COURT OF APPEALS
DECISION
DATED AND FILED

August 19, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2820 **Cir. Ct. No. 2013CV1595**

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

STEPHANIE J. PAULI,

PLAINTIFF-APPELLANT,

UNITED HEALTHCARE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

SAFECO INSURANCE COMPANY OF AMERICA, DEBRA EGAN AND PAUL DESANTIS,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Racine County: FAYE M. FLANCHER, Judge. *Reversed and cause remanded*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 GUNDRUM, J. Stephanie Pauli appeals from the circuit court's summary judgment dismissal of her lawsuit alleging the negligence of Debra Egan and Paul DeSantis[1] caused her injury when she fell while exiting from their summer home. She asserts the circuit court erred in determining her lawsuit is barred by the relevant statute of repose, WIS. STAT. § 893.89 (2013-14).[2] Because we conclude § 893.89 does not bar her action, we reverse and remand for further proceedings consistent with this opinion.

Background

¶2 In her complaint, Pauli alleges she was injured at a home owned by Egan and DeSantis on the night of July 2, 2011, when she "left thru the side door of the property which was not lit and as she stepped down onto the step, twisted her ankle causing a compound fracture of her right ankle." She further alleges both Egan and DeSantis "were negligent in the maintenance and repair of the area where [Pauli] was injured [by], among other things, [their] failure to have a properly working exit light" and "in not warning plaintiff as to … the unusual step down height of the first step." She alleges Egan's and DeSantis's negligence[3] directly and proximately caused her injuries and damages.

[1] DeSantis and Egan's insurer, Safeco Insurance Company of America, is also a named defendant and respondent on appeal. When discussing liability issues in this opinion, we include by implication Safeco in the term "Defendants" and "DeSantis" and/or "Egan."

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] Defendants treat Egan and DeSantis as one, making no attempt to distinguish the liability of one from the other.

¶3 Approximately a year after this lawsuit commenced, Pauli filed the report of her expert witness, an architect. Citing this report, Defendants moved for summary judgment, asserting Pauli's action is barred in its entirety by the statute of repose because the action is based upon an improperly constructed exterior step causing her to fall, and this structural defect was in existence for more than ten years. The summary judgment record consists largely of the report of Pauli's expert and a few select pages from deposition transcripts. We will discuss the expert's report later. Relevant testimony from the depositions is as follows.

¶4 Pauli testified that when she fell, "[t]here was no light on" outside the door where she exited and "[i]t was total darkness." After she had fallen and was on the ground, Pauli "heard Denny [in the kitchen] say that he was searching for the flashlight that they usually kept next to the back door because the lights had been broken or not working."[4] When asked if she at any other time heard "Denny, Paul or Debra say anything else about that light," Pauli responded, "No. There was no discussion of it. Other than there was no light to illuminate my foot or me."[5] Pauli added, "[A]fter the accident, I was laying there in total darkness until the police arrived" and someone "produced a flashlight."

¶5 Barbara Wooters-Dewey was also present at the time of the incident. She testified she was behind Pauli when Pauli exited the home and fell, with Pauli's daughter Devin Pauli either in between Wooters-Dewey and Pauli or

[4] Pauli stated she could not remember exactly what "Denny" said but she was "paraphrasing."

[5] The parties have provided us with only brief excerpts from the deposition transcripts. As a result, we assume, based on the context of the references, that references in the testimony to "Debra" or "Debbie," "Paul," and "Denny" are references to Defendants Debra Egan and Paul DeSantis, and to Egan's husband, Dennis, respectively.

directly behind Wooters-Dewey. When asked if there was any exterior lighting at this exit, Wooters-Dewey responded:

> No, because that's the first thing I asked, Turn on the light. Turn on the light.
>
> And he is like, That light—That light isn't working.
>
> And I said, Get a flashlight. Get me some kind of light, and a pillow so I can brace her leg when I was done.

When asked who told her the light was not working, Wooters-Dewey responded:

> Both of them apologized immensely. Both the cousin and the cousin's husband said, We're so sorry, we meant to get this fixed. We just haven't had a chance to get this fixed.
>
> And another thing … no one would have anticipated, or no one warned us that this block was like this far down (indicating) from the exit. So that was kind of horrifying.

