COURT OF APPEALS
DECISION
DATED AND FILED

August 11, 1999

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. 98-1937

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

BETTY JO RAMSEY AND GEORGE F. RAMSEY, SR.,

PLAINTIFFS-APPELLANTS,

BLUE CROSS & BLUE SHIELD UNITED OF WI,

PLAINTIFF,

V.

STATE FARM FIRE & CASUALTY CO. AND CREDIT BUREAU OF RACINE, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Racine County: WAYNE J. MARIK, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Nettesheim, Anderson and Snyder, JJ.

NETTESHEIM, J. Betty Jo Ramsey and George F. Ramsey, Sr., (Ramsey) appeal from a summary judgment granted in favor of Credit Bureau of Racine, Inc. and its insurer, State Farm Fire & Casualty Co. Ramsey sued the Credit Bureau after she slipped and fell on a publicly owned driveway apron leading to the Credit Bureau. Ramsey alleged that the Credit Bureau violated Wisconsin's safe place statute, § 101.11, STATS., and was negligent in failing to keep the driveway apron free of dangerous snow and ice. The trial court granted summary judgment because the Credit Bureau did not own the property and did not exercise sufficient custody, control or supervision of the area.

Ramsey contends that summary judgment is inappropriate because the Credit Bureau exercised complete control over the publicly owned property and as such, the property is subject to the safe place statute. Ramsey additionally argues that the common law should be changed to impose upon business owners the duty to maintain abutting walkways in a reasonably safe condition.

We conclude that summary judgment as to Ramsey's safe place claim is not appropriate. Based on the present record, the Credit Bureau has failed to demonstrate that it is entitled to judgment as a matter of law. We reverse that portion of the judgment and remand for further proceedings. However, we further conclude that Ramsey's common law negligence claim is barred under Wisconsin law. Therefore, we affirm the trial court's grant of summary judgment on that claim.

BACKGROUND

The facts in the summary judgment record are largely undisputed. The Credit Bureau is located at 211 9th Street in Racine. The front of the building faces 9th Street and provides the only customer entrance. A sidewalk runs in front

of the building and an alley runs immediately adjacent to its right side. The alley dead ends at a parking lot behind the Credit Bureau. In order to access the alley from 9th Street, a person would have to drive onto the driveway apron and over the sidewalk. The driveway apron is owned by the city of Racine.

On January 31, 1994, Ramsey slipped and fell on ice that had accumulated on the driveway apron abutting the Credit Bureau. Ramsey was using the driveway apron to access the sidewalk in front of the Credit Bureau. The photographs Ramsey submitted on summary judgment illustrate that the driveway apron provided the only approach to the Credit Bureau entrance from the street.

The summary judgment record includes the deposition testimony of Gloria Mitchell, the Credit Bureau's office manger. According to Mitchell, the driveway abutting the Credit Bureau, accessed by the driveway apron, was used exclusively for Credit Bureau employees and customers. There is a sign posted at the entrance of the alley which reads "CREDIT BUREAU PARKING" and shows an arrow pointing down the alley to the back of the Credit Bureau. The only customer entrance to the Credit Bureau building is in the front, facing 9th Street. Therefore, a customer parking in the rear of the Credit Bureau would have to walk the length of the alley to enter the building. Mitchell testified that it is not uncommon for customers to park, as Ramsey did, on 9th Street.

As office manager, Mitchell was also in charge of hiring maintenance people. At the time of Ramsey's fall, Mitchell had hired Tom Buchman to shovel the sidewalk, driveway and alley abutting the Credit Bureau. Buchman did not shovel the cement extension from the sidewalk to the street. Therefore, in the winter, the only way to access the Credit Bureau from 9th Street

is to walk up the driveway apron to the sidewalk. Mitchell occasionally maintained the sidewalk herself by sweeping, salting or shoveling, if necessary.

On January 27, 1997, Ramsey filed a complaint against the Credit Bureau alleging that the Credit Bureau violated Wisconsin's safe place statute, § 101.11, STATS., and was negligent in failing to keep the driveway apron free of snow and ice. On September 17, 1997, the Credit Bureau filed a motion for summary judgment arguing that Ramsey's safe place claim could not be maintained because the driveway apron on which Ramsey fell is publicly owned property and that Ramsey's negligence claim is defeated by the common law rule which immunizes landowners of abutting public property from liability for dangerous conditions.

