COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2013AP2238 **Cir. Ct. No. 2011CV384**

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

JAMES CHARTIER AND DEBORA CHARTIER,

PLAINTIFFS-APPELLANTS,

ROUNDY'S SUPERMARKETS, INC. AND ROUNDY'S SUPERMARKETS, INC. WELFARE BENEFIT PLAN,

INVOLUNTARY-PLAINTIFFS,

V.

BRIAN D. BENSON, BARBARA A. BENSON, BENSON MANAGEMENT, INC., BENSON PROPERTIES, BENSON PROPERTIES I, LLC A/K/A BENSON PROPERTIES 2, LLC, STATE FARM FIRE AND CASUALTY COMPANY, HOWARD J. DAVIS AND DAVIS CONSTRUCTION,

DEFENDANTS-RESPONDENTS,

ROUNDY'S SUPERMARKETS, INC. EMPLOYEE BENEFIT PLAN BY ITS PLAN MANAGER HUMANA INSURANCE,

DEFENDANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings*.

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

¶1 BLANCHARD, P.J. This tort case resulted from injuries that James Chartier suffered when he allegedly tripped over a protrusion or elevation differential on a concrete pad. The concrete pad was located next to a building owned by Brian and Barbara Benson, and straddled property owned by the Bensons and property owned by the City of La Crosse. The pad was the foundation that remained after the Bensons hired and directed a construction contractor, Howard Davis, to remove an enclosure that housed an automated teller machine on the side of the Bensons' building. Davis removed the ATM enclosure approximately six months before Chartier's fall.

¶2 Chartier filed a complaint against the Bensons and Davis[1] alleging negligence in failing to properly inspect, repair, and maintain the concrete pad, and, based on the same factual allegations, a violation of the safe place statute, WIS. STAT. § 101.11 (2011-12).[2] The circuit court granted summary judgment in favor of the Bensons and Davis, dismissing Chartier's complaint.

[1] Named defendants, in addition to the Bensons, are Benson Management, Inc., Benson Properties, Benson Properties I, LLC a/k/a Benson Properties 2, LLC, and State Farm Fire and Casualty Company. The parties do not distinguish among the defendants in their appellate briefing. Following the lead of the parties, we refer to these defendants collectively as "the Bensons." Similarly, Davis Construction and its insurer are listed as defendants in addition to Howard Davis, and we refer to those defendants collectively as "Davis."

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 On appeal, Chartier argues that the circuit court erred in granting summary judgment in favor of the Bensons because the court failed to reach the following four conclusions: (1) it was a factual question for the jury to resolve whether Chartier's alleged trip occurred on property that was then owned by the city, or instead on property owned by the Bensons; (2) the Bensons may be liable under the safe place statute because the location of the alleged trip was either a "public building" or a "place of employment"; (3) as a matter of law, Chartier's negligence did not exceed that of the Bensons in causing the accident; and (4) even if the location of the alleged trip was on city property, the Bensons could be negligent if they failed to exercise reasonable care in removing the ATM enclosure and in addressing the safety to pedestrians of the foundation that remained.

¶4 We agree with Chartier that the circuit court erred in deciding a disputed factual issue when it found that there was no genuine issue on the question of whether the spot where Chartier claims to have tripped was on city property. We also agree with Chartier that the Bensons are not entitled to judgment as a matter of law on the ground that they have no liability under the safe place statute, because we conclude that the portion of the concrete pad that was owned by the Bensons was a "place of employment" and because we also conclude that the question of whether the city-owned portion was a "place of employment" would be for the jury to decide. We also agree with Chartier that (1) the Bensons fail to demonstrate that this is the exceptional case involving uncontroverted evidence that one party is substantially more negligent than the other as a matter of law, and (2) the Bensons could have been negligent even if Chartier tripped on city property. Accordingly, we reverse the circuit court on those issues and remand for further proceedings.

¶5 As to the claim against Davis, Chartier argues that we should reverse the circuit court's grant of summary judgment "[d]ue to the complete lack of any record or basis upon which to base the judgment." We conclude that Chartier's argument is wholly undeveloped. Accordingly, we affirm this portion of the circuit court's decision.

BACKGROUND

¶6 The following background facts are not disputed by the parties. The Bensons own a two-story building on West Avenue North in La Crosse. There is a laundromat on the street level of the building. The second level consists of apartment units. The focus of this case is a concrete pad that, at the time of the accident, occupied a small, open air area adjoining the west side of the building, near the bottom of a stairway that runs between the first and second floors. Given the nature of the arguments made on appeal, we now describe in some detail the physical layout at the time of the accident.

¶7 Descending the stairway on the west end of the building, one would be heading south. The west side of the stairway was the inside of the west wall of the building. The stairway led down to an outdoor concrete walkway. At the bottom of the stairway, one could not turn left on the walkway, but had to turn right, to the west. A low retaining wall was directly across the walkway from the bottom of the stairway. Thus, a person reaching the bottom of the stairway would ordinarily turn right, and proceed on the walkway, with the retaining wall on the left. Once past the west wall of the stairway, the area at issue in this appeal was on the right, as described in more detail immediately below. After taking only a few steps, a person following the walkway from the bottom of the stairway met a

public, concrete sidewalk that ran north-south, parallel to the west side of the building.