She further testified "[b]oth of them were apologizing [to Pauli] over and over," "they" brought her a flashlight, and no one mentioned anything about the stairs or exit prior to Pauli's fall.[6]

¶6 Devin Pauli also testified the light fixture on the exterior of the home in the area where Pauli fell was not on at the time of the fall, and Devin believed "either Debbie or Denny had mentioned [after the accident that] it was broken." She further testified, "[T]hey said the light was broken, because we were trying to get some light to see what had happened to my mother, and that's when Denny

[6] Only four pages of Wooters-Dewey's deposition testimony are in the record. Based upon the fact the undisputed summary judgment evidence indicates DeSantis had left prior to Pauli's fall, the nature of the comment "We just haven't had a chance to get this fixed," and Wooters-Dewey's reference to "the cousin" and "the cousin's husband," we believe it reasonable to infer that the comments are attributable to Egan and her husband Dennis.

went and got a flashlight." She confirmed no one had mentioned anything about the lack of lighting at that exit prior to Pauli's fall.

¶7 Egan testified she and DeSantis inherited ownership of the summer home from their mother in 2008. The door, threshold, and steps where Pauli fell have not been modified since her mother purchased the home in the late 1970s. On the evening of July 2, 2011, Pauli was at the home with Egan, Egan's husband Dennis, and others, including, for some portion of the day, DeSantis, and around 11 p.m., Pauli exited out the door. When asked during the deposition how the exit there was illuminated and whether the exterior light in that area was working, Egan responded to both questions, "I don't know."

¶8 DeSantis testified he also was at the home on the night in question but departed prior to Pauli's fall. He is familiar with the home, visits it about once a week during the summers but does not stay overnight, and does minor repair work on the home. DeSantis testified he did not know whether the exterior light by the exit and stairs was working at the time Pauli fell.

¶9 The circuit court granted summary judgment to Defendants, basing its decision in large part upon the undisputed fact that the stairs[7] at the exit had not been modified in more than ten years, thereby meeting a necessary condition of the statute of repose, and its reading of the expert report as stating that the proximate cause of Pauli's injury and damage was the fact the stairs were nonconforming. Pauli appeals.

[7] We use the term "stairs" to refer to the steps and landing.

Discussion

¶10 "We review de novo a grant of summary judgment, applying the same methodology as the circuit court." ***Paskiewicz v. American Family Mut. Ins. Co.***, 2013 WI App 92, ¶4, 349 Wis. 2d 515, 834 N.W.2d 866. "Summary judgment is proper when the relevant facts are undisputed and only a question of law remains," ***id.***, but "should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy…. All doubts as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment," ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 566, 278 N.W.2d 857 (1979) (citation omitted). Additionally, we are obliged to interpret every reasonable inference from the record in favor of the nonmoving party. ***Thomas v. Mallett***, 2005 WI 129, ¶26, 285 Wis. 2d 236, 701 N.W.2d 523.

¶11 Pauli contends the circuit court erred in granting summary judgment to Defendants based upon the statute of repose, WIS. STAT. § 893.89, because the statute does not bar her claim that Egan and DeSantis are liable to her based upon failing to maintain the exterior light in the area of the exit and stairs. We agree.

¶12 WISCONSIN STAT. § 893.89 provides in relevant part:

> **(1)** In this section, "exposure period" means the 10 years immediately following the date of substantial completion of the improvement to real property.
>
> **(2)** … [N]o cause of action may accrue and no action may be commenced, including an action for contribution or indemnity, against the owner or occupier of the property or against any person involved in the improvement to real property after the end of the exposure period, to recover damages for … any injury to the person … arising out of any deficiency or defect in the design, … planning, … the construction of … the improvement to real property.

> ….
>
> **(4)** This section does not apply to any of the following:
>
> ….
>
> (c) An owner or occupier of real property for damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property.

¶13 We first clarify precisely what is the "improvement" to real property at issue. Throughout her brief-in-chief, and most directly in her five-page section specifically addressing WIS. STAT. § 893.89(4)(c), Pauli clearly and repeatedly addresses the impact of this paragraph in terms of the negligent maintenance of the exterior light on the home in the area of the stairs. In their response brief, Defendants devote but a single paragraph to responding to Pauli's para. (4)(c) arguments. In that paragraph, they state, without developing an argument or providing legal support, that "[t]he improvement to real property that is at issue here is the non-conforming step," and "there was nothing negligent in the maintenance or inspection of that step."

¶14 "Whether an item is an 'improvement to real property' under [WIS. STAT.] § 893.89 is a question of law that we review de novo." ***Kohn v. Darlington Cmty. Sch.***, 2005 WI 99, ¶12, 283 Wis. 2d 1, 698 N.W.2d 794. An improvement to real property is defined as a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." ***Id.***, ¶17 (quoting ***Kallas Millwork Corp. v. Square D Co.***, 66 Wis. 2d 382, 386, 225 N.W.2d 454 (1975) (citation omitted)).

