COURT OF APPEALS
DECISION
DATED AND FILED

February 7, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP125 **Cir. Ct. No. 2015CV35**

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

RHONDA L. SELL AND TERRY SELL,

PLAINTIFFS-APPELLANTS,

NETWORK HEALTH PLAN,

INVOLUNTARY-PLAINTIFF,

V.

RIVERVIEW CONDOMINIUM ASSOCIATION, NOEL FOLLMER, LYNN D. DRAGER D/B/A HANDYMAN INNOVATED SERVICES, STATE FARM FIRE AND CASUALTY COMPANY, HASTINGS MUTUAL INSURANCE COMPANY AND SOCIETY INSURANCE, A MUTUAL COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Green Lake County: MARK T. SLATE, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 PER CURIAM. In this personal injury case, Rhonda L. Sell and Terry Sell appeal from a circuit court judgment dismissing on summary judgment their claims against Riverview Condominium Association, State Farm Fire and Casualty Company, Noel Follmer, Hastings Mutual Insurance Company, Lynn D. Drager d/b/a Handyman Innovated Services, and Society Insurance, a Mutual Company. For the reasons that follow, we affirm.

¶2 This case arises from a slip and fall accident which occurred on March 9, 2013, on a private sidewalk on the premises of Riverview Condominiums, a five-unit condominium building located in the Town of Berlin. Rhonda L. Sell and her husband Terry Sell were in a group of Jehovah's Witnesses preaching door-to-door. At approximately 10:00 a.m., as they walked on the sidewalk leading to Noel Follmer's condominium unit, Rhonda slipped on a patch of ice and fractured her ankle.

¶3 Prior to the accident, Riverview Condominium Association hired Lynn D. Drager to provide snow removal and salting services for the condominium property. Drager was the owner of Handyman Innovated Services. He had no employees and performed all winter services himself. Pursuant to his agreement with Riverview Condominium Association, Drager was required to remove snow from the driveways and sidewalks and apply salt only when it snowed two or more inches. The last measurable snowfall before the accident occurred on March 6, 2013, when four inches accumulated. Drager performed snow and salting services at that time. He did not perform any services on March 7-9, 2013.

¶4 After the accident, the Sells filed a lawsuit alleging claims of negligence and violation of Wisconsin's safe-place statute, WIS. STAT. § 101.11 (2015-16),[1] against Riverview Condominium Association, its liability insurer State Farm Fire and Casualty Company, Follmer, and his liability insurer Hastings Mutual Insurance Company. The Sells also made negligence and safe-place statute claims against Drager, individually and/or d/b/a as Handyman Innovated Services, and his insurer, Society Insurance, a Mutual Company.

¶5 Based upon their personal observations, the Sells believed that the ice Rhonda slipped on resulted from water flowing onto the sidewalk from a nearby downspout and freezing there. The expert witnesses they hired reached the same conclusion.

¶6 John DeRosia, a consulting engineer, authored a liability report for the Sells. In it, he criticized the design of the downspout at Follmer's condominium unit, which had been in place for over ten years. He wrote:

> [Downspouts] should not be discharged in inappropriate places where they can flow out onto pedestrian walkways. The downspout at the Riverside [sic] Condominiums unit at 584 North Wisconsin Street discharged directly onto the egress sidewalk of the unit. The slab of concrete sidewalk where the downspout discharges was sloped away from the downspout towards the outer edge of the curved slab. The drainage path of the water flowing from the downspout was across the sidewalk where the possibility existed that, once the water ran onto the lower temperature ground surface, it would freeze and create an icy walkway.

¶7 At deposition, DeRosia opined that the improper design of the downspout was a cause of the accident. He testified as follows:

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

> Q In your professional opinion, was ice present and on the sidewalk at the time of Ms. Sell's fall?
>
> A Yes.
>
> Q And in your professional opinion, is the ice that she fell on a result of water which came off of the roof, down the downspout, and froze – flowed across the sidewalk and froze?
>
> A Yes, sir.
>
> Q In your professional opinion, the way the downspout was designed and located, was that in such a way that it discharged water onto the sidewalk where it could freeze causing a hazard?
>
> A Yes.
>
> Q And is it your opinion the improper design of the downspout was a cause of Ms. Sell's fall?
>
> A It was a cause.
>
> Q In other words, there was a causal relationship between the design of the downspout and where it discharged water and the fact that she fell on the sidewalk?
>
> A There was a causal relationship between the design of the downspout and the fact that water got onto the sidewalk and froze, and she slipped on that frozen water.

