COURT OF APPEALS
DECISION
DATED AND FILED

July 19, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1927

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

JUDITH CLEMENCE AND DAVID CLEMENCE,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

MILWAUKEE PUBLIC SCHOOLS, C/O MERIDIAN RESOURCE CORPORATION,

INVOLUNTARY-PLAINTIFF,

V.

MARYLAND CASUALTY COMPANY AND CLAYTON CREST TERRACE CONDOMINIUM ASSOCIATION, INC.,

DEFENDANTS,

MUTUAL SERVICE CASUALTY INSURANCE COMPANY AND JEFF GRUNDY,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 VERGERONT, J. This case arises out of injuries Judith Clemence sustained when she fell on snow-covered ice on the driveway apron of her condominium home in the City of Greenfield.[1] The complaint alleged that the Clayton Crest Terrace Condominium Association and Jeff Grundy, with whom the Association contracted for winter maintenance of the driveways, were negligent for not maintaining the driveway in a safe manner. The circuit court granted summary judgment to the Association and Grundy, concluding that, because the driveway apron was in the area of public dedication, the city had a non-delegable duty to keep the driveway apron clear, and therefore, neither the Association nor Grundy had a duty to do so.

¶2 Judith Clemence and her husband, David, appeal the dismissal of Grundy and his insurer.[2] The Clemences contend that the circuit court erred in concluding the city had a non-delegable duty and that Grundy had a duty because he assumed one by entering into the contract with the Association. They further contend there are factual disputes concerning Grundy's breach of his duty and they are thus entitled to a trial.

¶3 We do not decide whether the driveway apron is a public way or whether the city had a non-delegable duty to remove snow and ice from it because,

[1] For purposes of this appeal, the condition of the driveway is not in dispute.

[2] The Association and its insurer were dismissed after reaching a settlement with the Clemences.

even if the city did not have such a duty, the Clemences do not identify a duty that Grundy had independent of his contract with the Association. Therefore, they do not have a claim against Grundy for negligence. Accordingly, we affirm the order dismissing the complaint against Grundy.

BACKGROUND

¶4 The Clemences' condominium home is located at 4515 West Clayton Crest Avenue, within the Clayton Crest Terrace Condominium development. Judith Clemence's fall occurred on January 23, 1997, when she was walking down the driveway to her mailbox. The spot where she fell was approximately three-to-four feet from the curb of West Clayton Crest Avenue on the portion of the driveway that widens out before meeting the street, which we will call the "driveway apron." There is no sidewalk on West Clayton Crest Avenue in this area.

¶5 West Clayton Crest Avenue lies in the center of a sixty-foot wide public right-of-way, which is dedicated to and owned by the City of Greenfield. The paved surface of the road is thirty feet wide from curb face to curb face, with the area of public dedication extending fifteen feet on either side of the paved area. The condominium property line is set back fifteen feet from the curb and runs parallel with the roadway. It is undisputed that the location of the fall was within the area dedicated to and owned by the City of Greenfield.

¶6 At the time of the injury, the Association had a contract with Residential Maintenance Services (R.M.S.), a snowplowing business owned by Grundy, to perform winter snow removal for the condominium complex, including the driveways, front walks, and front steps. The agreement required R.M.S. to

snowplow all driveways "to be done at 1.5″ of snow" and to use "Calcium Chloride Blend as needed."

¶7 Grundy moved for summary judgment arguing that his duty was controlled by the contract with the Association and he had not breached the contract. The Clemences opposed the motion on the ground that there were factual disputes concerning whether Grundy had breached his duty, which the Clemences defined in terms of his obligations under the contract. The Clemences submitted material which, they asserted, showed that Grundy had not removed the snow at one and one-half inches and had not used calcium chloride as needed. The circuit court denied this motion, agreeing with the Clemences that there were disputed issues of fact.

¶8 At the same time, the Association moved for summary judgment on the ground that, because the fall occurred within the area dedicated to and owned by the city, the city had the sole responsibility to remove snow and ice on that portion of the driveway and the Association had no duty to do so. Grundy joined in this motion. The circuit court concluded there were no relevant factual disputes. It also concluded that, because the location of the fall was on property owned by the city, the city had a non-delegable duty under ***Walley v. Patake***, 271 Wis. 530, 74 N.W.2d 130 (1956), to remove the ice and snow in that area and, therefore, neither the Association nor Grundy had such a duty.[3]

[3] The court denied the Clemences' motion for reconsideration.

