COURT OF APPEALS
DECISION
DATED AND FILED

February 19, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1402 **Cir. Ct. No. 2012CV216**

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

GLORIA A. WILDE AND GARY WILDE,

PLAINTIFFS-APPELLANTS,

V.

PHARMACISTS MUTUAL INSURANCE COMPANY, NORTHEAST PHARMACIES, INC. D/B/A OCONTO PHARMACY AND CLEMENT PROPERTIES, LLC,

DEFENDANTS-RESPONDENTS,

HUMANA INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Oconto County: MICHAEL T. JUDGE, Judge. *Affirmed*.

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

¶1 PER CURIAM. Gloria and Gary Wilde appeal a summary judgment dismissing their negligence and safe place claims against Northeast Pharmacies, Inc., d/b/a Oconto Pharmacy, Clement Properties, LLC, and Pharmacists Mutual Insurance Company (collectively, Oconto Pharmacy). The circuit court concluded the Wildes' claims were barred by WIS. STAT. § 893.89,[1] the statute of repose for claims alleging injuries resulting from improvements to real property. We agree that § 893.89 bars the Wildes' claims. We therefore affirm.

BACKGROUND

¶2 The following facts are undisputed. Gloria Wilde[2] went to Oconto Pharmacy on October 4, 2011, to buy an ice pack. A pharmacy employee directed her to Aisle 3. While walking down Aisle 3, Wilde fell and injured her shoulder.

¶3 Oconto Pharmacy was renovated in 1995. The renovation involved combining two buildings to create a single, larger space for the pharmacy. In the area where the two buildings were combined, a joint line runs across the floor of all five of the pharmacy's aisles. Because of the joint line, there is a gradual slope or incline in the floor of each aisle. New carpet was installed on the floor during the 1995 renovation, and Oconto Pharmacy has not made any changes to the floor or carpet since that time.

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

[2] We refer to Gloria Wilde individually as Wilde throughout the remainder of this opinion.

¶4 Wilde returned to Oconto Pharmacy the day after she fell and inspected the floor of Aisle 3. She concluded she must have tripped or lost her balance after stepping in a "dip" that was different from the slope in the floor. She also concluded the floor's slope prevented her from regaining her balance, which caused her to fall. At her deposition, Wilde testified there were no objects in the aisle on the day she fell, the carpeting was in good condition, the lighting was fine, and she was "able to see everything appropriately[.]"

¶5 Wilde and her husband sued Oconto Pharmacy on June 8, 2012, alleging the pharmacy was negligent by failing to properly inspect, repair, and maintain the store's floor and by failing to warn customers of the floor's unsafe condition. The Wildes also alleged Oconto Pharmacy had violated WIS. STAT. § 101.11, the safe place statute.

¶6 Oconto Pharmacy moved for summary judgment, arguing the Wildes' claims were barred by WIS. STAT. § 893.89, the ten-year statute of repose for claims alleging injuries resulting from improvements to real property. The circuit court agreed that § 893.89 barred the Wildes' claims, and it granted Oconto Pharmacy summary judgment. The Wildes now appeal.

DISCUSSION

¶7 We review a grant of summary judgment independently, applying the same standards as the circuit court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶8 The circuit court concluded Oconto Pharmacy was entitled to judgment as a matter of law because the undisputed facts showed the Wildes' claims were barred by WIS. STAT. § 893.89. Interpretation of a statute and its application to a set of undisputed facts are questions of law that we review independently. ***McNeil v. Hansen***, 2007 WI 56, ¶7, 300 Wis. 2d 358, 731 N.W.2d 273. Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoting ***Seider v. O'Connell***, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659).

¶9 WISCONSIN STAT. § 893.89(2) states, in relevant part:

> [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 property, for any injury to the person, or for wrongful death, arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property.

The "exposure period" is "the 10 years immediately following the date of substantial completion of the improvement to real property." WIS. STAT. § 893.89(1). Section 893.89(4), in turn, sets forth four exceptions to the ten-year statute of repose.

¶10 On appeal, it is undisputed that: (1) the Wildes' lawsuit is an action seeking damages for bodily injury caused by a defect in the design or construction of an improvement to real property; (2) the ten-year exposure period began to run in 1995, when the renovations to Oconto Pharmacy were completed; and (3) the

Wildes filed their complaint after the exposure period ended. Thus, the Wildes' claims are barred unless one of the exceptions set forth in WIS. STAT. § 893.89(4) applies. The Wildes invoke two of the statutory exceptions—§ 893.89(4)(a) and (c). For the reasons explained below, we agree with Oconto Pharmacy that neither exception applies.

