COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2016AP2127 **Cir. Ct. No. 2015CV46**

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

JENNIFER L. NERISON AND ROBERT NERISON,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN FARMERS UNION, INC. D/B/A KAMP KENWOOD AND CAPITOL INDEMNITY CORPORATION,

DEFENDANTS-RESPONDENTS,

GROUP HEALTH COOPERATIVE,

DEFENDANT.

APPEAL from a judgment of the circuit court for Chippewa County: JAMES M. ISAACSON, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

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

¶1 PER CURIAM. Jennifer and Robert Nerison appeal a summary judgment dismissing their safe place and negligence claims. The Nerisons sued the owners of a campground for damages arising out of injuries Jennifer sustained when she fell down an unlit stairway in the staff cabin. We conclude summary judgment was appropriate as to the Nerisons' safe place claim. However, we conclude genuine issues of material fact preclude summary judgment as to the Nerisons' negligence claim. We therefore affirm in part and reverse in part, and remand for further proceedings.

BACKGROUND

¶2 Wisconsin Farmers Union, Inc. (Farmers Union) owned and operated Kamp Kenwood, a "rustic camp" for campers in the summer, and often booked the property for weddings and reunions. Jennifer attended her sister-in-law's wedding at Kamp Kenwood. The wedding party rented the camp's main lodge and several other buildings for the event, including a building referred to as the staff cabin. Jennifer, Robert, and their three-year-old son planned to sleep at Kamp Kenwood the night of the wedding. Before the wedding began, the bride showed Jennifer the staff cabin, which included an upstairs sleeping loft in which Jennifer's son was to sleep that night. Jennifer spent about twenty minutes in the staff cabin prior to the wedding, about five of which were spent in the sleeping loft. During that time, Jennifer did not notice any light fixtures or light switches in the sleeping loft. It is undisputed that there were light switches at the top and bottom of the staircase, which would have illuminated overhead lights in the loft and staircase.

¶3 The wedding reception took place in Kamp Kenwood's main lodge and at a campfire outside the lodge. Jennifer brought a bottle of vodka to the reception. She consumed six to eight mixed vodka drinks at the reception between 7:00 p.m. and 12:30 a.m. Jennifer left the reception to go to bed at about 12:30 a.m. She had planned to sleep in another of Kamp Kenwood's buildings, referred to as the bed cabin, but decided instead to sleep with her son in the staff cabin.

¶4 Jennifer was intoxicated when she left the reception. She made her way to the nearby staff cabin without incident. The lights in the stairway to the loft and in the loft itself were turned off. However, Jennifer did not have trouble climbing the stairs to the sleeping loft as Jennifer's niece, who was upstairs in the sleeping loft, used a cellphone to light the way as Jennifer walked up the stairs. Once upstairs, Jennifer went to sleep. She awoke later that night, still intoxicated, wanting to use a bathroom. The lights remained off and the sleeping loft was dark. There was no bathroom in the sleeping loft, so Jennifer walked away from the bed, trying to find the staircase to the lower level and the bathroom. Jennifer walked with her arms outstretched in front of her, feeling for a light switch but did not find the switch or touch anything before she fell, face first, down the stairs. She did not remember taking a step on the stairs before falling. Jennifer's sister-in-law heard Jennifer's fall and found her unconscious at the bottom of the stairs. Jennifer was taken by ambulance to a hospital. Jennifer did not remember anything that occurred after she got up and walked toward the stairs.

¶5 The Nerisons commenced this personal injury action, alleging Farmers Union's negligence caused Jennifer's injuries.[1] In an amended complaint, the Nerisons added a claim alleging a violation of Wisconsin's safe place statute. Farmers Union subsequently moved for summary judgment, arguing the Nerisons could not establish that it had breached any duty, that it failed to use ordinary care, or that it had any notice of an unsafe condition in the staff cabin. The circuit court granted summary judgment to Farmers Union determining that the undisputed facts based on the parties' summary judgment submissions demonstrated neither a safe place violation nor any negligence on the part of Farmers Union as a matter of law. The Nerisons now appeal.

