COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1790 **Cir. Ct. No. 2013CV503**

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

ANDREW HEINTZ,

PLAINTIFF-APPELLANT,

MEGA LIFE HEALTH INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

PAUL HANSON, ROGER VAN BEEK, LARRY PEABODY, RENEE PEABODY AND RURAL MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for St. Croix County: R. MICHAEL WATERMAN, Judge. *Affirmed*.

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

¶1 STARK, P.J. Andrew Heintz appeals a summary judgment dismissing his common law negligence claims against Paul Hanson, Roger Van Beek, Larry and Renee Peabody, and Rural Mutual Insurance Company. The circuit court determined Heintz's claims were barred by WIS. STAT. § 893.89,[1] the ten-year statute of repose for claims alleging injuries resulting from improvements to real property. We agree with the circuit court's conclusion, and therefore affirm.

BACKGROUND

¶2 Heintz sustained injuries when a second-story deck attached to a duplex he was renting from Hanson and Van Beek collapsed on January 4, 2013. The building and deck were constructed in the 1980s. In 1993, Larry and Renee Peabody purchased the building from Larry's father. Hanson and Van Beek purchased the property from the Peabodys on a land contract in 2003.

¶3 Heintz sued Hanson, Van Beek, and their insurer, Rural Mutual, on August 16, 2013, asserting a claim for common law negligence. The complaint alleged the defendants failed to properly maintain, operate, or inspect the deck, which caused its collapse. Heintz later filed an amended complaint, which added the Peabodys as defendants and similarly alleged they had failed to properly maintain, operate, or inspect the deck.

¶4 Hanson, Van Beek, and Rural Mutual moved for summary judgment, asserting Heintz's claims were barred by WIS. STAT. § 893.89 because

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

his injuries were caused by structural defects in the deck that were present from the time of its construction in the 1980s, more than ten years before he filed suit. In response, Heintz asserted his claims fell under § 893.89(4)(c), the exception to the statute of repose for claims arising from a property owner's negligent maintenance, operation, or inspection of an improvement to real property. Both sides cited expert testimony in support of their positions.

¶5 The defense expert, Brian Wert, testified at his deposition that the deck was structurally defective from the time of construction because it was not attached to the building using a true ledger board. Wert explained that a ledger board "gets attached to the house first, without siding," and the deck is then attached to the ledger board. In contrast, the deck in this case was attached to the building using a board placed on top of the siding. Wert further testified the deck was improperly attached to the building using "pole barn nails," which are not treated to resist rust. He also testified the deck was defective due to a lack of flashing around the area where it was attached to the building, which allowed water to "collect behind the rim board and rot the house from the outside in." Because the deck was not attached correctly at the time of construction, Wert opined it was "a failure waiting to happen." Wert further testified the deck collapsed due to a "structural defect."

¶6 Heintz's expert, Fred Comb, similarly testified at his deposition that the deck was improperly constructed due to "the use of nails as the primary fastening device" and "the fact that the ledger board was attached to the house on top of the siding." He explained the nails were "not sufficient to support the load of the deck," and "lag bolts, lag screws, [or] through bolts" should have been used instead. He agreed with Wert that "fastening of the ledger on top of the siding would have allowed water to enter the area behind the ledger." Comb also

testified the deck was defective due to the absence of flashing, and because four-by-four posts had been used as supports instead of six-by-six posts. Comb characterized these deficiencies as "structural defects" and testified they created an unreasonable risk of injury. He agreed with Wert that these defects were created in the 1980s, when the deck was constructed, and that the deck was "unsafe from the day it was built."

¶7 In a supplemental affidavit, Comb offered additional opinions about the cause of the deck's collapse. He explained that, because the ledger board used to attach the deck was not protected by flashing, water entered the area behind the ledger board, causing both the nails attaching the deck to the building and the "wood components" to "decay." Comb further explained:

> As a result of the rusted, decayed and fatigued fasteners and wood, the deck/balcony pulled away from the house, placing an overload on the posts that were providing structural support to the deck/balcony. The posts were unable to support the load (weight) of the deck, and the stress from the load ultimately caused the posts to fracture. When the posts fractured as a result of too much weight, the deck ultimately collapsed, causing Mr. Heintz's injuries.