¶8 Prior to November 2007, a small enclosure housing an ATM machine was joined to or at least flush with the west wall of the building, just east of the public sidewalk. Thus, the enclosure was immediately to the north of a person using the walkway to enter or leave the building. But as we now explain, the enclosure was removed before the accident, leaving the concrete pad at issue, between the west wall of the stairway and the public sidewalk.

¶9 In August 2007, as part of a project to widen West Avenue North, the city bought a portion of the Bensons' property located between the west wall of the building and the public sidewalk. As part of the purchase agreement, the Bensons agreed to remove the ATM enclosure, which straddled the new line between the property the city was acquiring and the property the Bensons would retain. The city acquired the west portion of the land on which the enclosure sat and the Bensons retained the east portion, which adjoined the west wall of the building.

¶10 The Bensons hired Howard Davis Construction Company, owned by Howard Davis, to remove the ATM enclosure. Davis initially quoted the Bensons a cost of $4,400 for tasks that included removal of the ATM building, removal of the foundation, and re-pouring concrete in this area. However, the Bensons paid Davis $1,800, for a reduced scope of work. This involved removing the ATM enclosure, but without replacing the foundation on which the enclosure sat, because, according to testimony by Brian Benson, "there was no major concrete work to be done" after the enclosure was removed, and in addition the city planned to replace the public sidewalk in that area in June 2008. Under the more

limited scope contract, Davis removed the ATM enclosure in November 2007, but did not replace the foundation.

¶11 The accident occurred in May 2008, as Chartier helped his son carry a desk out of a second-floor apartment. According to Chartier, the desk was approximately three feet long, and "pretty light." Chartier backed down the stairway and his son faced forward, each carrying one end of the desk. After reaching the bottom of the stairway, Chartier testified that he continued walking backwards in a "semicircle" fashion, so that the men effectively curled around the west wall of the building. This path took them over the concrete pad next to the west wall of the building.

¶12 Chartier testified that he tripped on something, fell, and was injured. A reasonable inference from Chartier's testimony is that one of his heels caught on either (1) a portion of slightly raised concrete forming a lip of the pad, perhaps at the junction of the walkway and the concrete pad, or (2) a hard nub of metal (a "piece of bolt") that was "sticking out of the cement pad."

¶13 Davis testified that, after removing the ATM enclosure, he had ground down all of the bolts remaining on the concrete pad. However, photos from the day of the accident or shortly thereafter, submitted on summary judgment, appear to illustrate at least one piece of metal not flush with the concrete pad.

¶14 In his complaint, Chartier alleged negligence and violation of the safe place statute. The complaint alleged that the defendants

> were negligent in the performance of the demolition project, and in creating an unguarded hazard consisting of leaving the foundation of the ATM building above the height of the surrounding surface of the sidewalk, and

> leaving a bolt or bolts as well as other materials in the ground sticking above the surrounding surface of the sidewalk, and in failing to inspect, maintain and keep the property in good repair and free of obstructions and hazards, and in guarding the hazards and obstructions, and in other matters.

The complaint also alleged, based on essentially the same facts, that the Bensons had failed to "furnish a safe place" in violation of the safe place statute.

¶15 In moving for summary judgment, the Bensons argued, in pertinent part, that: Chartier's fall did not occur on the Bensons' property, but instead on city property; the safe place statute does not apply to the spot where Chartier allegedly tripped; and the undisputed facts show that Chartier was negligent and that, as a matter of law, his negligence exceeded any negligence of the Bensons.

¶16 The circuit court granted summary judgment in favor of the Bensons on three grounds. First, the court determined that it was "logically impossible that Mr. Chartier fell on the Bensons' property," as opposed to the city's property, due to the size of the desk and the relative locations and configurations of the stairway, retaining wall, and adjacent walkway, and therefore "no reasonable jury could find that Mr. Chartier fell on Benson property." Second, the circuit court determined that the safe place statute, WIS. STAT. § 101.11, does not apply because, although the laundromat-apartment structure "qualifies as a public building," "the ATM foundation was not a part of the structure of the building." Third, the court determined that Chartier's negligence exceeded that of the Bensons as a matter of law, because at the time he fell Chartier had been "walking backward and not looking where he was going" and the "condition of the [concrete pad] was 'obvious,'" and therefore, "[n]o reasonable jury would hold the Bensons liable for Mr. Chartier's decision not to use the perfectly safe walkway" leading from the bottom of the stairway to the public sidewalk, in order to "save a few steps by

walking backwards over an 'obvious' hazard while carrying a large, heavy object."

¶17 Davis joined the Bensons in their arguments for summary judgment. The circuit court's August 28 order did not address defendant Davis, but on September 20, 2013, the court granted summary judgment in favor of Davis.

¶18 Chartier now appeals the circuit court's decisions as to both the Bensons and Davis.

STANDARD OF REVIEW

¶19 We review the circuit court's grant of summary judgment de novo, applying the same methodology as the circuit court, as set forth in WIS. STAT. § 802.08. ***Racine Cnty. v. Oracular Milwaukee, Inc.***, 2010 WI 25, ¶24, 323 Wis. 2d 682, 781 N.W.2d 88. To address the issues raised here, it is sufficient to explain that summary judgment shall be granted where "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." *See* § 802.08(2). In deciding whether genuine issues of material fact exist, "we view the evidence most favorably to the non-moving party, drawing all reasonable inferences from the evidence in that party's favor." ***Butler v. Advanced Drainage Sys.***, 2005 WI App 108, ¶11, 282 Wis. 2d 776, 698 N.W.2d 117.