The circuit court held a hearing on the motion on February 23, 1998. It found:

> [S]ince the area where the plaintiff fell was owned by the City of Racine, the long established general rule that an adjoining private landowner is not liable was applicable…. [T]he area in question was not a place of employment within the adjoining owner's custody, control or supervision and, therefore … the Safe Place Statute did not apply.[1]

Based on its findings, the court dismissed Ramsey's claim. She appeals.

DISCUSSION

When we review a summary judgment, we apply the same methodology as the trial court, and we consider the issues de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987).

[1] Because the court reporter lost her notes of the summary judgment motion hearing, the circuit court restated its decision in a letter to the parties.

The remedy is appropriate in cases where there is no genuine issue of material fact and the moving party has established his or her entitlement to judgment as a matter of law. *See* ***id.*** Inferences drawn from facts contained in the supporting materials are viewed in the light most favorable to the nonmoving party. *See* ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis.2d 555, 567, 278 N.W.2d 857, 862 (1979).

Ramsey's Safe Place Claim

Ramsey's first claim against the Credit Bureau is under the safe place statute, § 101.11, STATS. The safe place statute requires that "every owner of a place of employment or a public building … construct, repair or maintain such place of employment or public building as to render the same safe." ***Id***. subsec. (1). "Place of employment" is defined in relevant part as "every place, whether indoors or out or underground and the premises appurtenant thereto where either temporarily or permanently any industry, trade or business is carried on." Section 101.01(11), STATS.

Ramsey argues that summary judgment was inappropriate because the driveway apron is a "premises appurtenant" to the Credit Bureau such that it qualifies as a "place of employment" under the safe place statute. *See* §§ 101.01(11), 101.11, STATS. Relying on ***Schwenn v. Loraine Hotel Co.***, 14 Wis.2d 601, 111 N.W.2d 495 (1961), Ramsey correctly contends that ownership is not a prerequisite of liability under the safe place statute. She argues that the Credit Bureau exercised sufficient control over the driveway apron to warrant liability due to negligent maintenance.

While acknowledging that ***Schwenn*** creates a basis of liability when a private owner has exerted sufficient dominion and control over public property,

the Credit Bureau contends that the facts and circumstances of this case are more akin to those of ***Hansen v. Schmidman Properties, Inc.***, 16 Wis.2d 639, 115 N.W.2d 495 (1962). There, the supreme court concluded that the private business owner was not liable for injuries the plaintiff sustained when he fell on a driveway apron outside the defendant's place of business.

What constitutes a safe place of employment depends on the facts and circumstances of each case. *See* ***Schwenn***, 14 Wis.2d at 608, 111 N.W.2d at 499. Viewing the summary judgment record in the light most favorable to Ramsey, we conclude that the Credit Bureau has failed to demonstrate that it is entitled to judgment as a matter of law. We conclude that a genuine issue of material fact exists as to whether the facts and circumstances surrounding the Credit Bureau's use of the driveway apron render it a place of employment under the statute.

The parties agree that ***Schwenn*** and ***Hansen*** provide the appropriate guidance as to whether the Credit Bureau exerted sufficient control and dominion over the driveway apron such that it is liable for the injuries sustained by Ramsey as a result of her fall. However, they disagree as to which case governs the facts of the case before us.

In ***Schwenn***, the plaintiff tripped on an accumulation of snow and ice on the driveway outside of the Loraine Hotel. *See* ***Schwenn***, 14 Wis.2d at 603, 111 N.W.2d at 496. Although the driveway was publicly owned, the evidence showed that it was used "almost exclusively for the loading and unloading of guests and luggage from taxis and private autos." *See* ***id***. at 604, 111 N.W.2d at 497. The supreme court stated that:

> [t]he safe-place statute does not, by its terms, require an employer to own the premises in order to maintain a place

> of employment. Nor do cases on the subject require ownership as a requisite of liability. Thus, control and custody of the premises need not be exclusive, nor is it necessary to have control for all purposes.

Id. at 607, 111 N.W.2d at 498 (citations omitted).

In determining that the defendants, the hotel and the taxi company which used the property were liable for the plaintiff's injuries, the court looked to the control exercised by both the defendants and the city. With respect to the defendants, the court stated:

> Control by the hotel is shown by the evidence that it maintained a doorman whose work included keeping the driveway free of unauthorized vehicles…. The only parking permitted by the hotel was by the Yellow cabs, by hotel guests … and by officers of the hotel. There is evidence that the doorman and other employees of the hotel cleaned the driveway in winter. Private agencies plowed it with the express or tacit approval of the hotel.
>
> The evidence showed that employees of the cab company sometimes shoveled and sanded the driveway and that the company on some occasions used its own snowplow to clean the drive.

