COURT OF APPEALS
DECISION
DATED AND FILED

February 9, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP544 **Cir. Ct. No. 2014CV31**

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

MICHAEL A. KOCH,

PLAINTIFF-APPELLANT,

HEALTH PARTNERS,

INVOLUNTARY-PLAINTIFF,

V.

LITTLE BLACK MUTUAL INSURANCE COMPANY, MCCLAY ENTERPRISES WAUSAU, LLC AND MCCLAY ENTERPRISES WAUSAU, LLC,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Reversed and cause remanded for further proceedings.*

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

¶1 PER CURIAM. Michael Koch appeals a summary judgment dismissing his negligence and safe place statute claims against Little Black Mutual Insurance Company and McClay Enterprises Wausau, LLC (collectively, "McClay"). Koch sued for damages arising out of injuries he sustained when he slipped and fell on accumulated snow and ice in front of McClay's apartment building in the Village of Wittenberg. We conclude genuine issues of material fact precluded summary judgment. Accordingly, we reverse and remand for further proceedings.

¶2 The area in front of McClay's apartment building is covered by a concrete pad running from the street curb to the front edge of the building. As Koch approached the pad on the date of the accident, he noticed various levels of snow and ice accumulation. Some parts of the pad were partially cleared and snow was piled on other parts. As Koch approached an area where it appeared other people had traversed, he realized it was slippery but before he could get off the area, he slipped and fell.

¶3 Within a few days of the accident, Koch made contact with Shawn McClay, a member of the LLC, out of concern that other pedestrians may fall and injure themselves. Shawn allegedly told Koch that McClay was responsible for maintaining the area where the accident occurred, and it had hired a third party to do so, but when Koch investigated the matter he found that no one was taking care of the snow and ice at the property. McClay's insurance adjuster also told Koch the area of the fall was McClay's responsibility to maintain.

¶4 On January 6, 2011, the Village issued correspondence to McClay stating the Village had received several complaints indicating McClay was in

violation of municipal code provisions requiring sidewalks to be cleared of snow and ice. The letter further stated, "Right now the sidewalk is treacherous."

¶5 In moving for summary judgment, McClay insisted the accident occurred on the public sidewalk, asserting that "Koch confirmed as much in his deposition[.]" McClay argued the owner of property abutting a street is not liable for injuries resulting from the failure to remove natural accumulations of snow and ice on a public sidewalk.[1] Because the accident occurred on a public sidewalk, McClay further contended the safe place statute did not apply. Finally, McClay argued Koch's negligence exceeded any possible negligence of McClay as a matter of law. After a hearing, the circuit court granted summary judgment dismissing Koch's complaint. Koch now appeals.

¶6 When reviewing a summary judgment, we apply the same methodology as the circuit court, and we consider the issues de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party has established entitlement to judgment as a matter of law. ***Id.*** Inferences drawn from the facts contained in the supporting materials are viewed in the light most favorable to the nonmoving party. *See* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶21-23, 241 Wis. 2d 804, 623 N.W.2d 751. Doubts as to the existence of a genuine issue of material fact are resolved against the moving party. ***Id.***

[1] On appeal, McClay argues for the first time that the sidewalk at issue meets the statutory and municipal code definitions for sidewalks. Regardless of the definition of "sidewalk," which we need not reach, there is a genuine issue of material fact as to the location of Koch's accident on the concrete area between the street and the apartment building, and whether that location was on a public sidewalk or on McClay's property.

¶7 The summary judgment evidence did not establish as a matter of law that Koch's accident occurred on a public sidewalk. There was a cement pad from the street to the entrance of the apartment building over which snow and ice had accumulated. Koch stated that as he approached the area of his fall, he could see where the general public had traversed. However, the location of the area the public had traversed is unclear in the summary judgment record, as is the exact location of the accident. Quite simply, there is no evidence sufficient to determine, on summary judgment, that Koch fell on a public sidewalk owned by the municipality rather than while walking on that portion of the cement pad located on McClay's property. The general public can travel over either area.

¶8 It is not dispositive that Koch stated in his deposition that he slipped and fell on "the sidewalk, and we are not persuaded that Koch's affidavit in opposition to summary judgment should be disregarded as a sham affidavit. *See* ***Yahnke v. Carson***, 2000 WI 74, ¶2, 236 Wis. 2d 257, 613 N.W.2d 102. As Koch's affidavit explained: "I am not knowledgeable as to a legal definition of sidewalks. The area from the street curb is cemented to the building. The area your affiant fell on was in the cemented area between the street curb and the building …."

¶9 In its oral decision, the circuit court recognized that no party put into evidence any survey identifying the location of the public sidewalk versus that of McClay's property in the area of the accident. Nevertheless, the court went on to state:

> But everybody pretty much agrees it's out on the common area of the sidewalk, so it's almost certain, unless I had other evidence that would indicate different, its almost certain that the Village actually owns this land where the slip and fall occurred. So it's a sidewalk there.

> ….
>
> Well here you're really arguing McClay did not – it was a little vague I recognize because he says he hired somebody that did a bad job.
>
> ….
>
> Well actually I looked through the affidavits and I can't find any kind of logical factual basis for saying that that sidewalk was owned by McClay Enterprises. There is nothing like a survey there. There's not even a map from like the official city map.

¶10 We conclude the summary judgment evidence, viewed most favorably to Koch, raises alternative reasonable inferences concerning where Koch was walking when he fell and whether McClay may be liable, resulting in a disputed issue of material fact properly to be decided by the jury. Circuit courts do not make findings of fact in deciding a summary judgment motion. *See* ***Camacho v. Trimble Irrevocable Trust***, 2008 WI App 112, ¶11, 313 Wis. 2d 272, 756 N.W.2d 596. Indeed, summary judgment is only proper when there is no genuine issue of material fact.

¶11 On this record, the circuit court erred by finding on a motion for summary judgment that the accident occurred on a public sidewalk owned by the municipality. Accordingly, we reverse the judgment dismissing Koch's complaint and remand for further proceedings.

¶12 In its oral decision, the circuit court did not specifically address the applicability of the safe place statute. WISCONSIN STAT. § 101.11(1) (2013-14) provides, "Every employer … shall furnish a place of employment which shall be safe for employees and for frequenters thereof." 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). Exceptions may arise,

for example, when an abutting landowner exercises almost exclusive dominion and control over the public sidewalk. *See* ***id.*** at 632. However, because we conclude the circuit court erred by finding the accident occurred on a public sidewalk, and that a genuine issue of material fact exists as to the location of Koch's accident, we need not further address alternative theories based on the safe place statute.

¶13 McClay also argued on summary judgment that Koch's negligence exceeded any possible negligence of McClay as a matter of law. Where a plaintiff's negligence "clearly exceeds the defendant's, summary judgment may be appropriate as a matter of law." *See* ***Kloes v. Eau Claire Cavalier Baseball Ass'n***, 170 Wis. 2d 77, 88, 487 N.W.2d 77 (Ct. App. 1992). However, summary judgment based on apportionment of negligence is not easily granted, and is generally a question of fact to be decided by the jury. *See* ***Hansen v. New Holland N. Am. Inc.***, 215 Wis. 2d 655, 667-69, 574 N.W.2d 250 (Ct. App. 1997). McClay fails to persuade us that summary judgment based on apportionment of negligence should be granted based on the record.

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).