COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1556 **Cir. Ct. No. 00 CV 002608**

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

MARIA L. DORANTES,

PLAINTIFF-APPELLANT,

V.

HERITAGE MUTUAL INSURANCE COMPANY AND JACQUEZ AUTOMOTIVE SERVICE, D/B/A JACQUEZ SERVICE STATION,

DEFENDANTS-RESPONDENTS,

HUMANA/EMPLOYERS HEALTH INSURANCE,

SUBROGATED-PARTY.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Maria L. Dorantes appeals from the order granting summary judgment to Heritage Mutual Insurance Company and Jacquez Automotive Service (collectively, "Jacquez"), and dismissing her slip-and-fall claim, without prejudice, on the merits. She contends that the circuit court erred in granting summary judgment by "fail[ing] to consider that Jacquez caused snow to artificially accumulate on the sidewalk at the point of the slip and fall." Because the record contains no credible evidence that Jacquez negligently caused an artificial accumulation of snow or ice on the sidewalk, we affirm.

BACKGROUND

¶2 On the morning of January 10, 1998, Dorantes slipped and fell while walking on a City of Milwaukee sidewalk bisecting the driveway of Jacquez Automotive Service. The fall resulted in injuries to her right hand, wrist, and forearm, requiring surgery and necessitating time off work.

¶3 On March 31, 2000, Dorantes filed a complaint against Jacquez, claiming that as a result of the fall, she "suffered or incurred in the past and will continue in the future to suffer or incur pain, disability, emotional distress, anxiety, embarrassment, loss of enjoyment of life, the expense of medical care and treatment, loss of earnings, loss of earning capacity and disfigurement." While acknowledging that snow that had fallen prior to January 10, 1998, had been removed prior to that date, she alleged that on January 10 "a thin layer of snow had fallen that morning hiding the accumulation of snow and ice which had gathered on the sidewalk," that "this ice and snow was not visible" to her, and that she consequently slipped on it and fell. She further alleged that Jacquez "knew of the dangerous condition which existed as a result of the accumulation of snow left by tire tracks from cars coming in and out of the service station," and that Jacquez

"was negligent for failing to maintain the sidewalk … so as to make it safe for travel."

¶4 In its amended answer to the complaint, Jacquez admitted that it knew that the tires of vehicles entering and leaving the service station left snow on concrete surfaces, but denied that it had any responsibility for maintaining the sidewalk separating the station from the street. Jacquez also stated that it had no knowledge of the presence of any ice and that "if any ice was present, it did not constitute a hazardous condition."

¶5 Jacquez moved for summary judgment, arguing that it had no duty to remove snow and ice from a public sidewalk. Noting that our supreme court has consistently held that a property owner or lessee has no liability for injuries sustained by a person as a result of a fall on a public sidewalk, Jacquez requested that Dorantes' claims be dismissed.

¶6 Granting summary judgment to Jacquez, the circuit court explained:

> There is a variety of case law that discusses the issue of the responsibility and liability of a property owner adjacent to a sidewalk for the accumulation of snow, and both parties have cited most of those cases.
>
> ….
>
> I think under that case law and analysis, the facts of this case demonstrate that the snow naturally accumulated, be it that it fell off of cars … driving over, or that it melted after it had accumulated on the parking space, or his action caused no more snow to accumulate on the sidewalk than … would have [accumulated] had he left it from the snowstorms ….

DISCUSSION

¶7 Summary judgment methodology is used to determine whether a legal dispute requires a trial. ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150

Wis. 2d 80, 86, 440 N.W.2d 825 (Ct. App. 1989). A circuit court must enter summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (1999-2000).[1] As our supreme court has recently explained:

> An appellate court reviews a decision granting summary judgment independently of the circuit court, benefiting from its analysis. The appellate court applies the same two-step analysis the circuit court applies pursuant to Wis. Stat. § 802.08(2). Specifically, a court first examines the pleadings to determine whether a claim for relief is stated and whether a genuine issue of material fact is presented.
>
> If the pleadings state a claim and demonstrate the existence of factual issues, a court considers the moving party's proof to determine whether the moving party has made a prima facie case for summary judgment. If the defendant is the moving party the defendant must establish a defense that defeats the plaintiff's cause of action. If a moving party has made a prima facie defense, the opposing party must show, by affidavit or other proof, the existence of disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn that are sufficient to entitle the opposing party to a trial.
>
> The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact are resolved against the moving party. The court takes evidentiary facts in the record as true if not contradicted by opposing proof.

Lambrecht v. Estate of Kaczmarczyk, 2001 WI 25, ¶¶21-23, 241 Wis. 2d 804, 623 N.W.2d 751 (footnotes omitted).

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

¶8 Contending that whether the accumulation of snow was natural or artificial is a disputed material fact, Dorantes argues that summary judgment was inappropriate because it was "based on a misplaced analysis of the law." She explains:

> The question for a jury to decide is whether or not the accumulation of snow was a result of either cars traveling into and out of the businesses' [sic] property or Mr. Jacquez'[s] removal of snow from the car abutting the sidewalk. Assuming the jury decides the latter explanation in the affirmative, the next logical question would be whether the accumulation was natural or artificial.

¶9 Dorantes points to photographic evidence and Jacinto Jacquez's deposition to support her contention that "the snow she slipped on may have been negligently placed there by Mr. Jacquez." She says that, in his deposition, Jacquez admitted that the snow came from him cleaning off a car parked at the edge of the driveway. Only a portion of the deposition is contained in the appellate record, however, and it does not support her contention.