DISCUSSION

I. SUMMARY JUDGMENT AS TO THE BENSONS

¶20 On appeal, Chartier argues that the circuit court erred in dismissing his claims against the Bensons for four reasons: (1) the circuit court improperly decided a disputed factual issue on summary judgment when it determined that Chartier's alleged trip occurred on city property, and not on property owned by the Bensons; (2) the entire concrete pad qualifies under the safe place statute as either a "public building" or a "place of employment"; (3) under the undisputed facts, any negligence of Chartier did not exceed any negligence of the Bensons as a matter of law; and (4) a finding that Chartier tripped on city property would not preclude the Bensons' liability under common law negligence. We first address the location of the alleged hazard, then turn to the alleged safe place statute violation, and then to Chartier's last two arguments regarding common law negligence.

A. Location of the Alleged Hazard

¶21 We address this issue even though, as explained below, we conclude that the identity of the property owner of the spot where Chartier allegedly tripped does not dictate a result on the common law negligence claim. We do so because, as we also explain below, the location of the alleged trip could be pertinent to resolution of the safe place statute claim.

¶22 The circuit court found, based on Chartier's own account and all other evidence, that Chartier must have tripped on the city-owned portion of the concrete pad.

¶23 We disagree that the summary judgment evidence establishes that Chartier must have tripped, if at all, on the city-owned portion of the concrete pad. Instead, we agree with Chartier that all of the evidence bearing on this point creates a potentially material, genuine factual dispute as to whether Chartier allegedly tripped on the city-owned portion of the concrete pad, as opposed to the portion owned by the Bensons.

¶24 The circuit court rejected, as physically impossible, Chartier's testimony that he was "very close," "probably [a] foot maybe, foot and a half" away from the exterior wall of the stairwell when he tripped and the testimony of an engineer that, based on a professional survey created for purposes of this litigation, "the bolt that caused Mr. Chartier to trip was on" the Bensons' property. The court rejected this testimony based on the court's own geometric determination, involving the possible ways in which the two men could have maneuvered the approximately three-foot long desk, given dimensions reflected on the professional survey: the width of the Bensons' portion of the concrete pad closest to the bottom of the stairway was 2.57 feet; the width of the stairway was 4.26 feet; and the distance from the bottom of the stairway to the retaining wall varied from 4.8 feet to 4.91 feet. The circuit court effectively decided that it would have been impossible for the two men to have either (1) maneuvered the desk in a tight turn to the north at the bottom of the stairway, essentially pivoting around the south end of the west wall of the building, or (2) carried it a sufficient distance past the bottom of the stairs/end of the wall (with James Chartier coming close to the retaining wall), and then made something like a 180-degree turn to head north.

¶25 However, we do not see why the jury could not decide that it was more likely than not that the Chartiers did execute one of these types of turns,

particularly in light of the reasonable inferences raised by James Chartier's testimony. That is, the dimensions presented on the survey, considered alongside the affidavit from the engineer and the testimony of Chartier, appear to support a number of scenarios in which Chartier could have tripped over something on property owned by the Bensons. We conclude that this issue involves a factual dispute for the jury.

B. Safe Place Statute

¶26 Wisconsin's safe place statute, WIS. STAT. § 101.11, "addresses unsafe conditions," as opposed to "negligent acts." ***Megal v. Green Bay Area Visitor & Convention Bureau, Inc.***, 2004 WI 98, ¶9, 274 Wis. 2d 162, 682 N.W.2d 857. Under the safe place statute, in pertinent part, "[e]very employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe." Sec. 101.11(1). The interpretation of the safe place statute and the application of that statute to the undisputed facts here present legal issues that this court decides independent of the circuit court. *See* ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶17, 245 Wis. 2d 560, 630 N.W.2d 517.

¶27 Chartier argues that the Bensons have potential liability under the safe place statute because the accident site was either a "public building," or a "place of employment" owned by or under the control of the Bensons.[3] As

[3] Chartier argues that the Bensons are separately liable as "employer[s]," but we need not address this as a separate issue, because Chartier was not an employee of the Bensons, and therefore any duty the Bensons owed to Chartier as a frequenter of a place of employment where the Bensons were the *employers*, the Bensons would already owe to him as a frequenter of a place of employment they *owned*. *See* ***Naaj v. Aetna Ins. Co.***, 218 Wis. 2d 121, 126-27, 579 N.W.2d (continued)

explained below, we conclude that the Bensons did not have a duty, as owners of a "public building," to a frequenter such as Chartier. However, we further conclude that the portion of the concrete pad owned by the Bensons was a "place of employment," and the Bensons may be liable under the safe place statute if they failed to construct, repair, or maintain it in a safe manner. We also conclude that whether the portion of the concrete pad owned by the city is a "place of employment" as to the Bensons is a jury question.

¶28 Separately, we address and reject an argument of a different kind made by the Bensons, namely, that they could have no liability under the safe place statute "because the pad was not designed, constructed or intended for pedestrian traffic."

1. Owner of a "Public Building"

¶29 Chartier makes a three-part argument that the concrete pad was a "public building" within the meaning of the safe place statute: (1) "the ATM building itself is a public building"; (2) the concrete pad was an "exterior part" of the structure of the building; and (3) the concrete pad was "part of the means of egress and ingress" to the building. We now address and reject each of these arguments.