¶8 Charles Shortino, a meteorologist and television personality, also authored a report for the Sells. In it, he noted the weather conditions on the day of, and those leading up to the day of the accident, which included freeze/thaw cycles. During such a cycle, snow on the roof would melt, flow down the downspout as water, and discharge onto the sidewalk where it would later freeze. At deposition, Shortino testified that, "the overwhelming majority of the ice that formed on the sidewalk, if not all of it, was originated on the roof."

¶9 The defendants moved for summary judgment seeking dismissal of the Sells' lawsuit. Following a hearing on the matter, the circuit court granted the

motion. The court concluded that the Sells' lawsuit was barred, in part, by WIS. STAT. § 893.89's ten-year statute of repose that applied to improvements to real property, i.e., the downspout. Additionally, it concluded that the Sells were unable to prove their negligence and safe-place statute claims. This appeal follows.

¶10 We review a grant of summary judgment de novo, using the same methodology as the circuit court. *See* ***Estate of Sheppard ex rel. McMorrow v. Schleis***, 2010 WI 32, ¶15, 324 Wis. 2d 41, 782 N.W.2d 85. Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. ***Id.***; WIS. STAT. § 802.08(2).

¶11 This case also involves issues of statutory interpretation and application. Interpretation of a statute and its application to a set of facts are questions of law that we review de novo. *See* ***McNeil v. Hansen***, 2007 WI 56, ¶7, 300 Wis. 2d 358, 731 N.W.2d 273.

¶12 On appeal, the Sells contend that the circuit court erred in granting summary judgment to the defendants. They maintain that the statute of repose is inapplicable to the case. They further maintain that genuine issues of material fact exist to support their claims of negligence and violation of the safe-place statute.

¶13 We begin our discussion with the statute of repose. WISCONSIN STAT. § 893.89 "is a statute of repose that sets forth the time period during which an action for injury resulting from improvements to real property must be brought." ***Kohn v. Darlington Cmty. Sch.***, 2005 WI 99, ¶13, 283 Wis. 2d 1, 698 N.W.2d 794. Section 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, … the construction of, or the furnishings of materials for, the improvement to real property.

The "exposure period" is "the 10 years immediately following the date of substantial completion of the improvement to real property." Sec. 893.89(1).

¶14 The statute of repose generally applies to claims resulting from injuries caused by a structural defect, which has been defined as "a hazardous condition inherent in the structure by reason of its design or construction." ***Mair v. Trollhaugen Ski Resort***, 2006 WI 61, ¶¶22, 29, 291 Wis. 2d 132, 715 N.W.2d 598 (quoting ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶28, 245 Wis. 2d 560, 630 N.W.2d 517). However, it does not apply to claims resulting from injuries caused by an unsafe condition associated with the structure, which "arises from 'the failure to keep an originally safe structure in proper repair or properly maintained.'" ***Id.***, ¶¶23, 29 (quoting ***Barry***, 245 Wis. 2d 560, ¶27). This is due to an exception in WIS. STAT. § 893.89(4)(c), which excludes 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." ***Mair***, 291 Wis. 2d 132, ¶29.

¶15 The Sells argue that the statute of repose does not apply to their claims because the accident was caused by an unsafe condition associated with the structure as opposed to a structural defect. Accordingly, they assert that the facts of the case fall within the statutory exception of WIS. STAT. § 893.89(4)(c).

¶16 We are not persuaded by the Sells' argument. To begin, the Sells' own expert testified that the improper design of the downspout was a cause of the accident. That is because it discharged water directly onto the sidewalk where it

froze and became a hazard. The expert's opinion is consistent with the definition of a structural defect. Furthermore, there is no indication that the downspout changed in any way between the date of its installation more than ten years ago and the date of the accident. The Sells do not allege that the downspout was safe when installed but became unsafe due to negligence in its maintenance, operation, or inspection.[2] Consequently, the exception set forth in WIS. STAT. § 893.89(4)(c) has no relevance to this case.