¶15 Pauli's complaint alleges it is, in part, the lack of a functional exterior light at this exit and stairs area of the home that caused her to fall. No

party identifies, and we are unable to find, any evidence in the record suggesting the stairs were constructed other than as a part of the home's original construction or are an improvement separate and distinct from the improvement to the real property that is the home itself. There can be no serious dispute that the home as a whole is an "improvement" to real property under the ***Kohn*** definition, and, again, Defendants make no argument whatsoever on this key and obvious point. Thus, we consider the home as the improvement to real property at issue and the stairs as part of that improvement.[8]

¶16 There is no dispute that Pauli fell while exiting out the door and on the stairs of the home and that the exterior light to illuminate this area was not working at the time. On this latter point, Pauli, Wooters-Dewey, and Devin Pauli all testified that the exterior light was not working, while Egan and DeSantis only testified that they did not know if it was working. Additionally, a jury could reasonably infer that both Egan and her husband Dennis knew prior to Pauli's fall that the exterior light was broken. On this point, Pauli testified that after her fall, she heard Egan's husband Dennis say something to the effect that he was searching "for the flashlight that they usually kept next to the back door because the lights had been broken or not working." Wooters-Dewey testified both Egan and Dennis stated right after the fall, "We're so sorry, we meant to get this fixed." Devin Pauli testified that "either Debbie or Denny" or "they" mentioned after Pauli's fall that the light was broken.

[8] It is undisputed the home and stairs were constructed more than ten years before Pauli's injury.

¶17 Defendants rely heavily upon the report of Pauli's expert. They correctly point out that the expert concluded the stairs did not conform to code and were *a* cause of Pauli's injury. However, taking portions of the expert report out of context, they incorrectly assert the nonconforming stairs were the only cause, pointing to the expert's statements: "the failure to meet standards in the design, construction, and maintenance of the stairs were the proximate cause of [Pauli's] fall" and "under normal and code-conforming conditions, [Pauli] would not have been prone to falling."

¶18 Again, on summary judgment, we must interpret every reasonable inference from the record in favor of the nonmoving party, ***Thomas***, 285 Wis. 2d 236, ¶26, here Pauli. Considering this admonition, we review the entirety of the report of Pauli's expert and consider the context of the comments Defendants have highlighted.

¶19 In the report's "Overview" section, the expert states that the purpose of his review was "to determine, within a reasonable degree of certainty, if the conditions *on* the stairs resulted in the fall and subsequent injuries and whether or not standards of care in the construction *and provision* of the stairs have been violated." (Emphasis added.) The expert indicated his review was based on "seven sheets of photographs of *the area* at the stairs." (Emphasis added.) The photographs, attached to the expert's report, show the exit/door, the stairs, and the exterior light fixture next to the door on the side of the home.

¶20 In addition to considering the "riser heights" and "landing" of the stairs and concluding they violated standards of care, the expert also opined on the lighting in this area, based on the input from Pauli's counsel that the exterior light fixture was not functional. The expert stated, "Illumination on the stair assembly

is a critical factor in helping the user to determine the physical conditions at and surrounding the stairs." The report continues:

> Most current building codes require a minimum level of 1 foot-candle of illumination in exit paths. In my [43 years of] experience in the design and construction of buildings, light fixtures are always provided in exit paths, especially at exit doors. Simple procedures can and should *maintain* the functionality of the light fixture.
>
> The lack of a functional light at the exit door meant that users of the exit and stair assembly could not determine the physical conditions at the door and stairs. The non-conforming riser heights and the non-existent landing are, of themselves, hazards. The lack of ability to observe and possibly react to the hazards exacerbate the dangers.
>
> **STAIR SAFETY CRITERIA**
>
> Safe passage within an *exit and stair assembly* is related to physical factors of the design, construction and *maintenance of the stair and exit assembly*. Stairs which have been designed, constructed and maintained in conformance with standards and requirements of building codes and standards of care can be considered to be safe. Stairs which have been designed, constructed and maintained in violation or non-conformance with standards and requirements of building codes and standards of care can be considered to be unsafe.
>
> The *exit and stair assembly* at [the home] were designed, constructed and *maintained* in violation of building codes and standards of care with regard to:
>
> -Riser heights
>
> -Landing depth
>
> -*Illumination*
>
> **USER EXPECTATIONS**
>
> Stair users have become accustomed to expect familiar and usual conditions while traveling on a stair assembly, based on similar and expected conditions encountered over years of safely traversing stairs. Stair users are not expected to observe or have knowledge of defective

> conditions, *especially when such defective conditions are not easily observed*.
>
> **CONCLUSIONS**
>
> Ms. Pauli traversed the stairs without adjusting her gait and walking pattern. She could not use a consistent foot-to-foot dimensional conformity because the lack of a landing and the differing riser heights prevented her from doing so. *Under normal and code-conforming conditions*, she would not have been prone to falling. *The conditions at [the home] were far from normal*; the failure to meet standards of care in the design, construction *and maintenance* of the stairs were the proximate cause of her fall and subsequent injuries.
>
> I expect that a reasonable person should know that non-uniform riser heights are a hazardous condition.
>
> I expect that a reasonable person should know that lack of a landing is a hazardous condition.
>
> I expect that a reasonable person should know that no illumination at an exit is a hazardous condition. (Emphasis added.)