I. WISCONSIN STAT. § 893.89(4)(a)

¶11 The Wildes first cite WIS. STAT. § 893.89(4)(a), which states that the ten-year statute of repose "does not apply" to claims against "[a] person who commits fraud, concealment or misrepresentation related to a deficiency or defect in the improvement to real property." The Wildes argue this exception applies because Oconto Pharmacy concealed the dip in the floor of Aisle 3 by placing carpet over it.

¶12 WISCONSIN STAT. § 893.89 does not define the term "concealment." However, the verb "conceal" is ordinarily defined as "keep from sight; hide" or "keep (something) secret; prevent from being known or noticed[.]" NEW OXFORD AMERICAN DICTIONARY 354 (2001); *see also* ***Rock-Koshkonong Lake Dist. v. DNR***, 2013 WI 74, ¶128, 350 Wis. 2d 45, 833 N.W.2d 800 ("If the legislature does not provide a definition, we may resort to dictionaries."). Applying these definitions, we conclude, as a matter of law, that the undisputed facts show the dip in the floor of Aisle 3 was not concealed by the carpet.

¶13 In opposition to Oconto Pharmacy's motion for summary judgment, the Wildes offered multiple photographs of the floor of Aisle 3 that were taken after Wilde's fall. The photographs were taken without pulling back the carpeting. The Wildes reproduce some of these photographs in their appellate brief, asserting, "The indentation can be seen on [the] photographs … the dip in fact

existed (a physical fact borne out by the photos)[.]" That the dip can be seen in the photographs belies the Wildes' concealment argument. Because the dip is evident with the carpet in place, the carpet does not "hide" it or "prevent [it] from being known or noticed[.]" *See* NEW OXFORD AMERICAN DICTIONARY, *supra*, 354. Further, Wilde testified she returned to Oconto Pharmacy the day after the accident and was able to identify the dip as the cause of her fall. Again, if Wilde could see the dip without pulling back the carpet, it follows the carpet did not conceal the dip. We therefore reject the Wildes' argument that the concealment exception to the ten-year statute of repose applies.[3]

II. WISCONSIN STAT. § 893.89(4)(c)

¶14 The Wildes next cite WIS. STAT. § 893.89(4)(c), which excepts from the ten-year statute of repose claims against "[a]n owner or occupier of real property for damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property." The Wildes argue this exception applies because "the pharmacy's negligence in carpeting over the defects in the structure" constituted negligent maintenance, operation, or inspection of an improvement to real property.

¶15 Case law applying WIS. STAT. § 893.89(4)(c) does not support the Wildes' interpretation. Our supreme court has explained that owners and

[3] Oconto Pharmacy advances an alternative argument that the concealment exception does not apply because WIS. STAT. § 893.89(4)(a) requires intentional concealment, and there is no evidence Oconto Pharmacy intended to conceal either the dip or slope in the floor by covering them with carpet. We find Oconto Pharmacy's intentional concealment argument persuasive. However, we decline to further address the argument because we conclude on other grounds that the concealment exception does not apply. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (only dispositive arguments need be addressed).

occupiers of real property are protected by the ten-year statute of repose "so long as they are being sued for their conduct in *improving* the property." ***Kohn v. Darlington Cmty. Schs.***, 2005 WI 99, ¶66, 283 Wis. 2d 1, 698 N.W.2d 794 (emphasis added). Section 893.89(4)(c) abrogates that protection, though, "when liability is based upon *subsequent* negligent maintenance, operation, or inspection of the improvement." ***Kohn***, 283 Wis. 2d 1, ¶66 (emphasis added). Thus, for the exception in § 893.89(4)(c) to apply, the plaintiff's claim must be based on something the owner or occupier did *after* the improvement to real property was completed. Here, the installation of the carpeting was part and parcel of the 1995 renovation.

