COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 96-2967

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

LINDA GOLDBECK AND CHUCK GOLDBECK,

PLAINTIFFS-APPELLANTS,

V.

ROGER MARTIN,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

V.

SECURA INSURANCE,

THIRD-PARTY DEFENDANT-APPELLANT,

WISCONSIN AREA HEALTH FUND,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Linda and Chuck Goldbeck and their insurer, Secura Insurance, appeal from a judgment entered against them on a jury verdict. The issues are: (1) whether there was sufficient evidence to support the jury's finding that the Goldbecks were causally negligent; and (2) whether the trial court erred when it instructed the jury to consider the Goldbecks' causal negligence collectively, rather than individually. We conclude that: (1) there was sufficient evidence to support the jury's finding that the Goldbecks were negligent because they failed to remedy the dangerous condition in their tenant's yard; and (2) the trial court did not err when it instructed the jury to consider the Goldbecks' negligence as a unit, rather than as individual tortfeasors. Therefore, we affirm.

The Goldbecks sued to evict their tenant, Roger Martin, for nonpayment of rent. Martin counterclaimed for damages for the injuries he sustained when he fell in a grass-covered hole in the yard of the residence which he leased from the Goldbecks.[1] The jury returned a verdict of $68,094.87 in Martin's favor, found him 40% negligent and found the Goldbecks 60% negligent. The trial court reduced the award by 40% and entered judgment on the verdict. *See* § 895.045, STATS., 1993-94. The Goldbecks appeal.

[1] The Goldbecks impleaded Secura, their insurer. We refer to the Goldbecks and Secura collectively as the Goldbecks because they are united in interest on all issues in this appeal. This appeal does not involve the claim for non-payment of rent.

We use a deferential standard of review for a jury verdict. It will be sustained if there is any credible evidence to support it. ***Staehler v. Beuthin***, 206 Wis.2d 610, 617, 557 N.W.2d 487, 489 (Ct. App. 1996).

A tenant, injured as a result of the landlord's negligence in maintaining the premises, is entitled to recover from the landlord under general negligence principles. *See* ***Pagelsdorf v. Safeco Ins. Co.***, 91 Wis.2d 734, 745, 284 N.W.2d 55, 61 (1979). Negligence is the failure to exercise ordinary care. ***Ceplina v. South Milwaukee Sch. Bd.***, 73 Wis.2d 338, 342, 243 N.W.2d 183, 185 (1976). A person fails to exercise ordinary care, when, without intending to do any harm, he or she does something or fails to do something under circumstances where a reasonable person would foresee that he or she will subject a person to an unreasonable risk of injury or damage. *See* ***A.E. Inv. Corp. v. Link Builders, Inc.***, 62 Wis.2d 479, 484, 214 N.W.2d 764, 766 (1974). If an unreasonable risk of harm existed and the landlords were aware of it, or, if in the use of ordinary care, they should have been aware of it, then it was their duty to either correct the condition or danger or warn other persons of the condition or risk as was reasonable under the circumstances. ***Pagelsdorf***, 91 Wis.2d at 741, 284 N.W.2d at 59.

The Goldbecks rely on the general rule "that constructive notice is chargeable only where the hazard has existed for a sufficient length of time to allow the vigilant owner ... the opportunity to discover and remedy the situation." ***Kaufman v. State St. Ltd. Partnership***, 187 Wis.2d 54, 59, 522 N.W.2d 249, 251 (Ct. App. 1994) (citation omitted). Based on that rule, the Goldbecks contend that there was no evidence that they had constructive notice of this particular hole for a sufficient length of time preceding Martin's accident to have had the opportunity to remedy the situation. However, landlord liability for ordinary negligence does not require the jury to parse the dangerous condition as the Goldbecks contend and

consider their negligence with respect to each individual hole, in a yard full of holes. The jury must consider whether it was reasonably foreseeable that the Goldbecks' failure to correct the condition of the entire yard would subject another person to an unreasonable risk of harm. ***A.E. Inv. Corp.***, 62 Wis.2d at 484, 214 N.W.2d at 766.

We summarize the evidence which supports the jury's verdict on negligence. *See* ***Staehler***, 206 Wis.2d at 617, 557 N.W.2d at 489. A former tenant, Matthew Skinner, testified that a year before Martin's fall, Mr. Goldbeck told Skinner to be careful of holes in the yard. Skinner also testified that he asked Mr. Goldbeck to fill the holes, but that Goldbeck never did. About five weeks before Martin fell, his friend Lou Ann Hippe notified the Goldbecks that she had fallen in a hole in the yard. Martin also told Mrs. Goldbeck to fill the holes in the yard.

We conclude that there was sufficient evidence, and reasonable inferences therefrom, from which the jury could determine that the Goldbecks failed to exercise ordinary care in maintaining the premises. First, there was sufficient evidence to support the jury's finding that the Goldbecks had notice of the dangerous condition of the yard. Second, there was credible evidence that the dangerous condition "existed for a sufficient length of time to allow a vigilant owner ... to discover and remedy the situation." *See* ***Kaufman***, 187 Wis.2d at 59, 522 N.W.2d at 251. The jury was not required to define the dangerous condition as the precise hole in which Martin fell. It was properly instructed to determine whether it was reasonably foreseeable that the Goldbecks' failure to correct the condition would subject another to an unreasonable risk of harm. ***Pagelsdorf***, 91 Wis.2d at 743, 284 N.W.2d at 60. We conclude that the evidence and reasonable inferences from that evidence support the jury's finding that the Goldbecks' yard,

which was full of holes similar to the one in which Martin fell, was a dangerous condition and created an unreasonable risk of harm. We further conclude that there was sufficient evidence to support the jury's implicit finding that the Goldbecks breached their duty of ordinary care because it was reasonably foreseeable that their failure to remedy the dangerous condition would subject another to an unreasonable risk of harm.