Comb opined that the deck's deficiencies "grew" over time and became "more of a safety issue" as the wood and nails were exposed to water. He stated the "effect of weather has a huge impact as things deteriorate" and "as things change, one has the responsibility to recognize those changes over time and react to those changes." Comb therefore opined that the defendants' failure to inspect, maintain, and repair the deck was a cause of its collapse.

¶8 The circuit court granted all of the defendants summary judgment, based on the ten-year statute of repose set forth in WIS. STAT. § 893.89.[2] The court reasoned:

> [I]t is undisputed that the duplex and deck were built in the 1980s. It is also undisputed that the deck is an improvement to real property and the deck was designed and constructed with several defects. The deck was defectively attached to the duplex and supported by undersized posts. It is also undisputed that the defects caused the January 4, 2013 collapse, and Heintz sustained injuries as a result. Finally, it is undisputed that Heintz commenced his lawsuit on August [16], 2013, after the [ten-year] exposure period ended.

¶9 The circuit court further concluded the exception to the statute of repose set forth in WIS. STAT. § 893.89(4)(c) was inapplicable. It explained:

> Heintz does not complain about an originally safe structure that was improperly maintained. He complains about improper maintenance to a hazardous condition by reason of its design and construction. Heintz's claim is premised on a structural defect, and thus precluded by section 893.89(2).
>
> ….
>
> The Court is not persuaded by Heintz's arguments that the underlying defect may be parsed from the deterioration of the deck over time. There is no evidence that the deck deterioration was produced by a concurrent event, independent of and unrelated to the underlying defects. Heintz's expert testified that the wood ledger board and the fasteners deteriorated because of the defective attachment

[2] Only Hanson, Van Beek, and Rural Mutual moved for summary judgment based on the statute of repose. The Peabodys filed a separate summary judgment motion, asserting a land contract vendor cannot be held liable for injuries sustained by a third party on the subject property. The circuit court granted summary judgment to all defendants on statute of repose grounds, without addressing the Peabodys' motion. The Peabodys have chosen not to file a brief on appeal, asserting their interests are adequately represented in the brief filed by Hanson, Van Beek, and Rural Mutual.

> to the duplex. The deterioration to the deck is part and parcel to and inseparable from the underlying defect.

¶10 The circuit court entered a written judgment dismissing Heintz's claims on August 26, 2015. Heintz now appeals.

DISCUSSION

¶11 We review a grant of summary judgment independently, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Here, the circuit court determined Heintz's claims were barred as a matter of law by WIS. STAT. § 893.89. Interpretation of a statute and its application to 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.

¶12 WISCONSIN STAT. § 893.89(2) provides, in relevant part:

> [N]o cause of action may accrue and no action may be commenced … 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 the person…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 statute defines the term "exposure period" as "the 10 years immediately following the date of substantial completion of the improvement to real property." Sec. 893.89(1). However, § 893.89(4)(c) provides an exception to the ten-year statute of repose for 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."

¶13 Heintz argues the circuit court erred by concluding, as a matter of law, that the exception in WIS. STAT. § 893.89(4)(c) did not apply to his claim. He argues the experts' testimony raised a genuine issue of material fact regarding whether the defendants' failure to inspect and maintain the deck was a cause of its collapse. However, we agree with the circuit court that the undisputed facts establish § 893.89(4)(c) is inapplicable. Both of the experts who provided opinions in this case asserted the deck was structurally unsound from the date it was constructed. Wisconsin courts have held that, where an improvement to real property is defective from the time of construction, an owner's subsequent failure to discover and correct the defect does not constitute a negligent failure to inspect and maintain under § 893.89(4)(c). *See* ***Hocking v. City of Dodgeville***, 2010 WI 59, 326 Wis. 2d 155, 785 N.W.2d 398; ***Crisanto v. Heritage Relocation Servs., Inc.***, 2014 WI App 75, 355 Wis. 2d 403, 851 N.W.2d 771, *review denied*, 2014 WI 122, 855 N.W.2d 696.

