COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2017

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. 2016AP800 **Cir. Ct. No. 2015CV110**

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

JAMES DONALDSON,

PLAINTIFF-APPELLANT,

MILWAUKEE DRIVERS HEALTH & WELFARE FUND,

INVOLUNTARY-PLAINTIFF,

V.

K & R CROSS, INC. D/B/A CROSS FOUR CORNERS RESTAURANT, SOCIETY INSURANCE, A MUTUAL COMPANY, KENNETH E. CROSS AND ROBIN L. CROSS,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Chippewa County: STEVEN R. CRAY, Judge. *Affirmed.*

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

¶1 PER CURIAM. James Donaldson appeals a summary judgment dismissing his common law negligence and safe place statute claims against a restaurant and related parties.[1] We agree with the circuit court that the summary judgment materials demonstrate, as a matter of law, that Donaldson was a trespasser on an outdoor stairway and landing at the restaurant at the time his injuries occurred. Accordingly, we affirm.

BACKGROUND

¶2 Cross owns and operates the Cross Four Corners Restaurant in Chippewa Falls, Wisconsin. The main entrance to the restaurant is located on the north-facing side of the building. To the right of the main entrance[2] is a window; next to that window is an outdoor stairway with a landing that leads up to a door on the second level. The previous owner used the second level as a residence, but Kenneth and Robin have used it only as storage space since purchasing the Four Corners in 2007.[3] The undisputed deposition testimony was that, with the exception of an attempted robbery, no one has used the upper level door for access since that time. The door on the second floor has remained locked throughout

[1] The four defendants are K & R Cross, Inc. d/b/a Cross Four Corners Restaurant; Society Insurance, the restaurant's insurer; Kenneth Cross; and Robin Cross. We refer to these entities and individuals collectively as "Cross," identifying Kenneth and Robin by their first names where necessary.

[2] Descriptions are given from the perspective of a person looking at the building from the roadway.

[3] Kenneth and Robin maintained an office located in the upper level at the south end of the building, but that office was accessed via an interior stairway located in the kitchen.

Kenneth and Robin's ownership, and they have never seen anyone use the exterior staircase.[4]

¶3 Eric Nyhus, an acquaintance of Donaldson's, testified at his deposition that he was dining with others at the Four Corners when Donaldson arrived between 10:00 and 11:00 p.m. on October 13, 2013. According to Tonya Prince, one of the employees working at the time, Donaldson appeared "a little tipsy" when he arrived. Donaldson continued drinking while at the restaurant. Shortly after midnight, Donaldson left the building and was seen vomiting in the parking lot by another of his acquaintances, Todd Condon. Condon returned inside the restaurant after briefly talking with Donaldson outside.

¶4 Approximately one hour later, Condon overheard that Donaldson still had not returned inside, and he went to investigate. Condon discovered Donaldson lying face down near the entrance door. Believing Donaldson had passed out, Condon went back inside the Four Corners and asked other patrons to help him with Donaldson. Someone called Donaldson's mother, Darlys, who drove to the Four Corners. Like Condon, Darlys believed Donaldson had passed out from drinking. The restaurant patrons lifted Donaldson into the back of Darlys's vehicle. After driving around with her brother, Darlys returned to her house. She decided to let Donaldson sleep in the car, and retrieved a blanket and pillow for him.[5]

[4] Indeed, Kenneth testified he did not have a key to the exterior door lock.

[5] Donaldson had, by this point, been offering short responses to Darlys's questions about his well-being.

¶5 The following morning, Darlys returned to her vehicle and Donaldson told her he could not move his legs. He was transported by ambulance to a hospital, where he underwent surgery. Donaldson alleges he sustained, among other injuries, a "burst fracture of vertebrae in his cervical spine." There were apparently no witnesses to the incident that caused Donaldson's injuries, and Donaldson's last memory is of being at work days earlier.

¶6 Donaldson subsequently filed this lawsuit against Cross. His amended complaint alleges he fell from the landing atop the outdoor stairway when "the deteriorated railing" surrounding the landing failed. Donaldson's theories of liability were common law negligence and a violation of the safe place statute, WIS. STAT. § 101.11 (2015-16).[6] Donaldson alleged, among other things, that Cross failed to: properly repair and maintain the stairway, landing, and railing; inspect the premises; and place "adequate and appropriate warnings" not to enter around the stairway and landing.

