

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 2003

Cornelia G. Clark
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. 02-0904

Cir. Ct. No. 00-CV-214

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**LUCILLE FUNK, C/O CAROLE VAN GILDER, PERSONAL
REPRESENTATIVE,**

PLAINTIFF-APPELLANT,

v.

**MARKETPLACE FOODS AND SOCIETY INSURANCE, A
MUTUAL COMPANY,**

**DEFENDANTS-THIRD-
PARTY PLAINTIFFS-RESPONDENTS,**

MEDICARE PARTS A & B,

**DEFENDANT-THIRD-
PARTY PLAINTIFF,**

v.

**SUPERIOR GLASS, S&S GLASS, INC., SELECTIVE
INSURANCE AND ABC INSURANCE COMPANY,**

**DEFENDANTS-THIRD-
PARTY DEFENDANTS.**

APPEAL from a judgment of the circuit court for Barron County:
JAMES C. EATON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Lucille Funk, by her personal representative, appeals a summary judgment dismissing her personal injury claims against Marketplace Foods and its insurer, Society Insurance. We reject Funk’s arguments and affirm the judgment.

BACKGROUND

¶2 In June 2000, Funk filed suit against Marketplace Foods alleging she had sustained injuries as a result of Marketplace’s negligence and/or violation of the safe place statute, WIS. STAT. § 101.11.¹ Specifically, Funk claimed that as she was entering Marketplace, the automatic sliding doors bumped her cane as they closed, causing her to fall and break her hip.

¶3 Marketplace subsequently filed a third-party complaint for contribution against S&S Glass, the doors’ distributor, and Superior Glass, the company that had performed maintenance on the doors. Although Funk amended her complaint with direct claims of negligence against S&S Glass and Superior Glass, the claims against S&S Glass and Superior Glass were ultimately dismissed by stipulation. Marketplace subsequently moved for summary judgment.

¶4 In its order granting Marketplace’s summary judgment motion, the circuit court concluded that “any alleged defect to the automatic sliding doors ...

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

was an unsafe condition associated with the structure rather than a structural defect,” thus requiring either actual or constructive notice of defect. The court ultimately determined there was insufficient evidence “of any material causal defect of the automatic sliding doors and no proof that Marketplace Foods had any actual or constructive notice of any causal defect or malfunction of said doors.” This appeal follows.

ANALYSIS

¶5 This court reviews summary judgment decisions independently, applying the same standards as the circuit court. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶6 Wisconsin’s safe place statute is a negligence statute that “establishes a duty greater than that of ordinary care imposed at common law.” *Barry v. Employers Mut. Cas. Co.*, 2001 WI 101, ¶18, 245 Wis. 2d 571, 630 N.W.2d 522. The statute imposes three duties on owners of public buildings: the duties to construct, to repair and to maintain a safe public building. Safe place cases, however, tend to focus on the property condition that caused the injury rather than on the duty that the property owner breached. *Id.* at ¶21. To that end, there are two relevant categories of unsafe property conditions: (1) structural defects; and (2) unsafe conditions associated with the structure. *Id.* This distinction is important because of the differing notice requirements for each.

¶7 A property owner “is liable for injuries caused by structural defects regardless of whether he or she knew or should have known that the defect

existed.” *Id.* at ¶22. However, where the property condition that causes the injury is an unsafe condition associated with the structure, the property owner may be held liable only if he or she had actual or constructive notice of the defect. *Id.* at ¶23.

¶8 A defect is “structural if it arises by reason of the materials used in construction or from improper layout or construction.” *Id.* at ¶28. In other words, “a structural defect is a hazardous condition inherent in the structure by reason of its design or construction.” *Id.* In contrast, an unsafe condition associated with the structure is described as that “which involves the structure (or the materials with which it is composed) becoming out of repair or not being maintained in a safe manner.” *Id.* at ¶25.

¶9 Funk argues the circuit court erred by concluding that any alleged defect in the doors was an unsafe condition associated with the structure rather than a structural defect. Specifically, Funk claims that because the doors are “built in and fixed within the walls,” they are properly categorized as structural. We are not persuaded. Although “fixed within the walls,” the doors are more properly described as components installed within the building. Any alleged defect resulted from a failure to repair or maintain the doors, not a failure to safely construct the structure in which they were installed. *See id.* at ¶30.

¶10 Because any alleged defect to the automatic sliding doors was an unsafe condition associated with the structure, Funk must show that Marketplace had either actual or constructive notice of the alleged defect. Regardless of the notice issue, however, Funk has failed to identify any causal defect in the doors. She contends that the doors are unsafe because they close on “slow-moving people” and people standing in the open doorway. Funk cites deposition

testimony of Michael Laeuger, an engineer for an automatic door manufacturer, as evidence that the doors' operation "violated industry standards in several respects." Funk also cites alternative mechanisms for automatically opening doors and various repair invoices as evidence of some inherent defect in these particular automatic doors. However, the mere existence of alternative mechanisms or alternative types of doors does not establish a defect in Marketplace's doors. With respect to repairs, the doors were serviced approximately five weeks before Funk's fall. No defect was identified in the interim preceding Funk's fall nor in the doors' inspection immediately after her fall.

¶11 Further, Laeuger ultimately opined that "the doors were functioning properly within industry standards." Laeuger concluded that the "settings for motion and presence in the threshold of the doors were reasonably safe and were consistent with industry recommended settings for normal to high traffic facilities such as grocery stores." Laeuger averred, "I have no information to change my opinion to a reasonable degree of engineering probability that the doors at Marketplace Foods ... [on the day of Funk's fall] were functioning as designed and installed and were as safe as the premises would reasonably permit." Because Funk has failed to identify any specific causal defect, it is unclear what Marketplace would have notice of.

¶12 Funk's failure to identify a specific defect notwithstanding, Funk failed to prove that Marketplace had either actual or constructive notice of any alleged defect. Funk cites eight prior complaints Marketplace received concerning the doors closing on customers. These past complaints, however, did not inform on the condition of the doors on the day in question, especially in light of the record of repairs made and the doors' problem-free operation since the last complaint.

¶13 Alternatively, Funk argues the circuit court erred by determining there was no genuine issue of material fact concerning whether the doors were as safe as the nature of the premises would reasonably permit. As noted above, Funk failed to identify any causal defect in the doors. In fact, the circuit court noted there was no claim alleging defect or negligence in the design, manufacture, installation or maintenance of the doors. The engineering expert opined to a reasonable degree of engineering probability that the doors were functioning as designed and installed and were as safe as the premises would reasonably permit. Because the undisputed evidence is that the doors functioned as intended, the circuit court properly concluded there was insufficient evidence of a defect or malfunction to submit the case to a jury.

By the Court.—Judgment affirmed.

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