¶14 In ***Hocking***, the plaintiffs purchased their home before the surrounding area was developed. ***Hocking***, 326 Wis. 2d 155, ¶5. In 1992-93, the City of Dodgeville built streets, curbs, and gutters on adjacent land in a manner that caused the plaintiffs' yard and basement to flood. ***Id.***, ¶¶9-10. In 2006, the plaintiffs sued the city, asserting claims for negligence and for negligent and intentional creation and maintenance of a nuisance. ***Id.***, ¶12. They argued their claims were not barred by the statute of repose because the city was negligent in the maintenance, operation, and inspection of the streets, curbs, and gutters. ***Id.***, ¶2. Specifically, they argued that, by failing to correct the defective streets, curbs, and gutters, the city was "maintaining a nuisance." ***Id.***, ¶46.

¶15 Our supreme court rejected the plaintiffs' argument that the city's failure to correct the defects in the streets, curbs, and gutters constituted negligent maintenance, operation, or inspection under WIS. STAT. § 893.89(4)(c). The court explained:

> The text of the statute distinguishes between suits arising from "design" or "planning" defects, which explicitly fall within the statute of repose, and suits arising from negligent maintenance of the property under § 893.89(4)(c). If the improvement causes damage due to poor design, a plaintiff has ten years to assert his or her rights. Construing the phrase "maintenance, operation or inspection of an improvement to real property" to mean maintenance or operation of a nuisance would create an exception that swallows the rule. This is so because every improvement that is negligently designed could be considered an ongoing nuisance that the owner or operator negligently maintains by failing to correct.

Hocking, 326 Wis. 2d 155, ¶47 (footnote omitted).

¶16 In ***Crisanto***, the plaintiff was using an elevator to move carts of equipment between floors of a storage building in 2010. ***Crisanto***, 355 Wis. 2d 403, ¶2. The elevator, which was installed in the 1940s, did not have a safety gate to protect people traveling inside. ***Id.***, ¶¶2-3. The plaintiff was injured when his foot extended over the front edge of the elevator as it passed one of the building's floors. ***Id.***, ¶2. He sued the owner of the building in 2011, asserting negligence and safe place claims. ***Id.***, ¶4. The circuit court dismissed the plaintiff's claims on summary judgment based on the statute of repose. ***Id.***, ¶¶6, 9.

¶17 On appeal, we rejected the plaintiff's argument that WIS. STAT. § 893.89(4)(c) applied because the defendant had actual or constructive notice of the structural defect that caused his injury—i.e., the elevator's lack of a safety gate. ***Crisanto***, 355 Wis. 2d 403, ¶19. We concluded that accepting the plaintiff's

interpretation of the statute would "effectively swallow the rule" that property owners are not liable for claims arising from defects in improvements to real property brought more than ten years after an improvement's completion. ***Id.***, ¶¶22, 25. In other words, even though the defendant knew the elevator was unsafe, it could not be held liable for failing to correct that defect after the ten-year exposure period had elapsed.

¶18 In this case, both of the experts agreed that the deck was structurally defective from the time it was built. Under ***Hocking*** and ***Crisanto***, the defendants' failure to discover and correct the structural defects in the deck does not constitute negligent maintenance, operation, or inspection under WIS. STAT. § 893.89(4)(c).

¶19 Heintz correctly observes that, in Wisconsin, the test of cause is whether the defendant's negligence was a substantial factor in contributing to the result. *See* ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 458, 267 N.W.2d 652 (1978). He further notes there may be more than one substantial causative factor in a given case. ***Id.*** at 459. Based on Comb's expert testimony, Heintz argues there is a dispute of fact regarding whether the *deterioration* of the deck, as opposed to the structural defects, was a cause of its collapse. Heintz contends a reasonable jury could conclude the defendants' failure to discover and repair the deck's rusted nails and rotting wood constituted negligent inspection and maintenance, thus bringing the defendants' conduct within WIS. STAT. § 893.89(4)(c).