¶7 Following some discovery, Cross moved for summary judgment. It argued Donaldson was a trespasser on the stairway and landing, and that its only duty was to refrain from willful, wanton or reckless conduct towards him. Cross also argued there was no evidence to support Donaldson's allegations regarding how his injuries occurred or their cause. The circuit court concluded the undisputed evidence demonstrated, as a matter of law, that Donaldson was a trespasser on the stairway and landing. Accordingly, the court dismissed Donaldson's claims. Donaldson now appeals.

[6] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

DISCUSSION

¶8 We review a grant of summary judgment de novo, using the same methodology as the circuit court. ***Water Well Sols. Serv. Grp. v. Consolidated Ins. Co.***, 2016 WI 54, ¶11, 369 Wis. 2d 607, 881 N.W.2d 285. "Under that methodology, the court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented." ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If so, we then examine the moving party's submissions to determine whether they sufficiently establish a prima facie case for summary judgment—in this case, a defense that would defeat Donaldson's claims as a matter of law. *See* ***id.*** If the defendant has made such a prima facie showing, we examine the opposing party's affidavits for evidentiary facts to determine whether a genuine issue exists as to any material fact. ***Id.*** "Summary judgment materials, including pleadings, depositions, answers to interrogatories, and admissions on file are viewed in the light most favorable to the nonmoving party." ***AccuWeb, Inc. v. Foley & Lardner***, 2008 WI 24, ¶16, 308 Wis. 2d 258, 746 N.W.2d 447.

¶9 There is no dispute that Donaldson's amended complaint stated claims for common law negligence and a violation of the safe place statute. The complaint alleged Donaldson was "a member of the general public and a frequenter entitled to be on the premises where his injuries occurred." "The duties of an owner of a public building to a 'frequenter' are those prescribed by the safe place statute, WIS. STAT. § 101.11, and the principles of common law negligence." ***Gulbrandsen v. H & D, Inc.***, 2009 WI App 138, ¶6, 321 Wis. 2d 410, 773 N.W.2d

506.[7] However, Cross denied Donaldson was a frequenter and affirmatively alleged he was a trespasser on the outside stairway and landing at the time of his injury.

¶10 A "trespasser" is "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." ***Antoniewicz v. Reszcynski***, 70 Wis. 2d 836, 843, 236 N.W.2d 1 (1975) (quoted source omitted). A landowner is not ordinarily liable to trespassers for the failure to exercise ordinary care in maintaining his or her property in a safe condition. ***Id.*** at 842. Instead, "in respect to a trespasser, the owner of land has only the duty to refrain from wil[l]ful and intentional injury." ***Id.***; *see also* ***Hofflander v. St. Catherine's Hosp., Inc.***, 2003 WI 77, ¶103, 262 Wis. 2d 539, 664 N.W.2d 545 (observing that the lesser duty owed to trespassers encompasses only "willful, wanton, or reckless conduct"); WIS. STAT. § 895.529 (codifying the civil liability of landowners to trespassers). Donaldson has not alleged or submitted any evidence that Cross willfully, wantonly or recklessly caused his injuries. Thus, whether Cross may be held liable to Donaldson under both common law negligence and the safe place statute turns on whether Cross had consented to Donaldson's presence on the outdoor stairs and landing.

[7] The four elements of common law negligence are: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the defendant's breach and the plaintiff's injury; and (4) loss or damage resulting from the breach. ***Nichols v. Progressive N. Ins. Co.***, 2008 WI 20, ¶11, 308 Wis. 2d 17, 746 N.W.2d 220. The safe place statute "requires every owner of a public building to construct, repair or maintain that building so as to render it safe." ***Gulbrandsen v. H & D, Inc.***, 2009 WI App 138, ¶6, 321 Wis. 2d 410, 773 N.W.2d 506. The statute imposes a higher standard of care than that imposed by common law negligence, and a violation is shown by proving three elements: (1) an unsafe condition associated with the structure; (2) the unsafe condition caused injury; and (3) the owner of the structure had either actual or constructive notice of the unsafe condition prior to the injury. ***Id.***, ¶¶6-7. The amended complaint's allegations were sufficient to state claims under both theories of liability.