¶17 The circuit court's conclusion that the statute of repose applied is supported by the plain language of the statute. Again, WIS. STAT. § 893.89(2) bars claims for injuries "arising out of" any defect in the design of any improvement to real property. Here, Rhonda's injury arose from a defectively designed downspout. Because the downspout had been had been in place for over ten years, § 893.89(2) bars the Sell's claims against "the owner or occupier of the property" where the accident took place, which includes Riverview and Follmer.

¶18 We turn next to the Sells' claims against Drager, beginning with their claim of negligence. To state a claim for negligence, a plaintiff must plead facts that, if true, would establish four elements: (1) the existence of 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) actual loss or damage resulting from the breach. ***Hoida, Inc. v. M&I Midstate Bank***, 2006 WI 69, ¶23, 291 Wis. 2d 283, 717 N.W.2d 17.

[2] Riverview and Follmer's failure to correct the defectively designed downspout does not constitute negligent maintenance, operation, or inspection for purposes of WIS. STAT. § 893.89(4)(c). *See* ***Crisanto v. Heritage Relocation Servs., Inc.***, 2014 WI App 75, ¶25, 355 Wis. 2d 403, 851 N.W.2d 771.

¶19 Under Wisconsin law, "one has a duty to exercise ordinary care under the circumstances." ***Id***, ¶30. When the alleged negligence arises out of a business relationship, we examine the parties' contract or agreement to help determine what is included within the duty of care. ***Id.***, ¶35. The existence and scope of a duty are questions of law for this court to decide. ***Id.***, ¶23 n.12.

¶20 On this record, we cannot say that Drager had a duty to treat the icy sidewalk prior to the accident. Again, pursuant to his agreement with Riverview Condominium Association, Drager was required to remove snow from the driveways and sidewalks and apply salt only when it snowed two or more inches. He performed those services on March 6, 2013, when four inches accumulated. In the days that followed, when no measureable snowfall occurred, he was under no obligation to inspect the property and treat any ice that formed as a result of freeze/thaw cycles and defectively designed downspouts. It is unreasonable to expect him to do so. Because Drager had no duty to treat the icy sidewalk prior to the accident, the circuit court did not err when it dismissed the Sells' negligence claim against him.

¶21 Lastly, we consider the Sells' safe-place statute claim against Drager. "Wisconsin's safe place statute, WIS. STAT. § 101.11 is a negligence statute that imposes a heightened duty on employers and owners of places of employment and public buildings to construct, repair, or maintain buildings safely." ***Mair***, 291 Wis. 2d 132, ¶19. Section 101.11(1) provides:

> Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life,

> health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.

The Sells' safe-place statute claim asserts Drager's liability as an "employer"[3] at a "place of employment."[4]

¶22 We are not convinced that the safe-place statute applies to Drager in this case. As noted, Drager had no employees and performed all winter services himself. Moreover, he had no control over the place of the accident due to the lack of snow. *See* ***Powell v. Milwaukee Area Tech. Coll. Dist. Bd.***, 225 Wis. 2d 794, 813, 594 N.W.2d 403 (Ct. App. 1999) ("Before a person has a duty to furnish a safe place of employment, the person must have the right to present control over the place so that the person can perform the duty to furnish a safe place of employment.") (quoting WIS JI—CIVIL 1911). Finally, the fact that Drager occasionally performed services on the private sidewalk does not make it a place of employment for purposes of the safe-place statute. *See* ***Geiger v. Milwaukee***

[3] Employer is defined in relevant part as "any person … having control or custody of any employment, place of employment or of any employee." WIS. STAT. § 101.01(4).

[4] Place of employment is defined in relevant part as:

> [E]very 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, or where any process or operation, directly or indirectly related to any industry, trade, or business, is carried on, and where any person is, directly or indirectly, employed by another for direct or indirect gain or profit, but does not include any place where persons are employed in private domestic service which does not involve the use of mechanical power or in farming.

WIS. STAT. § 101.01(11).

Guardian Ins. Co., 188 Wis. 2d 333, 338, 524 N.W.2d 909 (Ct. App. 1994) (occasional business-related pursuits at a private residence do not constitute an industry, trade, or business). For these reasons, the circuit court's dismissal of the safe-place statute claim against Drager was proper.[5]

By the Court.—Judgment affirmed.

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

[5] To the extent we have not addressed an argument raised by the Sells on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").