¶30 Pursuant to WIS. STAT. § 101.01(12), a "[p]ublic building" means:

> any structure, including exterior parts of such building, such as a porch, exterior platform, or steps providing means of ingress or egress, used in whole or in part as a place of

815 (1998) (noting that, in addition to the duty to provide "a safe place of employment" to employees and frequenters, employers have a duty to provide "safe employment" to their employees).

> resort, assemblage, lodging, trade, traffic, occupancy, or use by the public or by 3 or more tenants.

The Bensons concede that the building structure, apart from the concrete pad, was a public building within the meaning of the statute. However, they disagree with Chartier's argument that the concrete pad qualified as a public building.

¶31 Chartier's first argument, that the ATM enclosure was a public building under the safe place statute, is irrelevant. It is uncontested that, by the time of Chartier's fall, the ATM enclosure no longer existed. It does not matter if the ATM enclosure itself may have qualified as a public building before it was removed. Or at least, if it could matter, Chartier does not explain why.

¶32 Chartier's second argument is that the concrete pad itself was a public building because it was a "structure" attached to the "exterior part" of the building. However, Chartier bases this argument entirely on a case that does not stand for this proposition, ***Topp v. Continental Insurance Co.***, 83 Wis. 2d 780, 266 N.W.2d 397 (1978). In ***Topp***, a tavern customer sought recovery from the owner of the property upon which the tavern was located for injuries he sustained when he tripped on a ridge at the junction of the tavern parking lot and a gravel strip. ***Id.*** at 782. The issue in ***Topp*** was whether the jury was correctly instructed as to the duty of the property owner, as the owner of a "place of employment," that the property owner's duty was to maintain the parking lot "'in a condition as *structurally safe* as the nature thereof would reasonably permit[.]'" ***Id.*** at 783 & n.2 (emphasis added) (quoting from jury instructions). The issue addressed in ***Topp*** was entirely unrelated to what constitutes a "structure" in the context of the definition of a "public building" in the safe place statute.

¶33 Apart from his reliance on ***Topp***, Chartier does not develop an argument as to why we should conclude that the concrete pad is a "structure." Moreover, we observe that similar areas surrounding public buildings have been found not to constitute a "structure" as that term is used in the definition of a "public building" within the safe place statute. *See, e.g.*, ***Voeltzke v. Kenosha Mem'l Hosp., Inc.***, 45 Wis. 2d 271, 276, 172 N.W.2d 673 (1969) (hospital parking lot is not a "structure"); ***Buckley v. Park Bldg. Corp.***, 31 Wis. 2d 626, 631, 143 N.W.2d 493 (1966) (a public sidewalk is not a "structure"); *see also* ***Rogers v. City of Oconomowoc***, 24 Wis. 2d 308, 313, 128 N.W.2d 640 (1964) ("[A] structure must have 'some aspects of similarity to a building as that term is commonly understood.'" (quoted source omitted)); HOWARD H. BOYLE, WISCONSIN SAFE-PLACE LAW REVISED 82-84 (1980) (A "'public building' does not include the premises on which the building is situated, nor appurtenances to the building excepting those which are expressly included in the definition … and which are an integral part of the building. Therefore, … a public or private sidewalk" is not considered part of a public building.).

¶34 Chartier's third argument is that the concrete pad was a "public building" because it was "part of the means of egress and ingress" to the building. There are a number of problems with this argument, but we reject it on the ground that it is premised on a faulty interpretation of the uncontested facts. Chartier asserts that in order to exit the apartment building, "the only option is to travel over the [concrete pad] to head toward the parking lot [on the north side of the building], which causes one to immediately encounter the defective conditions." However, there is no genuine issue about the fact that, after the ATM enclosure was removed, a person could enter or exit the apartment building via the walkway and public sidewalk described above, without walking over the pad.

¶35 For the forgoing reasons, we affirm the circuit court's decision that the concrete pad was not a "public building" as that term is used in the safe place statute. Accordingly, the Bensons are not liable under the safe place statute as owners of a public building.

2. "Place of Employment"

¶36 Chartier argues that the Bensons are liable under the safe place statute because the entire concrete pad, both the portion owned by the Bensons and that owned by the city, was a "place of employment" either owned by or under the control of the Bensons at the time of the accident. For the following reasons, we agree with Chartier that, based on undisputed facts, the portion of the concrete pad owned by the Bensons is a "place of employment." As to the portion owned by the city, we conclude that it is a jury question whether this was also a "place of employment."

¶37 A "[p]lace of employment" means

> *every place, whether indoors or out* or underground *and the premises appurtenant thereto* where either temporarily or permanently *any* industry, *trade, or business is carried on*, or where any process or operation, *directly or indirectly related to any* industry, *trade, or business*, is carried on, and *where any person is, directly or indirectly, employed by another for direct or indirect gain or profit* ….

WIS. STAT. § 101.01(11) (emphasis added). Thus, in order to qualify as a place of employment under the safe place statute, the "place" must be a place where trade or business is carried on and where at least one person is employed. ***Id.*** Separately, an "[e]mployee" is defined as "any person who may be required or directed by any employer, in consideration of direct or indirect gain or profit, to

engage in any employment, or to go or work or be at any time in any place of employment." Sec. 101.01(3).

¶38 We agree with Chartier's assertion that the portion of the concrete pad owned by the Bensons was a "place of employment" because it was a "premise[] appurtenant" to a "place" (the laundromat and apartment building) where "trade[] or business is carried on" and where at least one person was employed.