¶11 Consent may be express or implied. ***Reddington v. Beefeaters Tables, Inc.***, 72 Wis. 2d 119, 124, 240 N.W.2d 363, *modified*, 72 Wis. 2d 119, 243 N.W.2d 401 (1976). Donaldson does not argue he received express consent to use the stairs and landing, but he asserts there is a genuine issue of material fact regarding whether there was implied consent. "Generally, where there is a genuine issue of fact as to whether a person had implied consent and is therefore a frequenter and not a trespasser, the resolution of that issue should be made by a jury." ***Hofflander***, 262 Wis. 2d 539, ¶109 n.37 (citing WIS JI—CIVIL 1901). However, we have in many cases dismissed the plaintiff's claims as a matter of law where we concluded no reasonable trier of fact could have determined there was implied consent. *See, e.g.*, ***Monsivais v. Winzenried***, 179 Wis. 2d 758, 761, 508 N.W.2d 620 (Ct. App. 1993); ***McNally v. Goodenough***, 5 Wis. 2d 293, 299, 301-02, 92 N.W.2d 890 (1958). We turn to the applicable law regarding implied consent and analyze the summary judgment materials to determine whether there is a genuine issue of material fact.

¶12 The parties agree WIS JI—CIVIL 8015 (2013), accurately states the law regarding implied consent for purposes of determining whether someone is a trespasser:

> There is an implied consent when the possessor, by his or her conduct or his or her words, or both, by implication consents to such other person's being on the premises.
>
> In determining whether an implied consent exists, you should look at all of the circumstances then existing, including the acquiescence of the possessor, if any, in the previous use of the premises by others (including the plaintiff); the customary use, if any, of the premises by others (including the plaintiff); the apparent holding out of the premises, if any, to a particular use by the public; and the general arrangement or design of the premises. If, under all the existing circumstances, a reasonable person would conclude that the possessor of the premises

> impliedly consented that the plaintiff be on the premises, then there was consent.

When an owner solicits the patronage of the public in the conduct of business, the invitee may have express or implied permission to frequent one part of the premises, yet be a trespasser in another part to which he or she has not been invited. ***Monsivais***, 179 Wis. 2d at 765; *see also* ***Grossenbach v. Devonshire Realty Co.***, 218 Wis. 633, 637-38, 261 N.W. 742 (1935) ("[T]he duty of the owner to maintain in a safe condition a building that is a public building … extends only to such parts as are used by the public ….").

¶13 This principle has been applied in a number of cases directly analogous to the situation presented here. In ***Monsivais***, this court concluded the injured party had "lost his frequenter status and became a trespasser when he deviated from the public area of the tavern and entered into the basement area" without consent. ***Monsivais***, 179 Wis. 2d at 769. Our holding in ***Monsivais*** relied on our supreme court's decision in ***McNally***, in which a roof repairman seeking to consult with the building's commercial tenants took a wrong turn and fell down the stairs to a basement into which only clerks and the owner were permitted. ***McNally***, 5 Wis. 2d at 296-98. The court, assuming the repairman was a "frequenter" as long as he took a reasonable route through the building as an incident to the repair job, nonetheless held that he was trespassing when he "deviated from the direct path." ***Id.*** at 301. Finally, in ***Grossenbach***, the court concluded a building tenant was a trespasser in a boiler room, which she mistakenly entered while looking for a locker room in the basement of the building, and which was not "maintained for the use of the tenants or for use of the public." ***Grossenbach***, 218 Wis. at 638.

¶14 Donaldson argues these cases are distinguishable because the plaintiffs' injuries occurred *inside* buildings, whereas his injuries occurred outside the restaurant on an exterior stairwell and landing. This factual difference is immaterial. The general rule of law is clear: a person is a "frequenter" only with respect to the specific area where he or she has express or implied consent to enter. As soon as the person roves beyond the area of permissive use, he or she is a trespasser, and the owner is obligated only to refrain from willful, wanton, or reckless acts. These principles apply regardless of whether the area of permissive use is indoors or outdoors.[8]

¶15 Under the facts here, we agree with the circuit court's determination that Donaldson was a trespasser at the time he became injured. The only factor arguably supportive of Donaldson's "implied invitation" argument was the "general arrangement or design of the premises," in which the exterior stairway and landing were located in close proximity to the Four Corners' main entrance and parking lot. However, every person who testified—including Donaldson—

[8] There is no indication Donaldson was asking for directions or seeking out some other public area at the Four Corners at the time of his injury. Collectively, the case law teaches

> that when a person is reasonably seeking directions as to the location of an intended, but unknown, destination, such person is a frequenter. But where such inquiry is not made, or where the inquiry has concluded, the person's frequenter status is lost when the person deviates into an area where he or she is not expressly or impliedly invited.

