COURT OF APPEALS
DECISION
DATED AND RELEASED

February 5, 1997

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

NOTICE

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

No. 96-0829

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

SUSAN R. SCHLOUGH,
JAMES S. SCHLOUGH,
wife and husband,
adult individuals,

Plaintiffs-Appellants,

DEAN HEALTH PLAN, INC.,
a/k/a DEAN CARE HMO,
a Wisconsin corporation,

Plaintiff,

v.

CITIZENS SECURITY MUTUAL INSURANCE COMPANY, a Minnesota Fire and Casualty Company, and JOSEPHINE COE, an adult individual,

Defendants-Respondents,

TWIN CITY FIRE INSURANCE COMPANY, an Indiana Fire and Casualty Company, CITY OF WHITEWATER, a Wisconsin municipal corporation and BRUCE PARKER, an adult individual, CITY OF WHITEWATER SIDEWALK SUPERINTENDENT,

Defendants.

APPEAL from a judgment and an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed*.

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

PER CURIAM. Susan R. and James S. Schlough have appealed from a summary judgment dismissing their action against Josephine Coe and her insurer, Citizens Security Mutual Insurance Company. Because dismissal was mandated pursuant to the Wisconsin Supreme Court's two decisions in ***Walley v. Patake***, 271 Wis. 530, 74 N.W.2d 130 (1956), and 274 Wis. 580, 80 N.W.2d 916 (1957), we affirm the judgment.

According to the Schloughs' complaint, Susan was injured when she fell on a snow and ice covered public sidewalk abutting Coe's property. The primary issue on appeal is whether Coe could be held liable for injuries suffered by a pedestrian who fell because of a natural accumulation of snow and ice on the sidewalk adjacent to her residence. The Schloughs also allege that the trial court erroneously exercised its discretion by its order denying their motion to amend their complaint.

The Schloughs contend that Coe negligently failed for more than three weeks to shovel the sidewalk crossing her property, resulting in a treacherous buildup of snow and ice which caused Susan's fall. They contend that the common law doctrine of the abutting landowner's nonliability for injuries resulting from the accumulation of snow and ice has been abandoned. They further contend that if the rule has not yet been abandoned, it should be because it has outlived its usefulness and no longer comports with the realities of modern society.

The owners and occupiers of property abutting a public sidewalk are not liable to individuals for injuries resulting from a failure to remove from the sidewalk accumulations of snow and ice created by natural causes. *See* ***Walley***, 271 Wis. at 535, 74 N.W.2d at 132. This is true even though a municipal ordinance requires them to remove the accumulation. *See* ***id.*** Their only

liability under such circumstances is to pay the penalty prescribed by the ordinance. *See* ***id.*** A claim based on negligence may not be brought, *see* ***id.*** at 539, 74 N.W.2d at 134-35, nor may a claim be brought based upon nuisance, *see* ***Walley***, 274 Wis. at 584-85, 80 N.W.2d at 918.

These principles were more recently reiterated by the Wisconsin Supreme Court in ***Hagerty v. Village of Bruce***, 82 Wis.2d 208, 262 N.W.2d 102 (1978). In ***Hagerty***, the court rejected a claim that failure to remove accumulated snow and ice from a public sidewalk in violation of a municipal ordinance was negligence per se, rendering the abutting landowner liable. *See* ***id.*** at 211, 218, 262 N.W.2d at 103, 106. It expressly relied on the ***Walley*** holdings that owners of land abutting a public sidewalk are not liable for injuries resulting from the failure to remove naturally accumulated snow and ice, even when an ordinance required them to do so. *See* ***Hagerty***, 82 Wis.2d at 212-13, 262 N.W.2d at 104. It rejected the appellants' request that it treat the rule established in ***Walley*** and its predecessors as abrogated. *See* ***Hagerty***, 82 Wis.2d at 215-18, 262 N.W.2d at 105-06.

The rule applied in the ***Walley*** cases was not abrogated by ***State v. Deetz,*** 66 Wis.2d 1, 224 N.W.2d 407 (1974), as contended by the Schloughs. Initially, we note that the court's decision in ***Hagerty*** was issued four years after ***Deetz***, thus negating any claim that the nonliability rule stated in ***Walley*** was no longer viable after ***Deetz***. Second, the common enemy doctrine which was abandoned in ***Deetz*** is distinct from the nonliability doctrine discussed in the ***Walley*** cases and ***Hagerty.***

The common enemy doctrine which was abandoned in ***Deetz*** dealt with the diversion of surface water by a landowner to protect his own property from damage. *See* ***Deetz***, 66 Wis.2d at 9, 224 N.W.2d at 411. Prior to ***Deetz***, such diversion was always permissible regardless of whether it damaged the property of another. *See* ***id.*** In contrast, the nonliability rule discussed in the ***Walley*** and ***Hagerty*** cases deals with a landowner's responsibility for injuries occurring on his or her own property arising from snow and ice which accumulates because of natural weather conditions, not from any action taken

by the landowner. The cases are therefore inapposite, and ***Deetz*** cannot be construed as overruling the nonliability rule of the ***Walley*** cases.[1]

The ***Walley*** and ***Hagerty*** decisions were issued by the Wisconsin Supreme Court, and we are bound by them. *See* ***Livesey v. Copps Corp.***, 90 Wis.2d 577, 581, 280 N.W.2d 339, 341 (Ct. App. 1979). We therefore cannot "abandon" the nonliability doctrine as requested by the Schloughs.

The Schloughs' final argument is that the trial court erroneously exercised its discretion by denying them permission to file a second amended complaint. They made the motion after the trial court granted summary judgment. They contended that the amendment was necessary so that their complaint would set forth both the negligence and nuisance theories of law underlying their claims.

Relief from judgment is not warranted on this ground. As already noted, Coe cannot be held liable based on negligence, *see* ***Walley***, 271 Wis. at 539, 74 N.W.2d at 134-35, or nuisance, *see* ***Walley***, 274 Wis. at 584-85, 80 N.W.2d at 918. *See also* ***Jasenczak v. Schill***, 55 Wis.2d 378, 382, 198 N.W.2d 369, 371 (1972). The trial court's refusal to permit amendment of the complaint to allege nuisance as well as negligence therefore did not affect a substantial right of the Schloughs and provides no basis for relief on appeal. *See* § 805.18(2), STATS.

By the Court.—Judgment and order affirmed.

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

[1] While the court used the phrase "common enemy" in the second of the ***Walley*** decisions, it is clear from a reading of the court's opinion that it used the phrase not as a legal term of art, but in a generic fashion, describing Wisconsin's winter weather as an enemy of all state residents. *See* ***Walley v. Patake***, 274 Wis. 580, 585, 80 N.W.2d 916, 919 (1957).