the profit is intended and must benefit the charitable purposes for which it was formed.

Id. Accordingly, the fact that Kettle Range was paid $3775 under the contract does not automatically convert its nonprofit, recreational status to that of an independent commercial contractor.[4]

[4] The record does not include any facts which establish that Kettle Range used the profits from the contract for anything other than nonprofit purposes, as outlined in the bylaws. Messman attempts to categorize Kettle Range as an independent contractor based upon the bidding process, the specificity of the contract and the payment received, but these facts are irrelevant as long as the

Messman also argues that unlike the snowmobile clubs in ***Smith v. Sno Eagles Snowmobile Club, Inc.***, 823 F.2d 1193 (7th Cir. 1987), Kettle Range was not an "occupant" for the purposes of immunity. Messman attempts to distinguish ***Smith*** on two grounds. First, Messman contends that Kettle Range, which contracted for the snowmobile services, was more analogous to the independent contractor in ***Labree v. Millville Mfg., Inc.***, 481 A.2d 286 (N.J. Super. Ct. App. Div. 1984), than to the nonprofit snowmobile clubs in ***Smith***. We disagree.

Kettle Range, which contracted to provide grooming and maintenance services for the public snowmobile trail, is virtually indistinguishable from the defendants in ***Smith***. In ***Smith***, the Seventh Circuit considered whether two snowmobile organizations qualified as occupants under § 29.68, STATS. 1981, Wisconsin's former recreational use statute. ***Smith***, 823 F.2d at 1193-94. The snowmobile clubs had permission from the landowners to construct, groom and maintain snowmobile trails in the Eagle River, Wisconsin area. ***Id.*** at 1194. The plaintiff was injured on one of the trails constructed and maintained by the clubs. ***Id.***

The Seventh Circuit agreed with the district court's finding that even though the clubs were not in actual possession or exclusive control of the land, the clubs nevertheless qualified as occupants and were immune from

(..continued)
profits were used to benefit the purposes for which the organization was formed. *See* ***Szarzynski v. YMCA, Camp Minikani***, 184 Wis.2d 875, 888, 517 N.W.2d 135, 140 (1994). An appellate court's review is limited to those parts of the record made available to it. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992).

liability. ***Id.*** at 1198. The court based the clubs' immunity on the fact that they did not enter upon the land for "commercial gain (as they are non-profit) but only to build a recreational snowmobile trail for use by the public." ***Id***. at 1197. They had permission to and intended to construct, maintain and groom the public trail, illustrating "occup[ancy] … with a degree of permanence." ***Id.*** The court concluded that "to the extent they constructed and groomed" the trail, they were "properly classified as occupants." ***Id.*** at 1198.

Similarly, Kettle Range had a contract to provide grooming and maintenance services on the recreational snowmobile trail for use by the public. It is undisputed that Kettle Range was a nonprofit organization whose purpose was to "serve the interests of snowmobile owners … [by] perform[ing] all desirable and lawful functions for the successful operation of the club and in the general public interest." In addition, Kettle Range obtained permission, through its service contract, to maintain and groom the public snowmobile trail for Manitowoc County. We conclude, like the court in ***Smith***, that to the extent Kettle Range maintained and groomed the trail, it was properly classified as an occupant and was entitled to immunity.

Messman further contends that "[t]he real distinction both ***Smith*** and ***Labree*** make … is the commercial nature of the occupation, not the actual conduct of the occupants." Messman concedes in his brief that the "'occupation' in ***Smith*** is … similar to the 'occupation' here, [but argues that] the fee-for-services contract underlying Kettle Range's 'occupation' puts it in an entirely different category. Its presence is commercial rather than recreational."

We have already addressed and dismissed Messman's concerns regarding Kettle Range's purported "commercial contract."

However, Messman has also mischaracterized the distinction in ***Smith*** and ***Labree***. The issue in ***Smith*** was not whether the activity was a "volunteer" or "commercial" venture. Rather, the ***Smith*** court addressed the appellants' narrow definition of "occupants" and their assertion that ***Labree*** supported this interpretation.