¶20 We disagree. This is not a case in which a well-constructed deck deteriorated over time due to the defendants' failure to inspect and maintain it. This is a case in which structural defects rendered the deck unsafe from the date of

construction, and the same defects also caused its condition to worsen over time. For example, both experts testified the lack of flashing around the area where the deck was attached to the building was a structural defect because it allowed water to collect behind the ledger board, which then caused the nails to rust and wood components to rot. In other words, the lack of flashing was a structural defect precisely because it caused the deck to deteriorate. Consequently, the defect and subsequent deterioration cannot be distinguished and analyzed separately for statute of repose purposes. The exception in WIS. STAT. § 893.89(4)(c) permits a claim outside the ten-year exposure period for an owner's negligent maintenance of, or failure to maintain, an improvement that was safely constructed in the first instance. It does not provide an avenue to pursue a claim arising out of construction flaws that rendered the improvement unsafe from the date of construction.

¶21 On this point, ***Mair v. Trollhaugen Ski Resort***, 2006 WI 61, 291 Wis. 2d 132, 715 N.W.2d 598, is instructive. There, the plaintiff fell when she stepped into a floor drain in a restroom at a ski resort. ***Id.***, ¶3. She sued the resort, asserting a claim under the safe place statute. ***Id.***, ¶5. Our supreme court concluded WIS. STAT. § 893.89 barred the plaintiff's safe place claim. ***Mair***, 291 Wis. 2d 132, ¶2. The court observed that cases applying the safe place statute distinguish between two types of unsafe conditions: structural defects and unsafe conditions associated with the structure. ***Id.***, ¶21. 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), whereas an unsafe condition associated with the structure "arises from 'the failure to keep an originally safe structure in proper repair or properly maintained,'" ***id.***, ¶23 (quoting ***Barry***, 245 Wis. 2d 560,

¶27). The ***Mair*** court concluded the exception to the statute of repose for negligent maintenance and inspection applies to claims arising from unsafe conditions associated with the structure, but not claims arising from structural defects. ***Id.***, ¶29. The court further determined the plaintiff's injuries arose from a structural defect because her claim "related to a failure to design and construct a safe building," not any failure to keep a properly constructed building in a safe condition. ***Id.***, ¶30.

¶22 Although the instant case does not involve a claim under the safe place statute, ***Mair*** made it clear that, as a general matter, the exception to the statute of repose in WIS. STAT. § 893.89(4)(c) applies to claims arising from unsafe conditions associated with the structure, rather that claims arising from structural defects. ***Mair*** further clarified that an unsafe condition associated with the structure arises from the failure to properly maintain a structure that was originally safe. Again, it is undisputed that the deck at issue in this case was unsafe from the time it was constructed. Consequently, under the logic of ***Mair***, § 893.89(4)(c) does not except Heintz's claim from the statute of repose.

¶23 Heintz cites two authored, unpublished court of appeals decisions in support of his argument that WIS. STAT. § 893.89(4)(c) applies because the defendants negligently failed to discover and repair the deterioration caused by the deck's structural defects.[3] In ***Pauli v. Safeco Insurance Co.***, No. 2014AP2820, unpublished slip op., ¶2 (Aug. 19, 2015), the plaintiff brought a claim for injuries she sustained when exiting a home owned by the defendants. She alleged the

[3] *See* WIS. STAT. RULE 809.23(3)(b) (unpublished, authored opinions issued on or after July 1, 2009, may be cited for their persuasive value).

defendants were negligent in their maintenance and repair of the area by failing to have a properly working exterior light and by failing to warn her about "the unusual step down height of the first step." ***Id.*** The circuit court granted the defendants summary judgment based on the statute of repose. ***Id.***, ¶9. The court relied on the undisputed fact that the stairs where the plaintiff fell had not been modified during the ten years preceding her accident, as well as an expert's opinion that the nonconforming step height was the proximate cause of the plaintiff's injuries. ***Id.***