DISCUSSION

¶6 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is proper 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) (2015-16).[2] When applying this standard, we construe all facts and reasonable inferences in the light most favorable to the nonmoving party. ***Thomas ex rel. Gramling v. Mallett***, 2005 WI 129, ¶4, 285 Wis. 2d 236, 701 N.W.2d 523. However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported

[1] Robert claimed loss of marital property and loss of consortium due to Jennifer's injuries.

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

motion for summary judgment; the requirement is that there be no genuine issue of material fact." ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (internal quotation omitted). "A factual issue is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" ***Id.*** (citation omitted).

A. Safe place claim

¶7 Wisconsin's safe place statute requires that "[e]very employer and every owner of a place of employment or a public building ... shall so construct, repair or maintain such place of employment or public building as to render the same safe." WIS. STAT. § 101.11(1). Employers must also

> 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.

Id.

¶8 Wisconsin's safe place statute "imposes three duties on employers and owners of places of employment or public buildings: the duty to construct, to repair, and to maintain a safe place of employment or public building." ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶20, 245 Wis. 2d 560, 630 N.W.2d 517. Hazardous conditions may be "structural" or "associated with the structure." ***Id.***, ¶24. Structurally unsafe conditions relate to the construction of such a building, while unsafe conditions associated with the structure arise from a breach of the duty to repair or maintain. ***Id.***, ¶28. Provisions for artificial light are structural in

character. ***Harnett v. St. Mary's Congregation***, 271 Wis. 603, 611, 74 N.W.2d 382 (1956).

¶9 Farmers Union does not dispute that it was an employer within the meaning of WIS. STAT. § 101.11(1), and, as such, it was subject to the safe place requirements of employers as well as those of owners of public buildings. It is also undisputed that those requirements apply to the buildings at Kamp Kenwood, including the sleeping loft in the staff cabin.

¶10 The Nerisons argue there are material issues of fact as to whether the sleeping loft stairway was unsafe under the circumstances of its use.[3] Specifically, given that Kamp Kenwood was often rented for events such as weddings, the Nerisons contend that, under the safe place statute, Farmers Union was required to make the loft in the staff cabin safe for all "frequenters," including wedding guests, young children, and intoxicated adults. The Nerisons claim that the presence of structurally unsafe conditions associated with the lighting in the stairway and loft, as well as the lack of a stairway gate, violated Farmer Union's duty under the safe place statute.[4]

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[3] The Nerisons also note that the staff cabin had multiple code violations, including code violations related to the construction of the stairs. We need not address these alleged code violations as the Nerisons do not argue that any of them caused Jennifer's injuries. *See* ***Hofflander v. St. Catherine's Hosp., Inc.***, 2003 WI 77, ¶96, 262 Wis. 2d 539, 664 N.W.2d 545.

[4] The Nerisons fail to develop an argument that the lack of a stairway gate at the top of the stairs constituted a violation of the safe place statute. They merely suggest, "A stairway gate is one simple solution to prevent access to the stairway by small children .... [and] would also prevent errant adults from accidentally entering the stairway in the dark." We need not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶11 The Nerisons argue the stairway was structurally unsafe because Farmers Union failed to provide adequate additional lighting. They posit that additional lighting features could have been installed—e.g., an illuminated light switch at the top of the stairs in the sleeping loft, constant illumination on the stairs, or motion-sensor illumination on the stairs. They argue such measures would have made the stairway safer for guests at night.

¶12 The Nerisons concede there were light switches at the top and bottom of the staircase, which would have illuminated overhead lights in the loft and staircase if turned on. Their argument that Farmers Union was required to provide some additional safety measure fails because the safe place statute does not "create a duty that is breached simply because the premises could be made safer." *See* ***Hofflander v. St. Catherine's Hosp., Inc.***, 2003 WI 77, ¶87, 262 Wis. 2d 539, 664 N.W.2d 545. "'Safe' does not mean completely free of any hazards." ***Megal v. Green Bay Area Visitor & Convention Bureau, Inc.***, 2004 WI 98, ¶10, 274 Wis. 2d 162, 682 N.W.2d 857. The safe place statute does not transform an owner into an insurer of frequenters of their premises. ***Strack v. Great Atlantic & Pacific Tea Co.***, 35 Wis. 2d 51, 54, 150 N.W.2d 361 (1967). Nor does it require an owner to render the premises absolutely safe. ***Zernia v. Capitol Court Corp.***, 21 Wis. 2d 164, 167-168, 124 N.W.2d 86 (1963).