¶39 The Bensons argue that the building was not a "place" where "trade[] or business is carried on" because the "mere owning of an apartment house is not a trade and may be insufficient to qualify as a business." It is true that ownership of property that is rented does not necessarily qualify as a trade or business in this context. *See* ***Wittka v. Hartnell***, 46 Wis. 2d 374, 381, 175 N.W.2d 248 (1970) (making a distinction "between one who owns property only for investment purposes and one whose operation or management of the property requires a substantial and habitual devotion of time and labor to the management operation"). However, this argument ignores the fact that the building here comprised both apartment units and a laundromat. The Bensons do not dispute that the laundromat operated as a "business," nor do they argue that the concrete pad was not a "premise[] appurtenant" to the laundromat. We conclude that the building adjoining the pad was a "place" where "trade[] or business is carried on" on this basis.

¶40 Regarding the requirement of one or more employees at the building, Chartier points to the unrebutted deposition testimony of Brian Benson that an "on site" "maintenance man" performed maintenance at the building in May 2008.

This is sufficient evidence to support a reasonable inference that the Bensons employed someone at the building, within the meaning of the safe place statute.

¶41 Because we conclude that the portion of the concrete pad owned by the Bensons was a "place of employment," the Bensons may be liable if Chartier tripped on this portion of the concrete pad and if the Bensons violated their duty of care under the safe place statute, both of which are jury questions. *See* ***Gulbrandsen v. H & D, Inc.***, 2009 WI App 138, ¶8, 321 Wis. 2d 410, 773 N.W.2d 506 (The ultimate issue of whether the place of employment was "reasonably safe" as required by the safe place statute depends "upon the facts and circumstances of the particular case and is 'a question of fact for the jury in all but the exceptional case.'" (quoted source omitted)).

¶42 We turn now to whether the portion of the concrete pad owned by the city constitutes a "place of employment" as to the Bensons, which could be pertinent if a fact finder were to determine that Chartier tripped on city property.

¶43 We conclude that a jury could find that the safe place statute applies to the city's portion of the concrete pad if the Bensons exercised sufficient control over the area at the time of the accident. In reaching this conclusion, we rely on ***Schwenn v. Loraine Hotel Co.***, 14 Wis. 2d 601, 111 N.W.2d 495 (1961), and ***Peppas v. City of Milwaukee***, 29 Wis. 2d 609, 139 N.W.2d 579 (1966). In each case, the court examined the proposition that municipal streets and sidewalks are generally not considered places of employment, but that an employer or owner of a place of employment appurtenant to a publicly owned street or sidewalk might be liable for injuries incurred on the street or sidewalk if the employer or owner exercises "control" over the area in which the accident occurs. *See* ***Schwenn***, 14 Wis. 2d at 606-07; ***Peppas***, 29 Wis. 2d at 613-17.

¶44 In ***Schwenn***, a pedestrian tripped on snow and ice on a city-owned driveway in front of a hotel. 14 Wis. 2d at 602-04. The court concluded that, because the city-owned driveway was used "almost exclusively for the loading and unloading of [hotel] guests and luggage," and not for "general public vehicular or pedestrian travel," the hotel and a cab company "exercised control" over the driveway and, thus, had a duty to maintain it as a "place of employment" under the safe place statute. ***Id.*** at 604-08.

¶45 In ***Peppas***, a pedestrian fell on a city-owned driveway adjacent to a vacant lot. 29 Wis. 2d at 610-612. Applying the reasoning of ***Schwenn***, the ***Peppas*** court concluded that the city-owned driveway was not a "place of employment" as to the lessor and lessee companies of the vacant lot adjacent to the driveway. ***Id.*** at 613-617. The ***Peppas*** court distinguished ***Schwenn*** on a number of grounds, including that neither the lessor nor lessee in ***Peppas*** "exercised exclusive control over the driveway" and "the driveway [in ***Peppas***] was at best an incidental part of [the lessee's] business," unlike in ***Schwenn***, "where the drive played an integral part in both the hotel and cab company operations." ***Id.*** at 616.

¶46 It is true, as the Bensons point out, that in some respects the instant case resembles ***Peppas*** more than it does ***Schwenn***. There are no allegations that the Bensons used the concrete pad area in any specific manner to serve the laundromat or the apartments, and there is evidence that this was a high traffic pedestrian area for many, not just for those walking to and from the Bensons' building.

¶47 However, the Bensons exercised a substantial degree of control over the entire concrete pad, and we conclude that this is sufficient to create a jury

question on this issue. *See* ***Schwenn***, 14 Wis. 2d at 607 ("[C]ontrol and custody of the premises need not be exclusive, nor is it necessary to have control for all purposes."). The land purchase agreement between the city and the Bensons expressly provided that "[t]he landowner understands that the ATM structure … needs to be moved out of the Right-of-Way" and that if the Bensons failed to remove it, the structure "will be removed as part of the [street widening] project and become the property of the contractor." On the permit for removal of the ATM enclosure, the Bensons listed "Benson Properties" and "Brian Benson" as the owners of the area on which the enclosure was located. The Bensons contracted with Davis to remove the structure and directed the scope of the work. In addition, Brian Benson testified that he had "ultimate responsibility for maintaining" the area "where the ATM machine and the structure used to be" as of the date of the accident. Benson also averred that "customers" of the laundromat and "tenants" of the apartment building regularly walked over the concrete pad, after Davis removed the enclosure, to enter or exit the building.