¶24 On appeal, we agreed that the plaintiff's lawsuit "could not be maintained, based upon the statute of repose, if the evidence showed that the defect in the stairs was the sole cause of [her] injury." ***Id.***, ¶23. However, we concluded that was not the case because there was also evidence that a broken light above the door was a substantial factor in causing the plaintiff's fall. ***Id.***, ¶¶4-6, 22-23. There was evidence from which a jury could conclude the light had recently broken and the defendants were aware it was not working, but they nevertheless failed to repair it. ***Id.*** As a result, a reasonable jury could find the defendants were negligent in failing to maintain proper exterior lighting. ***Id.***, ¶22. We therefore reversed the grant of summary judgment to the defendants.

¶25 ***Pauli*** is distinguishable. In that case, there was evidence the defendants had allowed something that was once safe—i.e., the house's exterior lighting—to become unsafe by failing to maintain it. Conversely, in this case, it is undisputed the deck was unsafe from the date of its construction. Subsequent deterioration in the deck's condition does not alter the fact that the undisputed evidence shows it was not safe to begin with.

¶26 ***Firkus v. Telfer***, No. 2013AP1551, unpublished slip op. (May 8, 2014), the second unpublished case cited by Heintz, is also distinguishable. There, a landlord installed a set of hollow, precast concrete steps at a home's front entry in 1977. ***Id.***, ¶3. In 2008, a tenant was injured when the steps collapsed underneath him. ***Id.***, ¶5. At trial, the evidence showed the landlord had not walked on or looked at the steps since 1994, and he had not repaired or replaced them since 1977. ***Id.***, ¶3. Other evidence indicated there were cracks in the steps at least as early as 2005. ***Id.***, ¶4. The landlord conceded at trial that he knew cracks in the hollow steps would be dangerous, and that, had he seen the cracks, he would have investigated further to determine whether the steps needed to be repaired or replaced. ***Id.***, ¶6.

¶27 A jury concluded the landlord was negligent in inspecting and maintaining the property, but his negligence was not a cause of the tenant's injuries. ***Id.***, ¶10. The circuit court subsequently granted the tenant's postverdict motion to change the jury's answer on causation from "No" to "Yes." ***Id.***, ¶11. We affirmed the circuit court's decision on appeal, reasoning there was no credible evidence to support the jury's finding that the landlord's failure to inspect and maintain the steps was not a cause of the tenant's injuries. ***Id.***, ¶20.

¶28 ***Firkus*** did not address the statute of repose or its exceptions. Moreover, there was no evidence in ***Firkus*** that the hollow concrete steps were unsafe from the time of installation. Instead, the evidence showed the steps became dangerous only when cracks appeared. ***Id.***, ¶¶6-7. In contrast, the undisputed evidence in this case shows that the deck was unsafe from the date of its construction.

¶29 We are cognizant that the bar imposed by the statute of repose may be viewed as creating a disincentive for landlords to inspect and repair structural defects in the design or construction of improvements to their real property. However, in adopting WIS. STAT. § 893.89, the legislature made a policy choice that, after ten years, property owners should not be liable for injuries caused by those defects. Here, it is undisputed that the deck in question was unsafe from the date of construction due to various structural defects. Because of those defects, the deck's condition deteriorated further over time. That deterioration, however, cannot be separated from the original structural defects. Under these circumstances, holding the defendants liable for failing to inspect and maintain the deck would be tantamount to holding them liable for failing to discover and correct the original defects, contrary to ***Hocking*** and ***Crisanto***. Moreover, ***Mair*** teaches that the deterioration of an improvement that was already unsafe does not constitute an unsafe condition associated with the structure, and, as such, the exception to the statute of repose for negligent inspection and maintenance does not apply. Accordingly, the circuit court properly concluded the defendants were entitled to summary judgment based on the statute of repose.

By the Court.—Judgment affirmed.

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