COURT OF APPEALS DECISION DATED AND FILED

February 23, 2011

A. John Voelker
Acting 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. 2009AP2939

Cir. Ct. No. 2008CV2459

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

CHRISTINE A. DEZOMA,

PLAINTIFF-APPELLANT,

HUMANA INSURANCE COMPANY AND TRUSTMARK LIFE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFFS,

V.

THE CINCINNATI INSURANCE COMPANY AND JFM-SMM, LLC,

DEFENDANTS-RESPONDENTS,

MANAGED HEALTH SERVICES INSURANCE CORPORATION,

DEFENDANT.

APPEAL from an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Christine A. Dezoma has appealed from an order granting summary judgment and dismissing her claims against JFM-SMM, LLC (JFM) and its insurer, The Cincinnati Insurance Co., for injuries allegedly sustained by her when she slipped and fell on snow or ice outside a building owned by JFM. We conclude that summary judgment was properly granted and affirm the trial court's order.

¶2 When reviewing a grant of summary judgment, we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. ***Turner v. Taylor***, 2003 WI App 256, ¶7, 268 Wis. 2d 628, 673 N.W.2d 716. We first examine the pleadings to determine whether a claim for relief has been stated and whether a genuine issue of material fact is presented. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶21, 241 Wis. 2d 804, 623 N.W.2d 751. If the pleadings state a claim and demonstrate that material factual issues exist, our inquiry shifts to the moving party's affidavits or other proof to determine whether a prima facie case for summary judgment has been presented. ***Id.***, ¶22. If the moving party has made a prima facie case, the affidavits or other proof of the opposing party must be examined to determine whether there exist disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to trial. ***Id.***

¶3 Merely alleging a factual dispute will not defeat an otherwise properly supported motion for summary judgment. ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999).

The party that opposes a summary judgment motion must set forth specific evidentiary facts showing that a genuine issue exists for trial. *See* ***id.***

¶4 In her complaint, Dezoma alleged that she slipped and fell on a negligently maintained walkway while on property owned by JFM. She alleged that JFM and its insurer were liable for damages based on negligence and a violation of the safe-place statute, WIS. STAT. § 101.11 (2009-10).[1]

¶5 After answering, JFM and its insurer moved for summary judgment. In support of the motion, counsel for JFM submitted an affidavit attaching the depositions of Dezoma and her husband, Michael, and one photograph referred to in their depositions (photo 1-G). Dezoma filed a brief in response to the motion for summary judgment, but no affidavits or additional evidentiary material.

¶6 In their deposition testimony, Dezoma and Michael testified that Dezoma fell when she slipped on snow or ice while leaving a wedding reception at approximately 11:00 p.m. on January 21, 2006. The reception was held at a building owned by JFM. The fall occurred as Dezoma attempted to walk from the entrance to the JFM building to her vehicle. In its motion for summary judgment, JFM contended that it was not liable for Dezoma's injuries because the fall occurred on a public sidewalk.

¶7 As acknowledged by both parties, while a municipal ordinance may require a property owner to remove snow and ice from an adjacent public sidewalk, the property owner is not liable for injuries resulting from its failure to remove snow and ice created by natural causes. *See* ***Hagerty v. Village of Bruce***,

[1] All references to the Wisconsin Statutes are to the 2009-10 version.

82 Wis. 2d 208, 211-13, 218, 262 N.W.2d 102 (1978). Even if the property owner neglects its duties under the ordinance, it is not burdened with the responsibility for injuries arising from its neglect because the municipality's responsibility for maintaining public ways may not be delegated by ordinance to others. ***Id.*** at 213-14.

¶8 Dezoma contends that the trial court erred in granting summary judgment because a material issue of fact exists for trial as to whether her slip and fall occurred on a public sidewalk or JFM's private walkway. We disagree. In questioning Dezoma at her deposition, JFM's counsel stated: "Your accident that we're talking about occurred on the public sidewalk?" Dezoma replied, "Correct." Counsel then asked Dezoma to mark where her fall occurred on one of the photographs taken by Michael two days after the fall. Dezoma took photo 1-G and drew a circle on the public sidewalk in front of the JFM building, indicating that this was the location of her accident. Counsel stated: "That's a public sidewalk as you understand it?" and Dezoma replied, "It's the front of the property, yeah."

¶9 In his deposition testimony, Michael testified that he was on the way to get his truck when Dezoma fell, but came back to assist her. He testified that he did not disagree that the area Dezoma circled was the area in which she fell, and that it seemed to be a public sidewalk.

¶10 Because the deposition testimony of Dezoma and Michael indicated that Dezoma slipped and fell on a public sidewalk, JFM established a prima facie defense to Dezoma's negligence action. Dezoma presented no affidavits or other evidentiary material indicating that she slipped and fell on private property owned

by JFM. No material issue of fact therefore existed for trial on the question of whether Dezoma slipped and fell on a public sidewalk.[2]

¶11 Dezoma contends that even if she slipped and fell on a public sidewalk, a material issue of fact exists for trial as to whether the accumulation of snow or ice on the sidewalk was natural or artificial. Although a property owner is not liable when a person slips on snow or ice that accumulates on a public sidewalk from natural conditions, it may incur liability for artificial accumulations. ***Holschbach v. Washington Park Manor***, 2005 WI App 55, ¶10, 280 Wis. 2d 264, 694 N.W.2d 492. In some circumstances, the discharge from a downspout may be deemed a natural accumulation; in other circumstances, it may create an artificial condition. *See* ***id.***, ¶¶12-15; ***Gruber v. Village of North Fond du Lac***, 2003 WI App 217, ¶¶18-19, 267 Wis. 2d 368, 671 N.W.2d 692.