The Goldbecks also contend that the trial court erred when it compelled the jury to consider their causal negligence as a unit rather than individually because Mrs. Goldbeck was more responsible for the property than Mr. Goldbeck and consequently, their liability, although joint in law was divisible in fact. *See* § 895.045, STATS., 1993-94; ***Delvaux v. Vanden Langenberg***, 130 Wis.2d 464, 479, 387 N.W.2d 751, 758 (1986). To consider the comparative negligence of multiple tortfeasors collectively, the court must consider more than the similarity of their alleged acts and omissions. "In addition, the duty breached and the opportunity to fulfill that duty must be the same, and neither the obligation nor the breach of it may be divisible." ***Reiter v. Dyken***, 95 Wis.2d 461, 467, 290 N.W.2d 510, 514 (1980).

The trial court rejected the Goldbecks' request that the jury consider their negligence individually. It reasoned that "[t]he evidence indicated that each have the opportunity to have access to the property, to take the steps necessary to protect and improve, change or modify equally. It seems ... as a matter of law their obligation was not divisible, therefore they should be treated as an entity for purposes of this particular proceeding under the reasoning of [***Reber v. Hanson***, 260 Wis. 632, 51 N.W.2d 505 (1952)] ...." The trial court concluded that the Goldbecks, as joint owners, had indivisible duties as a matter of law, and equal opportunities to maintain the premises. It directed the jury to consider the

Goldbecks' causal negligence as a single unit in reliance on ***Reber***, 260 Wis. at 637, 51 N.W.2d at 508.

In ***Reber***, the court condoned the jury's consideration of the parents' contributory negligence collectively. ***Reber***, 260 Wis. at 638, 51 N.W.2d at 508. The Rebers' cheese factory and living quarters were in different parts of the same building. *See* ***id***. at 634, 51 N.W.2d at 506. A driveway used by truckers to deliver milk and take away the cheese circled that building. *See* ***id***. The Rebers brought a wrongful death action against Hanson, a truck driver who accidentally killed their infant son who was playing in the driveway. ***Id***. at 635, 51 N.W.2d at 507. The jury found Hanson 25% causally negligent, and the Rebers 75% causally negligent. *See* ***id***. The court described the Rebers' parental duties as substantially similar. "[T]here was a present danger known to both parents, the danger being the ability of the child, and [his] custom, to leave the safety of the dwelling portion of the building and its yard, which [the court] ... concede[s] is the mother's domain, and enter the dangerous, business part of the premises, which was primarily the father's part of the establishment." ***Id***. at 637, 51 N.W.2d at 508.

The Goldbecks contend that ***Reber*** was an unusual case and that the court should have followed the more recent cases of ***Reiter*** and ***Mariuzza v. Kenower***, 68 Wis.2d 321, 228 N.W.2d 702 (1975), which they contend require consideration of their causal negligence individually. However, ***Reiter*** and ***Mariuzza*** do not support their contention. They require analysis of the duties and opportunities to maintain the property to determine whether to consider the causal negligence of the culpable parties collectively or individually.

In ***Reiter***, the culpable parties were the absentee property owners and their realtor.[2] ***Reiter***, 95 Wis.2d at 463-64, 290 N.W.2d at 512. The court instructed the jury to consider the causal negligence of the property owners collectively, but separately from the causal negligence of the realtor. *See* ***id.*** at 467-68, 290 N.W.2d at 514. In ***Mariuzza,*** the defendants were the tenants who resided on the premises, and the absentee landlord who resided in California. ***Mariuzza*** held that the causal negligence of the tenants should be assessed separately from that of the absentee landlord because they had different duties and different opportunities to maintain the premises. *See* ***id.*** at 326, 228 N.W.2d at 705. However, the tenants' causal negligence was assessed collectively. *See* ***id.*** at 324, 228 N.W.2d at 704.

In these cases, the court's determination on whether to consider the parties' causal negligence individually or collectively depended on their legal status. The causal negligence of parties of the same legal status was considered collectively, whereas the causal negligence of parties of different legal status were considered individually.

We conclude that the court's analysis of the Goldbecks' duties and opportunities to fulfill those duties was consistent with ***Reber, Reiter*** and ***Mariuzza.*** The Goldbecks jointly owned and controlled the property. There was credible evidence that both knew about the dangerous condition of the yard. The Goldbecks' *de facto* informal division of labor does not constitute a distinction in

[2] In ***Reiter***, the plaintiff slipped and fell on a walkway of an unoccupied house which was for sale. *See* ***Reiter v. Dyken***, 95 Wis.2d 461, 462, 290 N.W.2d 510, 511 (1980). The owners had moved and were not living on the premises. *See* ***id***. The plaintiff sued the absentee owners who impleaded the realtor for failure to maintain the premises. *See* ***id.*** at 463-64, 290 N.W.2d at 512.

their legal status, such as that between the ***Reiter*** owners and their realtor, or the ***Mariuzza*** tenants and their absentee landlord. Although they participated to different degrees in the management and care of the property, their legal obligations and opportunities to maintain the property were identical. We conclude that the Goldbecks' status as joint owners, with equal opportunities to control and maintain the premises, is analogous to the ***Reber*** parents and consistent with the court's treatment of the ***Reiter*** owners and the ***Mariuzza*** tenants. Consequently, the law and the evidence compel consideration of the Goldbecks' causal negligence collectively.

By the Court.—Judgment affirmed.

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