The report concludes: "My opinions and conclusions are based on a reasonable degree of professional certainty."

¶21 Considering all relevant portions of the report, we cannot agree with Defendants that the expert was opining that *only* the nonconforming nature of the "riser heights" and "landing," i.e., the stairs, was the proximate cause of Pauli's fall. As Defendants point out, the expert did write in his conclusions, "[u]nder normal and code-conforming conditions, [Pauli] would not have been prone to falling" and "the failure to meet standards of care in the design, construction and maintenance of the stairs were the proximate cause of [Pauli's] fall." However, as can be seen, the latter phrase is preceded in the report by the language, "[t]he conditions at [the home] were far from normal." A reasonable juror considering this report in its entirety could easily conclude that the "conditions" to which the

expert was referring in his conclusions included the lack of lighting in this exit area. Further, the expert references "the failure to meet standards of care in the design, construction and maintenance of the stairs," but the only reference in the report to a maintenance deficiency relates to the failure to maintain lighting in this area.[9] Also, in his final conclusions, the expert opines that "a reasonable person should know" that "non-uniform riser heights," "lack of a landing," *and* "no illumination at an exit" are *all* "hazardous condition[s]," and then states, in the next sentence, that his "opinions and conclusions are based on a reasonable degree of professional certainty."

¶22 Based upon the deposition testimony and expert report,[10] a reasonable jury could conclude that the exterior light for illumination of this exit and the stairs was not working when Pauli exited the home, at a minimum Egan and her husband previously were aware it was not working but had not fixed the light, and the lack of lighting in this area was a cause of Pauli's fall and injury. For Defendants to be liable, a jury need only find that negligence in failing to maintain proper lighting in this area was *a* cause of Pauli's fall, not *the* cause. *See* WIS JI—CIVIL 1500; *see also* ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 458, 267 N.W.2d 652 (1978) ("The test of cause in Wisconsin is whether the defendant's negligence was a substantial factor in contributing to the result."). "There may be more than one substantial causative factor in any given case." ***Merco***, 84 Wis. 2d at 459. Further, it is well

[9] There is no suggestion in the record that the steps themselves had any maintenance deficiency, such as crumbling or being slippery, or that there were any other maintenance deficiencies in this area other than the nonworking light fixture.

[10] Defendants have provided no challenge to the admissibility of any of the evidence we have considered from the record.

established that owners of an improvement to real property may be held liable for their own negligent maintenance or repair of an improvement to real property once that improvement is complete. *See* ***Kohn***, 283 Wis. 2d 1, ¶66; *see also* WIS. STAT. § 893.89(4)(c).

¶23 While Pauli's lawsuit could not be maintained, based upon the statute of repose, if the evidence showed that the defect in the stairs was the sole cause of Pauli's injury,[11] the summary judgment evidence suggests that is not the case here. WISCONSIN STAT. § 893.89 is properly applied in a manner that "terminate[s] liability for [structural] defects without affecting an owner's duty to repair and maintain a structure in a condition as safe as reasonably possible given any inherent defects in its structure." ***Mair v. Trollhaugen Ski Resort***, 2006 WI 61, ¶35, 291 Wis. 2d 132, 715 N.W.2d 598. Defendants may be held liable if Pauli's damages resulted from negligent maintenance of the home, which in this case relates to the alleged failure of Egan and DeSantis to maintain proper lighting at this exit. *See* ***id.***, ¶¶26, 29 (observing that defects in lighting "could be considered [an] unsafe condition[] associated with the structure," which would be actionable, pursuant to § 893.89(4)(c)).

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

[11] This protection also includes the preclusion of liability for failure to warn of a deficiency or defect in the improvement to real property, such as the nonconforming nature of the stairs here. *See* ***Rosario v. Acuity & Oliver Adjustment Co.***, 2007 WI App 194, ¶¶22, 25, 29-30, 304 Wis. 2d 713, 738 N.W.2d 608; *see also* ***Crisanto v. Heritage Relocation Servs., Inc.***, 2014 WI App 75, ¶14, 355 Wis. 2d 403, 851 N.W.2d 771.