In the process of concluding that this interpretation would "negate and defeat the very intent of the Wisconsin legislature to open up as much land as possible," the Seventh Circuit also distinguished ***Labree***. ***Smith***, 823 F.2d at 1197-98. The defendant in ***Labree*** was an independent contractor whose business profited from the excavation of sand and gravel which were to be used in the construction of a highway bed. ***Labree***, 481 A.2d at 288. Although not part of the contract, the excavation resulted in the creation of a twenty-acre lake which was informally used by the public for swimming and bathing. ***Id.*** The plaintiff suffered a diving injury at the lake and was rendered a quadriplegic. ***Id.***

The ***Smith*** court made the following distinctions: (1) the ***Labree*** defendant entered the land as part of a business agreement and *for commercial gain*; (2) the ***Labree*** defendant never occupied the property "'with a degree of permanence,' [because] the contractor simply removed sand and gravel from the land pursuant to its contractual obligations;" and (3) "[t]he creation of the lake *was not* intended to be part of the commercial venture." ***Smith***, 823 F.2d at

1197 (emphasis added). The ***Labree*** defendant used the property to remove the sand and gravel, not to create the twenty-acre lake which was used for recreational activities. ***Smith***, 823 F.2d at 1197. In contrast, the snowmobile clubs utilized the property, according to their agreements, to construct, maintain and groom the recreational trails. ***Id.*** Herein lies the distinction between ***Labree*** and ***Smith***, as well as ***Labree*** and the case at bar. It is clear that ***Labree*** does not provide the support which Messman is seeking.

In the alternative, Messman argues that, unlike ***Smith***, here there is a genuine issue of material fact concerning whether Kettle Range abandoned the recreational land as articulated in ***Mooney***, 164 Wis.2d at 520, 476 N.W.2d at 289. This argument is equally unpersuasive.

Mooney involved a nonprofit snowmobile club which had received permission to hold a snowmobile speed race on Lake Minoqua. ***Id.*** at 519, 476 N.W.2d at 288. After the race, the club removed the flags and other race equipment from the lake. The members also attempted to flatten the track area back to its natural state, but several mounds of plowed ice remained after the clean-up. ***Id.*** at 519-20, 476 N.W.2d at 288. The club president testified that after the clean-up, the club had completed all of its activities on the lake and had no plans to return. ***Id.*** at 519, 476 N.W.2d at 288. Consequently, Mooney was injured when his snowmobile hit one of the remaining mounds of ice. ***Id.***

The ***Mooney*** court determined that the club had abandoned the recreational property. ***Id.*** at 522, 476 N.W.2d at 289. The court reasoned that "[w]hile an 'occupant' need not be in actual possession or exclusive control, he

cannot totally abandon the premises. … [T]he club [in ***Mooney***] had concluded all of its activities … before the accident occurred and did not intend to return." ***Id.*** (citation omitted).

The club pressed the court to establish a bright-line rule that an occupant remained in possession of the recreational property until the lease had expired. ***Id.*** The court declined to extend immunity in situations where "the evidence unequivocally show[ed] an intentional and permanent abandonment of the premises." ***Id.*** at 523, 476 N.W.2d at 290. However, the court noted that "where the evidence of abandonment is ambiguous and reasonably susceptible to conflicting intentions … immunity may extend for the length of a lease or a permit." ***Id.***

Here, the evidence does not establish that Kettle Range intentionally and permanently abandoned the trail. In fact, the evidence demonstrates quite the opposite. Kettle Range submitted the affidavit of Lester Tetzlaff, vice president of Kettle Range, in which he stated "[O]n February 28, 1994, I performed the grooming of the trail in question … [and] it was my intention to return to the snowmobile trail to perform additional grooming work." Kettle Range's contract was in effect through March 31, 1994. Even though the service records indicate that February 28, 1994, was the last day that Kettle Range performed any grooming or maintenance on the trail, this does not negate Kettle Range's stated intention to return to the trail to conduct further grooming. At best, the evidence is somewhat "ambiguous and reasonably susceptible to conflicting intentions," in which case Kettle Range's immunity

should be extended to the end of the contract. *See* ***Mooney,*** 164 Wis.2d at 523, 476 N.W.2d at 290. We so hold.

We agree with the trial court and hold that it properly found under § 895.52, STATS., that Kettle Range, a nonprofit snowmobile club, was an occupant to the extent it maintained and groomed the Manitowoc Trail. We also hold that the trial court properly found that Kettle Range had not yet abandoned its responsibilities to maintain the Manitowoc Trail. We affirm the trial court's grant of summary judgment in favor of Kettle Range since there was no genuine issue of material facts and Kettle Range was entitled to judgment as a matter of law.

By the Court.—Order affirmed.

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