Monsivais v. Winzenried, 179 Wis. 2d 758, 771-72, 508 N.W.2d 620 (Ct. App. 1993).

stated they had never seen anyone from the general public using the stairway or landing.[9]

¶16 There is no indication the stairway, landing, second-floor door, or second level generally were ever held out for use by the public. The stairs and landing were unlit (and therefore were dark at the time of the incident), the door atop it was kept locked, and police observed cobwebs covering the area, which further indicated the area was not in customary use. The fact that Cross opened the restaurant area to the public and invited their patronage did not give Donaldson implied consent to wander in areas of the property that were not held out for that purpose, including the stairway and landing area here.

¶17 Accordingly, we reject Donaldson's reliance on ***Reddington*** and ***Verdoljak v. Mosinee Paper Corp.***, 192 Wis. 2d 235, 531 N.W.2d 341 (Ct. App. 1995), *aff'd*, 200 Wis. 2d 624, 547 N.W.2d 602 (1996). In ***Reddington***, a child was struck by a car while returning to his motel room from visiting the rock garden at an adjacent restaurant. ***Reddington***, 72 Wis. 2d at 122. The court's analysis focused on the nature of the rock garden—consisting of a Tiki god statue, colored lights, water, and rock formations—all of which "could have no purpose but to attract the public to the premises to inspect the garden and, it was hoped, to dine at the restaurant." ***Id.*** at 122-23. The record here discloses no business purpose for Cross to have wished for visitors to travel upon the exterior stairway

[9] Kenneth testified the outer screen door on the landing "had a propensity to fly open," and the only occasion he had to use the stairway was to close that door. Prince testified that a painter may have used the stairway while working on the outside of the building. Neither of these uses would suggest to a reasonable person frequenting the property that the stairway, landing or second level was open to the public.

and landing, nor any features of the area that would have invited special attention.[10]

¶18 ***Verdoljak*** was a recreational immunity case in which a motorbike rider was injured when he struck a closed gate on a private logging road. ***Verdoljak***, 192 Wis. 2d at 237. We declined to hold the plaintiff was a trespasser as a matter of law, because there were potential reasonable inferences from which a factfinder could determine the plaintiff was not a trespasser. Namely, a jury could reasonably conclude the plaintiff was present by invitation because the defendant had "granted permission to the public to enter its land for certain recreational purposes, but posted no notice of [those] limits," and "the gate at an undisclosed location in the interior of the property left an apparent unrestricted entry to the logging road at an intersection with a public highway." ***Id.*** at 243-44. Here, by contrast, there was nothing to suggest to the general public that they were entitled to use the Four Corners' exterior stairway and landing, and the proximity of those building features to commonly traveled areas is, as the foregoing case law illustrates, not itself enough to create a genuine issue of material fact.

[10] Moreover, we reject Donaldson's assertion that the exterior stairway and landing might have held an "allure" to an intoxicated person or child akin to the rock garden in ***Reddington v. Beefeaters Tables, Inc.***, 72 Wis. 2d 119, 124, 240 N.W.2d 363, *modified,* 72 Wis. 2d 119, 243 N.W.2d 401 (1976). First, Donaldson's argument—as well as Cross's, for that matter, who repeatedly mentions that Donaldson was inebriated—ignores that "Wisconsin courts have previously refused to grant exceptions to the general rules of trespass based on the diminished mental capacity of the trespasser." ***Hofflander v. St. Catherine's Hosp., Inc.***, 2003 WI 77, ¶108, 262 Wis. 2d 539, 664 N.W.2d 545. Such diminished mental capacity would include that which is due to alcohol consumption. *See* ***id.*** Thus, it is irrelevant that Donaldson was intoxicated, as that fact cannot transform a trespass into an invitation, and vice versa.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. This opinion may not be cited under RULE 809.23(3)(b).