¶48 Whether an employer or owner of a place of employment has assumed the necessary control over an area is generally a question for the jury, s*ee* ***Callan v. Peters Const. Co.***, 94 Wis. 2d 225, 243, 288 N.W.2d 146 (Ct. App. 1979), and we see no reason that, given the disputed facts discussed above, it should not be so here.[4] If the jury were to find that the portion of the concrete pad

[4] Chartier cites ***Potter v. Kenosha***, 268 Wis. 361, 68 N.W.2d 4 (1955), to support the proposition that, as a matter of law, the Bensons are liable under the safe place statute for defects in the condition of the city-owned portion of the concrete pad because the Bensons exercised a "right to present possession, control or dominion" over the entire concrete pad. ***Id.*** at 371. We now briefly explain why we disagree that ***Potter*** is on point here.

In ***Potter***, the City hired a contractor to replace a sanitary sewer. ***Id.*** at 363. During construction, contractor employee Potter was killed due to negligence by the contractor in connection with a trench. ***Id.*** at 362-63. The court concluded that the City was not liable as an (continued)

owned by the city is a "place of employment" as to the Bensons, then it would be yet another question for the jury whether the Bensons violated their duty of care under the safe place statute. *See* ***Gulbrandsen***, 321 Wis. 2d 410, ¶8.

3. The Concrete Pad Was Not Designed, Constructed, or Intended for Pedestrian Traffic

¶49 The Bensons make an additional argument of a different kind, namely, that because they did not intend that the concrete pad be used by pedestrians, they cannot be liable under the safe place statute for Chartier's fall on the pad. For support, the Bensons cite a number of cases explaining that a defect may not be actionable if the area on which a pedestrian fell was not intended for pedestrian use. *See, e.g.*, ***Peppas***, 29 Wis. 2d at 619 ("In any event, the defect was not actionable since the driveway was not intended for pedestrian use."); ***Hansen v. Schmidman Props.***, 16 Wis. 2d 639, 642, 115 N.W.2d 495 (1962) (no safe place statute liability "when the alleged defect is in the part of the street constructed for use by vehicles and not by pedestrians"); ***Kuhlman v. Vandercook***, 241 Wis. 418, 422, 6 N.W.2d 235 (1942) (questioning whether "there is any liability … where a shuffleboard is deliberately used as a sidewalk").

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owner of a place of employment (the trench) because the City had turned over "complete control and custody of a safe place" (the street) to the contractor, and it was the contractor who had made the area unsafe. ***Id.*** at 371-77. Chartier attempts to analogize the Bensons to the contractor in ***Potter***, on the grounds that the Bensons took complete control and custody of the area where the ATM enclosure was. However, in ***Potter***, there was no question that the trench was a "place of employment" at the time of the accident due to the temporary construction work. Here, however, Davis's work was completed months before Chartier's fall, and the concrete pad cannot be deemed a "place of employment" on the basis of that completed construction work. *See* ***Rausch v. Buisse***, 33 Wis. 2d 154, 163, 146 N.W.2d 801 (1966) ("Once work on a street project has terminated it is no longer a place of employment.").

¶50 However, as explained in ***Schwenn***, the safe place statute "imposes a duty upon an employer to anticipate what the premises will be used for and to inspect them to make sure they are safe for such uses." 14 Wis. 2d at 608. Here, as in ***Schwenn***, the likelihood that the concrete pad would be used by persons walking to and from the building "was not just a remote possibility." *See* ***id.*** The pad was a flat-appearing space adjacent to the public sidewalk and adjacent to the building's west side stairway. There was no fence or posting preventing or discouraging people from walking over the concrete pad. Chartier's son, who lived in the apartments, testified that he walked over the pad "[l]ots" of times when entering or exiting the west-side stairway. Brian Benson averred that "at least hundreds of people walked over the area after Mr. Davis removed the ATM structure," including laundromat customers, tenants, and the general public. Regardless whether the Bensons specifically contemplated these pedestrian uses when they had Davis remove the enclosure, there is evidence from which a jury could conclude that the Bensons became aware that this space was in fact used in this foreseeable manner. Therefore, the Bensons' argument that they cannot be liable under the safe place statute because the concrete pad was not intended for pedestrian use fails.

C. Negligence

¶51 We turn now to whether a jury question also remains in regard to Chartier's separate common law negligence claims. We conclude that it does.

1. Chartier's Negligence Did Not Exceed That of the Bensons as a Matter of Law

¶52 Chartier argues that the circuit court incorrectly determined that, as a matter of law, Chartier was more negligent than the Bensons, because it is

undisputed that Chartier was "walking backwards over an 'obvious' hazard while carrying a large, heavy object." We agree with Chartier for the following reasons.

¶53 Where a plaintiff's negligence "clearly exceeds the defendant's, we may so hold as a matter of law" and grant summary judgment in favor of the defendant. ***Kloes v. Eau Claire Cavalier Baseball Ass'n***, 170 Wis. 2d 77, 88, 487 N.W.2d 77 (Ct. App. 1992). "[W]here a plaintiff voluntarily confronts an open and obvious danger, his negligence, as a matter of law, exceeds any negligence attributable to the defendant(s)." ***Id.*** at 86; *see also* ***Wagner v. Wisconsin Mun. Mut. Ins. Co.***, 230 Wis. 2d 633, 638, 601 N.W.2d 856 (Ct. App. 1999) ("[T]he application of the open and obvious danger doctrine is tantamount to a determination that the plaintiff's negligence exceeds the defendant's negligence as a matter of law.").