Id. at 606, 111 N.W.2d at 498. With respect to the city, the court determined a lack of control, noting that "the city exercised no control over the driveway which interfered with the control exercised by the defendants. It maintained no parking or cabstand signs in the area; it did not control parking there; it never plowed snow from the driveway." ***Id***. The court determined that "the two defendants exercised control over this driveway for purposes of snow removal," *see* ***id***. at 607, 111 N.W.2d at 498, and thus, the defendants were liable for the plaintiff's injuries under the safe place statute.

In ***Hansen***, the supreme court reached the opposite conclusion. There, the plaintiff fell on ice while traversing a publicly owned driveway apron of a tavern parking lot. Relying on ***Schwenn***, the plaintiff argued that the defendants

were liable under the safe place statute. *See* ***Hansen***, 16 Wis.2d at 642, 115 N.W.2d at 497. The court distinguished ***Schwenn*** concluding that the record in ***Hansen*** failed to demonstrate that the defendants had complete and exclusive dominion over the area in question, noting that "it appears … that drivers of vehicles, without hindrance by the defendants, used the apron and that portion of the driveway within the street limits in making turnarounds." ***Hansen***, 16 Wis.2d at 642, 115 N.W.2d at 497. The court additionally noted that the defendants should not be held liable for a defect on abutting property "when the alleged defect is in the part of the street constructed for use by vehicles and not by pedestrians." *See* ***id***.

Here, we conclude that the summary judgment facts fall somewhere in between ***Schwenn*** and ***Hansen***. For example, Mitchell testified that the Credit Bureau arranged for the snow removal on the driveway apron. However, there is no evidence that the city did not also contribute to the removal of snow from the driveway apron. Mitchell testified that the alley and parking lot behind the Credit Bureau are used exclusively by Credit Bureau employees and customers. However, there is no indication that the Credit Bureau posted "no parking" signs or that other vehicles would have been "unauthorized" had they driven or parked on the property. Moreover, there is no evidence as to whether the driveway apron was used with the same exclusivity as the property in ***Schwenn*** or whether, as in ***Hansen***, any motor vehicle could have used the driveway apron to turn around.

When reviewing a summary judgment motion, we look at the affidavits and draw inferences from the facts contained therein, viewed in the light most favorable to the nonmoving party. *See* ***Kraemer Bros.***, 89 Wis.2d at 567, 278 N.W.2d at 862. If these facts are subject to conflicting interpretations or reasonable persons might differ as to their significance, summary judgment is

improper. *See* ***id***. Here, we conclude that the summary judgment evidence, viewed most favorably to Ramsey, raises a question of fact as to whether the Credit Bureau exercised sufficient control over the driveway apron on which Ramsey fell such that it may be held liable under the safe place statute. We reverse the court's grant of summary judgment as to Ramsey's safe place claim and we remand for further proceedings on that claim.

Ramsey's Common Law Negligence Claim

While acknowledging that Wisconsin law bars her common law negligence claim, Ramsey requests that this court certify the issue of whether the common law nonliability rule for landowners abutting public walkways should apply to businesses.[2] We decline to do so. Wisconsin law is clear:

> The owners and occupiers of the premises abutting a street in a city are not responsible to individuals for injuries resulting from a failure to remove from the sidewalk accumulations of snow and ice created by natural causes, although there is a valid ordinance requiring them to remove such accumulations. The only liability is to pay the penalty prescribed by the ordinance.

Walley v. Patake, 271 Wis. 530, 535, 74 N.W.2d 130, 132 (1956). We affirm the circuit court's grant of summary judgment as to Ramsey's common law negligence claim.

CONCLUSION

We conclude that the grant of summary judgment dismissing Ramsey's claim under the safe place statute was error because the facts contained

[2] Ramsey requests certification noting that the supreme court was recently poised to revisit the issue of common law nonliability for abutting landowners. The supreme court had accepted a petition for review of a court of appeals decision which addressed that very issue. *See* ***Schlough v. Citizens Sec. Mut. Ins. Co.***, No. 96-0829, unpublished slip op. (Wis. Ct. App. Feb 5, 1997), *review granted*, 211 Wis.2d 529, 568 N.W.2d 297 (1997). However, that case settled before oral arguments and was removed from the supreme court's calendar.

in the summary judgment record are subject to competing reasonable inferences. However, we further conclude, and Ramsey concedes, that existing Wisconsin law clearly bars her common law negligence claim. We affirm the circuit court's grant of summary judgment as to that claim.

Costs are denied.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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