¶16 The supreme court has also explained that the ten-year statute of repose in WIS. STAT. § 893.89 generally applies to claims resulting from injuries caused by "structural defects," but the exception in WIS. STAT. § 893.89(4)(c) applies to claims resulting from injuries caused by "unsafe conditions associated with the structure[.]" ***Mair v. Trollhaugen Ski Resort***, 2006 WI 61, ¶29, 291 Wis. 2d 132, 715 N.W.2d 598. A structural defect is "a hazardous condition inherent in the structure by reason of its design or construction." ***Id.***, ¶22 (quoting ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶28, 245 Wis. 2d 560, 630 N.W.2d 517). Structural defects arise from "materials used in the construction, improper layout of the structure or improper construction." ***Rosario v. Acuity***, 2007 WI App 194, ¶16, 304 Wis. 2d 713, 738 N.W.2d 608. In contrast, unsafe conditions associated with the structure arise from "the failure to keep an originally safe structure in proper repair or properly maintained." ***Mair***, 291 Wis. 2d 132, ¶23 (quoting ***Barry***, 245 Wis. 2d 560, ¶27).

¶17 It is undisputed that the dip and slope in the floor of Aisle 3 are structural defects. Consequently, to the extent the Wildes allege that Wilde fell

because of the dip and slope in the floor, the exception in WIS. STAT. § 893.89(4)(c) does not apply to their claims. However, the Wildes also allege that Wilde fell because the pharmacy negligently carpeted over the structural defects in the floor. They argue carpet is not a part of the structure, so an unsafe condition created by carpet must be an unsafe condition associated with the structure, rather than a structural defect.

¶18 The Wildes' argument that the carpet created an unsafe condition associated with the structure fails for three reasons. First, the Wildes cite ***Hartberg v. American Founders' Securities Co.***, 212 Wis. 104, 108, 249 N.W. 48 (1933), for the proposition that carpet is "furniture." They therefore argue carpet cannot be considered part of a structure, and, accordingly, it cannot give rise to a structural defect. However, the issue in ***Hartberg*** was whether carpet installed in a rented space belonged to the tenant or the landlord under the terms of a lease. ***Id.*** at 105, 107-08. ***Hartberg*** did not address whether carpet is part of the structure for purposes of WIS. STAT. § 893.89. Further, we agree with Oconto Pharmacy that "carpet installed on a floor … cannot be characterized as 'furniture' under any reasonable modern definition[.]" *See, e.g.*, NEW OXFORD AMERICAN DICTIONARY, *supra*, 689 (defining furniture as "large movable equipment, such as tables and chairs, used to make a house, office, or other space suitable for living or working"). Moreover, structural defects can arise from "materials used in the construction[,]" ***Rosario***, 304 Wis. 2d 713, ¶16, and the carpet was a material used in the 1995 renovation.

¶19 Second, an unsafe condition associated with the structure arises from "the failure to keep an originally safe structure in proper repair or properly maintained." ***Mair***, 291 Wis. 2d 132, ¶23 (quoting ***Barry***, 245 Wis. 2d 560, ¶27). Here, the carpet was installed during the 1995 renovation, and it was not changed

in any way between 1995 and the date of Wilde's fall. The Wildes do not allege that the carpet was safe when installed but became unsafe due to lack of repair or maintenance.

¶20 Third, although the Wildes argue the carpet itself created an unsafe condition by concealing the dip in the floor, it is undisputed that the dip was visible despite the presence of the carpet. We therefore reject the Wildes' argument that the carpet, as opposed to the dip and slope of the floor, created an unsafe condition.

¶21 Alternatively, the Wildes argue the exception in WIS. STAT. § 893.89(4)(c) applies to their claims because Oconto Pharmacy negligently failed to warn Wilde of the danger posed by the floor. They contend the pharmacy's failure to warn Wilde of the structural defects in the floor created an unsafe condition associated with the structure. We rejected an identical argument in ***Rosario***. There, Rosario was leaving a building when she fell while "negotiating a step three inches in height[.]" ***Rosario***, 304 Wis. 2d 713, ¶2. She sued the building's owner, asserting negligence and safe place claims. ***Id.***, ¶3. On appeal, we concluded Rosario's claims were barred by WIS. STAT. § 893.89 because the step was a structural defect. ***Id.***, ¶¶19, 22. We rejected Rosario's argument that the owner's failure to warn her of the step created an unsafe condition associated with the structure. ***Id.***, ¶14. We agreed with the circuit court that accepting Rosario's failure-to-warn argument would effectively "undo the Statute of Repose" because it would allow plaintiffs to assert claims based on structural defects, which would otherwise be time-barred, simply by rephrasing them as failure-to-warn claims. ***Id.***, ¶¶29-30. We reject the Wildes' failure-to-warn argument for the same reason.

By the Court.—Judgment affirmed.

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