COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP583-FT **Cir. Ct. No. 2010CV445**

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

MARLENE A. CLARK AND JAMES CLARK,

PLAINTIFFS-APPELLANTS,

V.

RICE LAKE HOUSING AUTHORITY, INC. AND STATE FARM FIRE AND CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS,

UNITED WISCONSIN INSURANCE COMPANY, UNITED STATES CENTERS FOR MEDICARE & MEDICAID SERVICES AND UNITED HEARTLAND,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Barron County: TIMOTHY M. DOYLE, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM.[1] Marlene Clark appeals a summary judgment dismissing her personal injury suit.[2] Clark was injured after slipping on an icy sidewalk. She argues she can maintain an action for negligent maintenance of a public nuisance even though landowners have no duty to remove snow or ice on abutting sidewalks. We reject Clark's argument, and affirm.

BACKGROUND

¶2 Clark slipped and fell on ice on a public sidewalk abutting Marshall Towers, which is owned by the Rice Lake Housing Authority. The ice was covered with a light accumulation of snow, making the ice unnoticeable to Clark. Clark observed the ice after her fall and, based on its thickness and appearance, believed it had been there for some time. Clark notified an employee, who responded she was aware of the slippery conditions and had fallen herself.

¶3 The circuit court granted Rice Lake summary judgment, dismissing Clark's claims of negligence and negligent maintenance of a public nuisance. Clark now appeals the dismissal of her public nuisance claim.

DISCUSSION

¶4 Clark concedes she cannot maintain an ordinary negligence action. It is well-established that when ice or snow has accumulated on a public sidewalk abutting private property, the landowner owes no duty to passers-by either to clear

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] James Clark also appeals; however, only Marlene was injured. We therefore refer to Marlene throughout the opinion.

the sidewalk or to scatter abrasive material thereon.[3] ***Holschbach v. Washington Park Manor***, 2005 WI App 55, ¶10, 280 Wis. 2d 264, 694 N.W.2d 492. Clark contends, however, that she can still prevail under a negligent maintenance of a public nuisance theory.

¶5 Rice Lake responds with arguments that necessitate a reply; Clark has filed no reply. We affirm on this basis. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶6 Regardless, we would also affirm on the merits. Clark argues that pursuant to ***Walley v. Patake***, 271 Wis. 530, 541-42, 74 N.W.2d 130 (1956), the accumulation of snow or ice on a sidewalk may constitute a public nuisance if it exists for an unreasonable period of time. She asserts that the only component of negligence at issue in her public nuisance claim, therefore, is whether Rice Lake had actual or constructive notice. *See* ***Physicians Plus Ins. Corp.* v. *Midwest Mut. Ins.* Co.**, 2002 WI 80, ¶29, 254 Wis. 2d 77, 646 N.W.2d 777.

¶7 Clark's reliance on ***Walley*** is misplaced. The portion she relies on was later rejected in ***Jasenczak v. Schill***, 55 Wis. 2d 378, 382, 198 N.W.2d 369 (1972). There, the issue was "whether an abutting owner is liable for injuries resulting from the dangerous condition of a public sidewalk not caused by [the owner] or his [or her] property." ***Id.*** at 381. The court explained:

> We believe that the case law in Wisconsin clearly establishes that abutting landowners are liable for only such

[3] There is one exception to the rule, but it is not implicated here. *See* ***Walley v. Patake***, 271 Wis. 530, 536, 74 N.W.2d 130 (1956) (liability may exist if owner creates an artificial accumulation of water or ice).

> defects or dangerous conditions in public streets or sidewalks as are created by the active negligence of such landowners or their agents.
>
> The plaintiff argues that the abutting landowner can be liable for the maintenance of a nuisance primarily because the defect existed for a long period of time. Again the same rule applies—the abutting landowner is not liable unless his active negligence created or contributed to the creation of the dangerous condition which might otherwise constitute an actionable nuisance.

Id. at 382 (footnote omitted); *see also* ***id.*** at n.2 (declining to apply ***Walley***).

¶8 Clark's reliance on ***Physicians Plus*** is also misplaced. That case involved an overgrown tree obscuring a stop sign, not maintenance of a sidewalk. *See* ***Physicians Plus***, 254 Wis. 2d 77, ¶1. Moreover, the court addressed the issue of the "sidewalk cases" and declined to apply them to the public nuisance analysis. ***Id.***, ¶25 n.20. The court explained that the sidewalk cases are predicated on maintenance of the highway, including sidewalks, whereas its public nuisance analysis concerned a condition existing on private property extending into the public right of way. ***Id.***, ¶¶25 n.20, 48. Thus, the court stated it did not rely on ***Jasenczak*** and the other "sidewalk cases" in its public nuisance analysis. ***Id.***, ¶25 n.20.

By the Court.—Judgment affirmed.

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