DISCUSSION

¶9 Summary judgment is appropriate when there are no disputed issues of fact and one party is entitled to judgment as a matter of law. WIS. STAT.§ 802.08(2) (1999-2000).[4] Our review of the circuit court's order granting summary judgment is de novo, and we apply the same methodology as the circuit court. ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 287, 531 N.W.2d 357 (Ct. App. 1995).

¶10 The Clemences first argue the circuit court misread ***Walley*** because that case, like ***Hagerty v. Village of Bruce***, 82 Wis. 2d 208, 262 N.W.2d 102 (1978), is concerned with the non-delegable duty of a municipality to keep sidewalks clear of ice and snow, and the driveway apron is not a sidewalk. In response, Grundy contends that the body of law the court in ***Hagerty*** relied on concerned municipalities' obligations to maintain "public ways," and this includes the Clemences' driveway apron because it is on the property dedicated to and owned by the city. However, the premise of the non-delegable duty concept at the heart of ***Walley*** and ***Hagerty*** is not simply that the property is owned by the municipality, but that the municipality is responsible for maintaining the driveway apron, or for clearing the snow and ice from it, because it is a "public way."[5]

---

[4] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[5] The court in ***Hagerty v. Village of Bruce***, 82 Wis. 2d 208, 213, 262 N.W.2d 102 (1978), explained that the rule is "premised on the general observation that under most statutory schemes, the state has imposed the duty upon municipalities to maintain its streets and highways in a reasonably safe condition for travelers which may not be delegated by ordinance to others." The court continued:

> The responsibility of the public authority to maintain its highways and streets in a reasonably safe condition for travelers cannot be delegated to another so as to relieve the public

(continued)

Neither of the parties address the question of whether a statute or the common law imposes on a municipality the obligation to maintain or keep clear of snow and ice the driveway apron to the driveway of a residence when the driveway apron is in the area dedicated to and owned by the city.[6] If the city does not have such a duty, then the reasoning of ***Walley*** and ***Hagerty***, and the cases and treatises on which they rely, do not appear to prevent the imposition of a duty on another person or entity. However, even if the Clemences are correct that the city does not have a duty to maintain or keep the driveway apron clear of snow and ice, they must still establish Grundy had a duty to do so. For the reasons that follow, we conclude Grundy does not have a duty the breach of which would give rise to a cause of

---

> authority from liability in the event that one is injured by reason of defects therein, at least in the absence of action by the legislature expressly relieving the public authority from liability in this respect. The actual work of maintenance may be assigned to others, but not the ultimate responsibility therefor. Thus, the duty of the public authority to keep its highways reasonably safe for travel is not abrogated or suspended by reason of the fact that a third person is doing construction work within the limits of the highway, or that he is making repairs therein. Moreover, the fact that the duty to care for public streets or sidewalks has been assumed by or imposed upon private persons does not relieve the public authority from responsibility for the failure of such person to perform such duty.
>
> Therefore, it is stated that even though a municipality, by ordinance, may impose upon the individual landowner some duty with respect to the care or maintenance of a public way, the individual is not burdened with the responsibility for injuries arising from his neglect to perform the duty in the absence of any statutory provision to that effect because the primary duty to maintain public ways may not be delegated.

Id. at 213-14 (citations omitted).

[6] We observe the fact that the driveway apron is in the area that is dedicated to the city and owned by the city is not necessarily dispositive of whether it is a "public way" or "open to the public," since there is authority from other jurisdictions that a municipality's duty to maintain its streets or highways in a reasonably safe condition applies only to ways, or those portions of ways, that are open to public use. *See, e.g.*, 39 AM. JUR. 2D *Highways, Streets and Bridges*, 389, 391, 392. (1968).

action for negligence. We therefore need not decide whether the city had a non-delegable duty to keep the driveway apron clear of snow and ice.

¶11 The Clemences assert Grundy had a duty because of the contract he entered into with the Association. They acknowledge Grundy had no duty to remove the snow and ice in the absence of the contract, but, they contend, once he entered into the contract, he did have a duty, defined by the terms of the contract, and he breached that duty because he did not comply with the terms of the contract. In essence, the Clemences are arguing that a breach of contract, in itself, gives rise to a claim for negligence, but that is not the law. In ***Madison Newspapers, Inc. v. Pinkerton's Inc.***, 200 Wis. 2d 468, 472-73, 545 N.W.2d 843 (Ct. App. 1996), we stated:

> MNI argues that the facts of the case give rise to a separate tort cause of action against Pinkerton's in addition to its claim for breach or misperformance of the parties' contract. In ***McDonald v. Century 21 Real Estate Corp.***, 132 Wis.2d 1, 390 N.W.2d 68 (Ct. App. 1986), we recognized that, under the common law, causes of action for tort and contract "have historically had different purposes and protected different interests," and we emphasized that difference by noting that "'torts consist of the breach of duties fixed and imposed upon the parties by the law itself, *without regard to their consent to assume them*….'" ***Id.*** at 7, 390 N.W.2d at 70, 71 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 4 (5th ed. 1984)) (emphasis added).
>
> Thus, where the alleged tort may be seen as related to a contract between the parties, "[i]n order for … a cause of action in tort to exist, a duty must exist *independently of the performance of the contract.*" ***Dvorak v. Pluswood Wisconsin, Inc.***, 121 Wis.2d 218, 220, 358 N.W.2d 544, 545 (Ct. App. 1984) (emphasis added). Under this test, "the existence of a contract is ignored when determining whether [the] alleged misconduct is actionable in tort."

(Footnote omitted.)

¶12 The Clemences have not identified any duty Grundy had, except to perform the contract; they have not identified any acts by Grundy that they claim are negligent, except his failure to remove snow and use calcium chloride as required by the contract.

¶13 The Clemences assert that ***American Mutual Liability Ins. Co. v. St. Paul Fire & Marine Ins. Co.***, 48 Wis. 2d 305, 179 N.W.2d 864 (1970), and ***Nischke v. Farmers & Merchants Bank & Trust***, 187 Wis. 2d 96, 522 N.W.2d 542 (Ct. App. 1994), support their argument. In ***American Mutual***, a company's employee was injured when a boiler fitting ruptured. The company sued its boiler insurer, alleging both that the insurer had agreed to make periodic inspections of the boiler and make recommendations on corrections, and that its insurer had made numerous inspections, but had negligently failed to advise the company of the defect. The circuit court dismissed the entire complaint on summary judgment because there was no evidence of a contract. The supreme court reversed, concluding RESTATEMENT (SECOND) OF TORTS § 324A (1965)[7] was applicable and under that rule there need not be a contract to perform the inspection. ***American Mut.***, 48 Wis. 2d at 313. Section 324A provides:

> **Liability to Third Person for Negligent Performance of Undertaking**.
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or

[7] All references to the RESTATEMENT (SECOND) OF TORTS are to the 1965 edition.

> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

¶14 In ***Nischke***, the plaintiff claimed a bank was negligent in not informing her that an underground storage tank, in which the bank had a security interest, was leaking on her property. The court held there was no evidence the bank had made any promises giving rise to a duty to the plaintiff, but, it held, if an ordinary prudent bank in possession of an underground storage tank ought to reasonably foresee that the plaintiff's property was subject to injury by failing to inform the plaintiff it was abandoning the tank, the bank was negligent in failing to inform the plaintiff of that. ***Nischke***, 187 Wis. 2d at 115-16. The court relied on RESTATEMENT (SECOND) OF TORTS § 323 (1965) which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

¶15 In neither ***American Mutual*** nor ***Nischke*** was the alleged tort-feasor contractually obligated to perform the services that the plaintiff asserted the tort-feasor had a duty to perform. Therefore, these cases do not shed light on whether Grundy had a duty independent of the performance of his contract. It is true that both of the Restatement provisions permit a claim for negligence even if the alleged tort-feasor had a contractual obligation to perform the tasks, if the conditions of the provisions were met. However, the Clemences do not develop

an argument explaining how either provision applies to Grundy. Instead, they define Grundy's duty solely in terms of the contract and then assert "[i]t was reasonable for Mrs. Clemence to rely on Grundy to make sure that all dangerous, icy conditions on her driveway had been removed, either by shoveling or a melting substance."

¶16 It may be the Clemences intend to rely on RESTATEMENT (SECOND) OF TORTS § 324(c).[8] However, they do not discuss whether removing snow or ice is a service that courts have held is one that the person undertaking "should recognize as necessary for the protection of [another]," nor do they discuss what reliance means in this context, in which people using the driveway are able to see whether it is clear of snow and ice.