¶54 However, the determination of whether a condition constitutes an open and obvious danger, and the apportionment of negligence, are questions of fact that are generally to be decided by the jury. *See* ***Hansen v. New Holland N. Am., Inc.***, 215 Wis. 2d 655, 667, 574 N.W.2d 250 (1997); ***Kloes***, 170 Wis. 2d at 88. "In the ordinary negligence case, if the plaintiff confronts an open and obvious danger, it is merely an element to be considered by the jury in apportioning negligence and will not operate to completely bar the plaintiff's recovery." ***Hansen***, 215 Wis. 2d at 667. "Summary judgment should only be used in the exceptional case where it is clear and uncontroverted that one party is substantially more negligent than the other and that no reasonable jury could reach a conclusion to the contrary." ***Id.*** at 669.

¶55 The Bensons argue that the concrete pad presented an open and obvious danger, and that Chartier's "failure to not only be aware of [the] alleged

hazard, but to totally ignore it by walking backward, without looking where he was going," constitutes greater negligence than any negligence contributed by the Bensons as a matter of law. To support this argument, the Bensons cite WIS JI—CIVIL 1049, which describes the duty of pedestrians using sidewalks to exercise ordinary care, including the duty to "observe the sidewalk … and its immediate surroundings to discover any dangerous condition or defect" and to make "efficient use of one's eyes, faculties, and opportunities for observation … to become aware of the dangers naturally incident to the situation or to see unsafe conditions that are in plain sight." *See also* ***Kobelinski v. Milwaukee & Suburban Transport Corp.***, 56 Wis. 2d 504, 511, 202 N.W.2d 415 (1972) ("[A] city is liable at common law for breach of its duty to maintain sidewalks in such a condition as is reasonably safe for public travel by a person exercising ordinary care for their own safety.").

¶56 The Bensons fail to persuade us that, under the ***Hansen*** standard, this is the "exceptional case where it is clear and uncontroverted that one party is substantially more negligent than the other." *See* 215 Wis. 2d at 669. A reasonable jury could reach a variety of conclusions about the relative degrees of negligence here. The Bensons may have a reasonable basis to argue that Chartier was negligent in failing to exercise ordinary care by walking backwards while carrying a desk. On the other hand, Chartier has a reasonable basis to argue at trial that the Bensons were to some degree negligent in declining to approve Davis's more complete proposed project and thereafter allegedly failing to identify or address hazards. To cite only one potential factor weighing against the Bensons, a jury could consider it significant that Chartier was not alone at the time of the accident. He was accompanied by someone who resided in the building and who was presumably familiar with the lay of the land. Thus, among the arguments that

appear available to Chartier is that he thought that he had, in effect, a spotter for his backward progress (regardless of how effective that spotter turned out to be).

¶57 Turning to the Bensons' central argument on this point, the "open and obvious danger" concept, the summary judgment evidence on this point is conflicting. Chartier's son testified that the dangerous condition of the concrete pad "was just obvious" and that "anyone can see it." Chartier, however, testified that he did not notice anything "out of the ordinary" in regard to the surface near the west side of the building when he first approached it on the day of his fall. Similarly, Brian Benson testified that he "noticed no problems" with the area of the concrete pad, and that he had received no complaints about it.

¶58 In sum, summary judgment based on apportionment of negligence is not easily granted, and the Bensons fail to convince us that it should be granted based on the summary judgment materials here.[5]

2. Common Law Negligence Liability if the Fall Occurred on City Property

¶59 As we explained above, we agree with Chartier that the circuit court improperly decided a potentially material disputed factual issue when it determined that any trip must have occurred on city-owned property. However, even if the jury were to decide that Chartier did not trip on the Bensons' portion of

[5] We need not, and do not, take a position on the merits of Chartier's separate argument that his negligence claim should survive summary judgment because the Bensons failed to comply with Wisconsin Department of Transportation Codes regarding demolition projects. The Bensons respond that these codes "are for projects in which a contractor is awarded a 'bid' project by the state" and are not applicable to the scenario here. Chartier does not respond to this assertion in his reply brief, other than to assert that he has "adequately addressed this argument," but he fails to point to a section of his principal brief on appeal in which he addressed this argument.

the property, we conclude that the Bensons could still be liable under common law negligence because the alleged hazard was created at the direction of and for the benefit of the Bensons and the concrete pad was near a public way for travel and connected with it.