¶12 Dezoma relies on the deposition testimony of Michael and photo 1-G to contend that an artificial condition existed because the design of a downspout on the JFM property caused water to empty directly onto the sidewalk. Dezoma's argument fails because nothing in the summary judgment record provides a basis to conclude that the ice on which she slipped and fell was affected by the downspout. Nothing in photo 1-G indicates that the downspout discharged into the area where Dezoma slipped and fell. In addition, in his deposition Michael testified that ice from the downspout was in a different area than the area in which

[2] Dezoma contends that summary judgment was unwarranted because the edge of the circle drawn by her on photo 1-G extended into what may have been private property. However, after drawing the circle at her deposition, Dezoma indicated that the area she marked was a public sidewalk, confirming her earlier statement that her accident occurred on the public sidewalk. She submitted no affidavit in response to JFM's motion for summary judgment attesting that the area in which she slipped and fell was not a public sidewalk. No material issue of fact therefore existed for trial.

Dezoma fell, and that the downspout would not cause water to form in the area circled by Dezoma to indicate where she slipped and fell. Because the evidence that the downspout did not discharge water in the area where Dezoma slipped was not rebutted by Dezoma, no issue of fact related to the downspout existed for trial.[3]

¶13 Dezoma's final argument is that the trial court improperly dismissed her safe-place claim. Dezoma relies on WIS. STAT. § 101.11(1), which provides: "Every employer … shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof." She contends that even if she slipped and fell on a public sidewalk outside of the JFM building, an issue exists for trial as to whether that sidewalk was a place of employment within the meaning of § 101.01(11), which defines "place of employment" to include "every place, whether indoors or out or underground and the premises appurtenant thereto."

¶14 Generally, a public sidewalk is not a place of employment for purposes of the safe-place statute. ***Buckley v. Park Bldg. Corp.***, 31 Wis. 2d 626, 631, 143 N.W.2d 493 (1966). However, exceptions arise under extraordinary conditions, as when the abutting landowner exercises almost exclusive dominion and control over the public sidewalk. *See* ***id.*** at 632. Absent such extraordinary circumstances, an abutting landowner is not liable under the safe-place statute for

[3] Dezoma contends that since Michael did not photograph the area in which she fell until two days after her fall, conditions may have been different at the time she fell. However, Michael's testimony clearly supported a conclusion that ice accumulation from the downspout did not cause Dezoma's fall. Dezoma presented no rebuttal evidence indicating that the downspout discharged water into the area in which she fell, or that the ice had melted or otherwise changed in the two days after her fall. She therefore failed to rebut JFM's prima facie defense that discharge from the downspout did not contribute to her slip and fall.

injuries to a person who slips and falls on naturally-occurring snow or ice on the public sidewalk. *See* ***id.*** at 633.

¶15 Nothing in the summary judgment record provides a basis to conclude that JFM exercised almost exclusive dominion or control over the public sidewalk where Dezoma slipped and fell. Dezoma's attempt to analogize this case to ***Callan v. Peters Constr. Co.***, 94 Wis. 2d 225, 288 N.W.2d 146 (Ct. App. 1979), is also unavailing.

¶16 In ***Callan***, a customer fell and was injured near a sidewalk entrance to the Marshall Field store during a remodeling project to enclose the Mayfair Shopping Center. ***Id.*** at 229-30. The Marshall Field store claimed that since it was a mere tenant in the Mayfair Shopping Center, and since the plaintiff's injuries occurred on a sidewalk in a common area to which it lacked legal title, it could not be liable. ***Id.*** at 241.

¶17 This court held that ownership of the premises was not a prerequisite to liability under the safe-place statute for the injuries suffered by the customer, and that liability attached if Marshall Field had the right to assume influence over the activities of construction workers using the sidewalk and the right to regulate the movement of pedestrians. ***Id.*** at 242-43. This court upheld the jury's finding of liability, pointing out that prior to the plaintiff's fall, it had been agreed between Marshall Field and the property owner that Marshall Field had a duty to participate in cleaning up debris during the remodeling process. ***Id.*** at 243-44. This court also pointed out that Marshall Field had the right and power to close the sidewalk entranceway to the public, to tell the construction contractor to keep construction materials away from the entrance, to change the flow of pedestrian traffic, and to control the activities of the contractor for the safety of its frequenters. ***Id.*** at 243.

¶18 Contrary to Dezoma's argument, nothing in the summary judgment record provides a basis to conclude that JFM had the right to control traffic over the public sidewalk, or that it exercised such control. Nothing in the record indicates that JFM had the responsibility or the right to regulate the movement of pedestrians over the public sidewalk, to close the public sidewalk to use, or to change the flow of traffic. The mere fact that individuals entering and exiting the JFM building walked across the public sidewalk did not mean that JFM had sufficient control over the public sidewalk to render it a place of employment for purposes of the safe-place statute.[4] Because the summary judgment record provided no basis to conclude that the public sidewalk was a place of employment for JFM, the trial court properly granted summary judgment dismissing Dezoma's claim under the safe-place statute.

By the Court.—Order affirmed

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

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[4] While acknowledging that the municipal ordinance requiring an adjacent property owner to clear snow and ice from a public sidewalk did not make JFM liable for her injuries, Dezoma contends that this ordinance gave JFM the right to influence the condition of the sidewalk by choosing whether to remove the snow, and thus made the public sidewalk a place of employment. However, based on ***Buckley v. Park Bldg. Corp.***, 31 Wis. 2d 626, 631-33, 143 N.W.2d 493 (1966), JFM's failure to remove the snow and ice or otherwise remedy the icy conditions on the public sidewalk, standing alone, cannot render it liable under the safe-place statute.