COURT OF APPEALS
DECISION
DATED AND FILED

June 7, 2016

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. 2015AP1329 **Cir. Ct. No. 2014CV53**

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

ANDREW HISER

PLAINTIFF-APPELLANT,

AND

SECURA INSURANCE, A MUTUAL COMPANY,

INVOLUNTARY-PLAINTIFF-APPELLANT,

V.

WEST BEND MUTUAL INSURANCE COMPANY, MIRACLE ON MAIN, LLC, ROBERT J. BEATTY AND JANIS L. BEATTY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sawyer County: GERALD L. WRIGHT, Judge. *Reversed and cause remanded for further proceedings.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Andrew Hiser and Secura Insurance (collectively "Hiser") appeal a summary judgment dismissing their negligence action against Robert and Janis Beatty; their business, Miracle on Main, LLC; and their insurer, West Bend Mutual Insurance Company, (collectively "the Beattys"). Hiser argues: (1) the circuit court improperly applied safe place statute[1] principles to his common law negligence action, specifically the requirement that the plaintiff must show the defendant's actual or constructive notice of a defective condition; (2) issues of material fact preclude summary judgment; and (3) Hiser was not required to support his claim with expert testimony. Because we agree with each of Hiser's arguments, we reverse the judgment and remand the cause for further proceedings.

BACKGROUND

¶2 Hiser, a cable and internet installer, injured his shoulder when he fell while descending the stairs from a second-story apartment owned by the Beattys and occupied by Tom and Melissa Zemaitis. When Hiser reached the third step from the bottom, a rubber tread detached from the wooden stair, causing him to fall. In his deposition, Hiser testified the tread was attached by only two rusty nails, one on each side of the tread. Tom Zemaitis testified he recalled seeing two nails on each side, and the nails had punctured through the rubber such that the heads were no longer securing the treads. A photograph of the step shows eight nails securing the tread, and Robert Beatty testified he never replaced or reattached any of the rubber treads. However, that assertion was contradicted by

[1] *See* WISCONSIN STAT. § 101.11. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Melissa Zemaitis' testimony that Beatty nailed down the rubber treads sometime after the incident.[2]

¶3 The Beattys testified they bought the building in 2003, eight years before the accident, and never removed or replaced the treads on the stairs. Janis Beatty testified she saw no defect in the tread when she cleaned the stairs on her hands and knees a few days before the incident, in preparation for the Zemaitises moving in.

¶4 Hiser's complaint alleged common law negligence consisting of inadequate inspection and maintenance of the stairs as well as a violation of the safe place statute. The Beattys filed a motion for summary judgment, focusing on their lack of notice of any defective condition. Hiser responded by conceding that dismissal of his safe place statute claim was appropriate, but arguing actual or constructive notice of a defect was not a prerequisite to maintaining his negligence claim.

¶5 The circuit court granted summary judgment dismissing the action, concluding uncontroverted evidence showed the Beattys were inspecting the premises. The court speculated "somebody [apparently referring to the construction worker who installed the treads] had become just a little over zealous with the hammer and hit the nails through too far and the thing failed." The court concluded Janis Beatty's inspection while she was cleaning the stairs for the new tenants fulfilled the Beattys' duty to inspect.

[2] Contrary to the Beattys' argument, subsequent remedial measures would be admissible under WIS. STAT. § 904.07 to impeach Robert Beatty's testimony and to establish that the photograph taken years after the incident did not accurately depict the condition of the third step at the time Hiser fell.