¶60 We rely in part on a supreme court opinion that appears to stand for the proposition that when a private party takes on a task that creates an alleged hazard on public property, that party may be liable in negligence for the hazard. *See* ***Kull v. Sears, Roebuck & Co.***, 49 Wis. 2d 1, 10-11, 181 N.W.2d 393 (1970). The plaintiff in ***Kull*** fell in a hole in an area of grass owned by a city adjacent to a Sears store. ***Id.*** at 3-5. This hole was created when, at the direction of Sears, a drain was installed in an empty lot adjacent to the city-owned grass area, which Sears leased from another company to use as a parking lot. ***Id.*** at 4-5, 8-9. Sears argued, in part, that the circuit court erred in instructing the jury not to consider the city's ownership of the grass area in assessing Sears' negligence. ***Id.*** at 10-11. The court rejected this argument, explaining that, because the hole was created "at the direction of and for the benefit of Sears[,] …. Sears had a duty to inspect the area of the drain and eliminate any dangerous defects caused by the installation of the drain pipe." ***Id.*** at 11. "The ownership of the land did not affect Sears' duty." ***Id.***

¶61 While the discussion in ***Kull*** is limited, and we are not certain of the full scope of the rule that the court intended to apply, the court's fundamental point is clear, comports with our understanding of tort law, and defeats the Bensons' argument. Having decided to remove the ATM enclosure and taken on full responsibility over that project, the Bensons had the duty to exercise reasonable care in leaving the area safe, regardless whether part of the area included city property. *See* ***id.***; *see also* ***Shannon v. Shannon***, 150 Wis. 2d 434,

445, 442 N.W.2d 25 (1989) (owners of lake front property may owe duty of care to child who was injured in adjacent publicly owned body of water); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 54 cmt. b (2012) ("[A]n actor on public land must take care for the safety of others.").

¶62 Moreover, even if we were to assume that the decision in ***Kull*** has a narrower and different reach, we would still conclude that the Bensons could be found negligent based on the proposition that, as Chartier argues, "abutting land owners are liable for [such] defects or dangerous conditions *in a public way* as are created by active negligence on their own part." *See* ***Peppas***, 29 Wis. 2d at 617-19 (emphasis added).

¶63 The Bensons respond that this principle does not apply here because no portion of the concrete pad was a "public way." The Bensons argue that, under ***Peppas*** and the precedent on which ***Peppas*** relies, a "public way" means a "public sidewalk or highway," and the concrete pad "was not designed, intended or constructed" to be either.

¶64 However, case law that includes ***Kull*** undermines the Bensons' narrow definition of a "public way." Even if ***Kull*** does not stand for the broad proposition that private parties have liability for creating hazards on public property, ***Kull*** at a minimum stands for the proposition that an adjacent property owner's liability for defects in a "public way" extends to areas that are not designed as "sidewalks" or "highways." In ***Kull***, in addition to the argument addressed above, Sears argued that its motion for a directed verdict should have been granted because it had no duty to maintain or repair the grass area, which was beyond Sears' lot line. 49 Wis. 2d at 6-10. Relying on precedent including

Peppas, the court in ***Kull*** concluded that Sears was not entitled to a directed verdict on this issue and, in doing so, implicitly concluded that the grass area was a public way, without analyzing whether the grass area was designed to be used as a "sidewalk" or "highway." ***Id.*** This conclusion undermines the Bensons' assertion that a public way is limited to a "sidewalk" or "highway," as the Bensons apparently mean to use those terms.

¶65 Other case law supports a broad definition for a "public way." For example, in ***First National Bank & Trust Co. v. S.C. Johnson & Sons***, 264 Wis. 404, 59 N.W.2d 445 (1953), a case relied on by the ***Peppas*** court, the plaintiff fell on a portion of a city-owned curb that the private property owner had "broke[n] up" in order to join the city street to the property owner's private driveway. ***Id.*** at 405. The property owner argued that it had no liability, because the curb was not part of the "travelled portion of the thoroughfare." ***Id.*** at 407. The court disagreed, based in part on evidence that the curb area was used by the public in walking to and from vehicles. ***Id.*** at 408. The court concluded that the broken up curb was "so near the public way for travel or so connected with it that the place for travel is not reasonably safe," rendering it an actionable defect in a public way. ***Id.*** at 407.

¶66 Here, even if the city-owned portion of the concrete pad was not intended to be part of the public sidewalk, the undisputed summary judgment evidence presented demonstrates that it was used as a walkway by numerous pedestrians. As in ***First National***, the concrete pad is "so near the public way" and "so connected with it" that any defect created by the Bensons on the city-owned portion of the concrete pad is actionable. *See* ***id.***

¶67 In sum, a jury could find that Chartier tripped on city property due to negligence of the Bensons in failing to exercise reasonable care in removal of the ATM enclosure and inspection or maintenance of the concrete pad.

II. SUMMARY JUDGMENT AS TO DAVIS

¶68 Chartier argues that "[t]he judgment in favor of the Davis defendants … was granted out of thin air" and that, "[d]ue to the complete lack of any record or basis upon which to base" the circuit court's decision, we must reverse. However, Chartier does not point to any disputed facts regarding Davis's involvement in the removal of the ATM enclosure, nor does he develop any argument as to how Davis could be liable for Chartier's fall based on reasonable inferences drawn from the summary judgment submissions. As Chartier concedes, and the summary judgment evidence illustrates, Davis "only performed the work that Mr. Benson directed him to do." We reject Chartier's argument as wholly undeveloped. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶69 To the extent that Chartier is attempting to argue that we should reverse the circuit court because it did not provide an explicit justification for its decision to grant summary judgment to Davis, we reject this argument. As previously explained, whether to grant or deny summary judgment is a question of law that we review de novo. *See* ***Racine Cnty.***, 323 Wis. 2d 682, ¶24.

CONCLUSION

¶70 For the forgoing reasons, we reverse the circuit court's grant of summary judgment to the Bensons on Chartier's safe place statute claim and

common law negligence claim, and remand for proceedings consistent with this opinion. We affirm the circuit court's grant of summary judgment as to Davis.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded for further proceedings.

Not recommended for publication in the official reports.