¶17 We observe that in Wisconsin these two restatement provisions have been applied in situations where the service has been one that protects a person or persons from contaminated water (***Nischke***); malfunctioning boilers (***American Mutual***); disclosure of identity as a confidential informant (***Maynard v. City of Madison***, 101 Wis. 2d 273, 304 N.W.2d 163 (Ct. App. 1981)); defective standpipes (necessary to provide water to fight fires) (***Coffey v. City of Milwaukee***, 74 Wis. 2d 526, 247 N.W.2d 132 (1976)); and dangers in a materials preparation room where employees work with flammable chemicals (***Miller v. Bristol-Myers Co.***, 168 Wis. 2d 863, 485 N.W.2d 31 (1992)). *See also* ***Gritzner v. Michael R.***, 2000 WI 68, 235 Wis. 2d 781, 611 N.W.2d 906 (applying RESTATEMENT (SECOND) OF TORTS § 324A to a claim that a neighbor undertook

[8] Presumably if the Clemences intend to rely on one of the two provisions, it is RESTATEMENT (SECOND) OF TORTS § 324 since Grundy's contract to perform the services was with the Association, not with the Clemences.

the care of a young child in his home knowing there was a risk that an older child in the home would engage in inappropriate sexual acts with the young child if unsupervised). These are all situations where the danger to personal safety at stake is significant, and the person undertaking to perform the service has knowledge, expertise, or an ability to control that the person claiming reliance lacks. The court in ***Jones v. United States***, 703 F.2d 246, 249-51 (1983), cited these distinctions as reasons, among others, for declining to consider the gratuitous undertaking of snow removal to create a duty under § 324A.

¶18 Another difficulty we have due to the lack of development of the Clemences' argument is that they appear to assume Grundy had a duty to "make sure that all dangerous, icy conditions on [the Clemences'] driveway had been removed, either by shoveling or a melting substance," (otherwise Judith Clemence's reliance on Grundy to do that could not be reasonable, as they assert it was). However, they do not explain why, by obligating himself contractually to snow plow at 1.5 inches of snow and use a calcium chloride blend as needed, Grundy was undertaking to remove all dangerous icy conditions. The "open endedness" of the task of snow removal and the difficulty of defining the duty was another reason given by the court in ***Jones*** for not applying RESTATEMENT (SECOND) OF TORTS § 324A.[9] True, there was no contract in ***Jones*** to define the duty, but if we look to Grundy's contract, we are back to our underlying problem with the Clemences' position on Grundy's duty: they define this solely in terms of

[9] We recognize that in ***Jones v. United States***, 703 F.2d 246, 247-48 (1983), a public sidewalk was involved, and, therefore, the court held the city had a non-delegable duty under Wisconsin law to maintain the sidewalks. As we have discussed above, this may or may not be the case here. However, even though this was one of the factors the court referred to in deciding that RESTATEMENT (SECOND) OF TORTS § 324A did not apply, ***Jones***, 703 F.2d at 251, the other factors it referred to are useful to illustrate the issues the Clemences have not addressed.

his obligation to perform as required by the contract.[10] By way of contrast, in ***Leverence v. United States Fidelity & Guaranty***, 158 Wis. 2d 64, 462 N.W.2d 218 (1990), a company contracted with a manufacturer of prefabricated homes to inspect them for code violations and, in addition, sent a memo to potential buyers that could be construed as undertaking broader duties than that defined in the contract. The court held that, because of the memo, there were sufficient facts to defeat summary judgment on the occupants' negligence claim under § 324A against the inspecting company, even though it did not breach its contract.

¶19 We decline to develop the Clemences' argument for them. In the absence of a developed argument showing that Grundy had a duty under RESTATEMENT (SECOND) OF TORTS § 324A (or 323), we conclude the Clemences are not entitled to a trial on the negligence claim against him.

¶20 In summary, assuming for the purposes of this appeal that Grundy breached his contract as the Clemences assert he did, we conclude the Clemences have no claim against him for negligence. They may have a claim for breach of contract as third-party beneficiaries of his contract with the Association, *see* ***Schilling v. Employers Mut. Cas. Co.***, 212 Wis. 2d 878, 886-87, 569 N.W.2d 776 (Ct. App. 1997), but they have neither pleaded nor argued that. Accordingly, we

[10] To illustrate this point: If the contract required Grundy to snowplow the driveways when there was 2 inches of snow, instead of 1.5 inches, his failure to snowplow after a snow fall leaving 1.5 inches on the ground would not be a breach of that contract. Would Grundy nevertheless have breached a duty of care so as to be liable in negligence? If so, how is that duty defined? If not, why does the variation in contract terms affect Grundy's duty for negligence purposes unless those terms define that duty.

affirm the circuit court's order granting summary judgment in favor of Grundy and his insurer and dismissing the complaint against them.[11]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[11] Because of our disposition, it is unnecessary for us to address Grundy's contention that the circuit court erred in considering an affidavit of David Clemence in denying Grundy's first motion for summary judgment.