¶13 The Nerisons' argument is essentially that lighting features which can be fully turned off always constitute a structurally unsafe condition in violation of the safe place statute, at least under the circumstances that existed in the staff cabin in this case. However, they have cited no authority to support their contention that the safe place statute mandates continual lighting in overnight accommodations. We cannot independently conceive how such a rule would be proper. Here, there is no dispute that, if turned on, the lighting would have

sufficiently illuminated the area to allow for safe descent down the stairway. That is all the safe place statute requires in the context of this case. Therefore, the Nerisons fail to show there are material questions of fact as to their structural defect claim based upon inadequate lighting.

¶14 The Nerisons further contend that the light switch at the top of the stairs was located in an obscure place, "above a dresser," and that "it was a near-certainty that a majority of guests would not be able to find the switch in the dark." However, the Nerisons do not present any evidence that, in spite of the location of the light switch above the dresser, Jennifer could not have reached the light switch. Thus, the Nerisons failed to show there is a material issue of fact regarding the placement of the light switch constituting a structural defect sufficient to support a safe place claim.

¶15 In their reply brief, the Nerisons cite two older cases in which safe place liability was found on the basis that otherwise sufficient lighting was turned off, contributing to the plaintiffs' accidents. *See* ***Heiden v. City of Milwaukee***, 226 Wis. 92, 275 N.W. 922 (1937); ***Zimmers v. St. Sebastian's Congregation***, 258 Wis. 496, 46 N.W.2d 820 (1951). These cases related not to structural defects, but rather to the failure to maintain a public building so as to render it safe. *See* WIS. STAT. § 101.11(1).

¶16 In ***Heiden***, a child was injured when she fell down four steps in a school's unlit hallway on her way to the bathroom. ***Heiden***, 226 Wis. at 96. In ***Zimmers***, the plaintiff was injured when he fell in the bathroom of a church. ***Zimmers***, 258 Wis. at 498. In both cases, there was evidence that an agent of the property owners had turned the lights off prior to the plaintiffs' accidents. *See* ***Heiden***, 226 Wis. at 96; ***Zimmers***, 258 Wis. at 500. The owners' conduct thus

caused some portion of the building to become unsafe for frequenters. The present case is materially distinguishable, because here there is no evidence that Farmers Union had control over the light switches in the staff cabin or that any agent of Farmers Union turned off the lights that night. Therefore, while the Nerisons are correct that safe place liability has been found in cases in which otherwise sufficient lighting was turned off, those cases are inapplicable here.

¶17 Finally, the circumstances of ***Heiden*** and ***Zimmers*** are factually distinguishable because they involve situations in which the lights should have remained illuminated—*i.e.*, visitors were expected to be moving about the building—but the lights were turned off. This case involves a completely different scenario—visitors sleeping in a building rented for that purpose with the lights turned off to allow for sleep. Therefore, ***Heiden*** and ***Zimmers*** do not support the Nerisons' argument that the lights being turned off constituted a structurally unsafe condition. Furthermore, because the lack of ambient lighting was not at issue in either ***Heiden*** or ***Zimmers***, those cases do not support the Nerisons' argument that the lack of ambient lighting gives rise to a safe place claim.

¶18 Our conclusion is supported by our supreme court's reasoning in another safe place case involving a plaintiff falling in a dark hallway, ***Pettric v. Gridley Dairy Co.***, 202 Wis. 289, 232 N.W. 595 (1930). In ***Pettric***, the court explained that if the lights had been "turned out by the employees of the defendant, the unlighted condition of the stairway might be attributable to affirmative conduct for which the defendant would be responsible." ***Id.*** at 294. The court noted that the lights could have been turned off by any person present at the time. ***Id.*** The court concluded that the burden is on the plaintiff to show who turned the lights off, and that, without any evidence to suggest the defendant was

responsible for turning the lights off, "the jury should not be permitted to guess upon the question of who turned off the lights." ***Id.***

¶19 Because the Nerisons presented no evidence that Farmers Union was responsible for turning off the lights in the staff cabin stairway, there was no issue of fact to present to the jury regarding any structurally unsafe condition or failure to maintain the building in a safe condition. We conclude there was no other issue of material fact on the safe place claim and summary judgment in favor of Farmers Union was appropriate as to that claim.