DISCUSSION

1. Actual or Constructive Notice

¶6 The owner's actual or constructive notice of a defective condition in the property is required if the plaintiff wishes to invoke the safe place statute's requirement that the owner make the premises as safe as the nature of the business would allow. *See* WIS. STAT. § 101.01(13). However, such notice is not a prerequisite to maintaining a common law negligence action based on the Beattys' inspection and maintenance of the stairs. *See* ***Megal v. Green Bay Area Visitor & Convention Bureau, Inc.***, 2004 WI 98, ¶23, 274 Wis. 2d 162, 682 N.W.2d 857; ***Gennrich v. Zurich Am. Ins. Co.***, 2010 WI App 117, ¶¶23-24, 329 Wis. 2d 91, 789 N.W.2d 106. While Hiser is required to show that the Beattys knew or should have known, in the exercise of ordinary care, that the rubber treads were unsafe and thus created an unreasonable risk of harm, that question focuses on the quality of their inspection and maintenance, not on the defective construction or defective condition itself. The common law negligence claims can proceed without Hiser having to prove actual or constructive notice of the defective condition.

2. Summary Judgment and Outstanding Issues of Material Fact

¶7 Summary judgment is appropriate if there are no outstanding issues of material fact and the moving party is entitled to judgment as a matter of law. ***Wright v. Hasley***, 86 Wis. 2d 572, 577, 273 N.W.2d 319 (1979); *see also* WIS. STAT. § 802.08. If a material fact is in dispute, or if competing inferences can be drawn from the facts, the issue must be resolved by the trier of fact. ***Delmore v. American Fam. Mut. Ins. Co.***, 118 Wis. 2d 510, 512, 348 N.W.2d 151 (1984). Questions of negligence are rarely susceptible to resolution on motions for summary judgment "because such questions almost invariably involve conflicting

evidence and we do not decide issues of fact in summary judgment proceedings." ***Madison Newspapers, Inc. v. Pinkerton's Inc.***, 200 Wis. 2d 468, 478-79, 545 N.W.2d 843 (Ct. App. 1996).

¶8 Here, outstanding issues of material fact, especially when they are viewed in the light most favorable to Hiser, preclude summary judgment. Hiser's description of the two rusty nails securing the rubber tread and Tom Zemaitis' testimony that the head of the nails had completely penetrated through the tread call into question the quality of Janis Beatty's inspection. Among other facts of record, the Beattys' admission that they did not repair or replace the treads during the eight years they owned the property, combined with the alleged condition of the treads and nails at the time of the accident, would allow a reasonable trier of fact to find inadequate maintenance. Because the parties' testimony would support competing reasonable inferences, the credibility of the witnesses and the weight to be afforded their testimony should be decided by the trier of fact. ***Gouger v. Hardtke***, 167 Wis. 2d 504, 517, 482 N.W.2d 84 (1992); ***Fischer v. Mahlke***, 18 Wis. 2d 429, 435, 118 N.W.2d 935 (1963).

¶9 Hiser also argues expert testimony is not needed to prove his negligence claim. He raises the issue because he construes the circuit court's following statement as requiring expert testimony: "A lay person looking at these stair treads would have no idea whether there was any adhesive under them or not." We do not construe the court's comment as holding that expert testimony would be necessary for Hiser to prevail. The court was referring to the Beattys' inability to know whether there was adhesive under the rubber tread. It was not suggesting that expert testimony would be necessary for a jury to decide whether the Beattys breached their duty of ordinary care in terms of their inspection and maintenance of the stairway. The Beattys maintain expert testimony is needed

"[i]f plaintiff is claiming negligent construction of the stairs in the first instance." Hiser is not claiming negligent construction. Therefore, it is not clear whether this issue is properly before this court.

¶10 In any event, we conclude expert testimony is not necessary to establish Hiser's common law negligence claims. The quality of the Beattys' inspection and maintenance, including whether a reasonable person looking at the stairs would or should have recognized the treads were not adequately secured, is well within the realm of ordinary human experience. *See* ***Cramer v. Theda Clark Mem'l Hosp.***, 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969). The question is not, as the Beattys argue, whether the average juror has had any experience building stairways or covering them with tread. Rather, the question is whether the jury is capable of understanding the evidence presented without the assistance of expert testimony. ***Id.***

By the Court.—Judgment reversed and cause remanded for further proceedings.

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