¶10 During the deposition, Dorantes' attorney questioned Mr. Jacquez regarding photographic exhibits:

> [DORANTES' COUNSEL] Let's talk about the numbers. Number 4?
>
> [JACQUEZ] Number 4.
>
> [DORANTES' COUNSEL] Number 2—
>
> [JACQUEZ] You can see the car track clearly up to here except in the place where the snow was put in on top of the car track to take the picture. You can see very good on that picture the car track is stopped right where they put the snow on for the picture taking. See—
>
> [DEFENSE COUNSEL] That's exhibit 4 you're pointing to?
>
> [JACQUEZ] Look how clear the car track is up to here. Then the snow's thrown in there to take a picture.
>
> [DORANTES' COUNSEL] Well, you would have seen someone doing that, right?

> [JACQUEZ] No. Well, probably—Well, I work inside most of the time. After I finish cleaning the sidewalk I stay inside all the time.
>
> [DORANTES' COUNSEL] So, you think someone threw the snow on here?
>
> [JACQUEZ] In the way that the picture looks, like they stopped in the car track that way. So clearly we know my car was running over that snow. It seemed like it was put in after the car pass[ed] through it.
>
> [DORANTES' COUNSEL] Do you see the snow over here in back of the—
>
> [DEFENSE COUNSEL] Back on exhibit 1.
>
> [DORANTES' COUNSEL] Back of the car that's parked on the—Do you see the snow?
>
> [JACQUEZ] That's from cleaning the top of the car then, the snowfall in back of the car.
>
> [DORANTES' COUNSEL] I mean, someone didn't throw that on there; that just came from the car itself?
>
> [JACQUEZ] That was from cleaning the car. It's going there.
>
> [DORANTES' COUNSEL] Okay.
>
> [JACQUEZ] That's inside the driveway. Because I do it myself before I put it inside the shop, I clear off the snow so there won't be too much water inside.
>
> [DORANTES' COUNSEL] Take a look at Exhibit number 5. Tell me if you see

Thus ends the portion of Mr. Jacquez's deposition transcript that is contained in the record before this court.

¶11 Nor does Dorantes' own deposition testimony support her contention that "the snow she slipped on may have been negligently placed there by Mr. Jacquez":

> Q So you have marked on Exhibit number 1 the spot where you fell on the sidewalk?
>
> A Yes.
>
> Q Was there any snow at the spot where you fell? It doesn't look like there is anything where you marked the X.

> A Yes, there is snow, there is snow, but it was—It was like a, you know, a fine—a powdery snow, but where this is, there is snow.…
>
> ….
>
> Q You saw that there was snow where you fell?
>
> A Of course.
>
> Q Are you saying that there was ice also present?
>
> A I didn't see it. If I had seen it, I wouldn't have stepped there.
>
> ….
>
> Q Do you know if ice was present at the spot where you fell when you fell?
>
> A I only saw the snow. I—There was snow on both sides, but I did not see any ice because the snow was covering—this dusting of snow was covering.
>
> Q Did you slip on snow or ice or both?
>
> A Well, it was probably on both because the ice was underneath. I didn't see it.
>
> Q If you didn't see the ice, how do you know if there was any there?
>
> A No, no, because the ice was underneath, and that's what made me slip. I felt myself slip on ice. If it was just this powdering of snow, I wouldn't have fallen.

¶12 As Dorantes correctly points out, Mr. Jacquez "admitted that he and his employees knew that vehicles came in and out of the service station and that their tires left snow on the concrete surface." She concludes that this admission, coupled with his admission that he removed snow from the parked car, "can only lead to the conclusion that Mr. Jacquez created an 'artificial accumulation' of snow." Dorantes is wrong.

¶13 Many years ago, our supreme court explained:

> The owners and occupiers of the premises abutting a street in a city are not responsible to individuals for injuries resulting from a failure to remove from the sidewalk accumulations of snow and ice created by natural causes, although there is a valid ordinance requiring them

> to remove such accumulations. The only liability is to pay the penalty prescribed by the ordinance.

Walley v. Patake, 271 Wis. 530, 535, 74 N.W.2d 130 (1956). The court further clarified that, under Wisconsin law, "a person who slips and falls and sustains injuries on an uneven, rough, slippery condition of ice and snow resulting from natural causes upon the sidewalk of an adjacent property owner" may not prevail on "a claim of negligence against such property owner because of the existing condition." ***Id.*** at 539. In a later decision regarding the same parties, the supreme court, reiterating that "[t]he law is well settled that if the owner or occupant of property does nothing in so far as snowfall is concerned he is not liable to a pedestrian who is injured because thereof," commented that citizens should be encouraged to remove snowfall from sidewalks, rather than penalized for doing so. ***Walley v. Patake***, 274 Wis. 580, 585, 80 N.W.2d 916 (1957). And later, the supreme court explained:

> The difficulty lies in distinguishing between natural or ordinary drainage of water onto a sidewalk from private land or structures and drainage which will be deemed an artificial accumulation and an intentional or negligent discharge thereof onto the sidewalk. It appears to be the rule that where land is graded or structures are built in the usual and ordinary way, and not for the purpose of accumulating and discharging water on the public sidewalk, drainage which results only incidentally and is not caused by negligent maintenance, is deemed natural or ordinary.

Corpron v. Safer Foods, Inc., 22 Wis. 2d 478, 484, 126 N.W.2d 14 (1964).

¶14 Dorantes has not alleged that the site of Jacquez's business contains anything other than "land [that] is graded or structures [that] are built in the usual and ordinary way, and not for the purpose of accumulating and discharging water on the public sidewalk." *See* ***id.*** Nor has Dorantes shown that any drainage of water onto the sidewalk from Jacquez's business site was due to negligent

maintenance by Jacquez. *See* ***id.*** Dorantes' arguments, at best, are based on pure speculation. The court correctly granted summary judgment.

By the Court.—Order affirmed.

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