B. Negligence claim

¶20 The Nerisons also contend material issues of fact remain as to their common law negligence claim. Particularly, the Nerisons argue issues of fact exist as to negligence, the foreseeability of the risk posed by the unlit stairway, and the cause of Jennifer's injury. In Wisconsin, every person owes a duty to the world at large to protect others from foreseeable harm. ***Jankee v. Clark Cty.***, 2000 WI 64, ¶53, 235 Wis. 2d 700, 612 N.W.2d 297. A duty to use ordinary care is established whenever it is reasonably foreseeable to the defendant that his or her act or failure to act might cause harm to some other person. ***Gulbrandsen v. H & D, Inc.***, 2009 WI App 138, ¶17, 321 Wis. 2d 410, 773 N.W.2d 506. As a general rule, in Wisconsin,

> the existence of negligence is a question of fact which is to be decided by the jury. To hold that a person is not negligent as a matter of law, the court must be able to say that no properly instructed, reasonable jury could find, based upon the facts presented, that the defendants failed to exercise ordinary care. This court has stated that summary judgment does not lend itself well to negligence questions and should be granted in actions based on negligence only in rare cases.

Ceplina v. South Milwaukee Sch. Bd., 73 Wis. 2d 338, 342-43, 243 N.W.2d 183 (1976) (footnotes omitted).

¶21 Here, the Nerisons allege that Farmers Union was negligent in the placement of the light switch at the top of the stairs in the sleeping loft, and in its failure to install any safety precautions, such as ambient lighting or a night light in an electrical socket. The Nerisons further claim that Farmers Union was negligent in causing Jennifer's injuries because of its failure to properly place the light switch or provide other safety measures to keep a person from falling down the loft's stairs during darkness. They contend that had the light switch been accessible, or had there been sufficient ambient light, Jennifer would not have fallen and been injured.

¶22 In opposing summary judgment, the Nerisons submitted deposition testimony, photos, and affidavits on those issues. Jennifer testified as to the circumstances leading to her fall, including that she was unable to locate the light switch, she was unable to see anything in the sleeping loft, and she felt nothing before falling down the stairs. Photos in the record show the light switch on the wall behind the edge of the stairs, with a dresser placed in front of it. Jennifer's testimony and these photos also establish that the light switch was not lighted, there was no ambient lighting on or near the stairs, and there was no stairway gate. Whether Farmers Union was negligent, resulting in conditions that exposed Jennifer to an unreasonable risk of harm, remains in dispute. *See* WIS JI—CIVIL 8020 (2013). These disputes include whether Farmers Union was negligent, for example, in failing to: (1) provide ambient lighting; (2) install a lighted switch; (3) place the light switch in a more accessible location; or (4) install a stairway gate.

¶23 In addition, case law provides that "harm must be reasonably foreseen as probable by a person of ordinary prudence under the circumstances, if conduct resulting in such harm is to constitute negligence." ***Kemp v. Wisconsin Elec. Power Co.***, 44 Wis. 2d 571, 581, 172 N.W.2d 161 (1969). A jury issue remains as to whether it was reasonably foreseeable that guests sleeping in the staff cabin loft at night would fall down the staircase and injure themselves because they would be unable to locate the light switch or lacked sufficient ambient lighting to safely navigate the stairs.

¶24 Viewed in the light most favorable to the Nerisons, and given the rarity in which negligence claims lend themselves to summary judgment, *see* ***Ceplina***, 73 Wis. 2d at 342-43, a genuine issue of material fact remains as to whether Farmers Union was causally negligent in failing to provide ordinary care regarding the sleeping conditions for guests in the staff cabin loft. Accordingly, Farmers Union is not entitled to summary judgment as a matter of law on the Nerisons' common law negligence claim.

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

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