COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1096-FT **Cir. Ct. No. 01CV000023**

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

THOMAS J. ENDERS,

PLAINTIFF-APPELLANT,

WEA INSURANCE CORPORATION,

SUBROGATED-INSURER-APPELLANT,

V.

NORTHWOODS INN AND INDIANA INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Forest County: J. MICHAEL NOLAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Thomas J. Enders and WEA Insurance Corporation appeal a summary judgment dismissing Enders' claim against Northwoods Inn and its insurer, Indiana Insurance Company, arising out of Enders' slip and fall on a

public sidewalk abutting the Inn.[1] Enders argues that the trial court erroneously concluded that the Inn had no duty under the safe place statute, WIS. STAT. § 101.11, to keep the sidewalk clear of snow and ice. Because the record fails to support his argument, we affirm the judgment.

¶2 The facts are undisputed. The record discloses that Enders slipped and fell on ice and snow on a public sidewalk near the entrance to Northwoods Inn, a restaurant in Laona, Wisconsin. Enders testified that the sidewalk was not well taken care of and was slippery when he fell. The Inn's proprietor, Curt Spencer, testified at his deposition that because Laona did not clear snow and ice from the sidewalk adjacent to the Inn, he and his friends would plow and shovel the sidewalk. He also stated that he used salt to melt ice on the sidewalk. He tended to the sidewalk because Laona did not.

¶3 Enders brought this action against the Inn, claiming that under WIS. STAT. § 101.11, the safe place statute,[2] the Inn was liable for injuries he sustained in the fall. On the Inn's motion for summary judgment, the circuit court concluded that there was no evidence that Spencer had taken control of the sidewalk so as to create a safe place duty under Wisconsin law. The court granted the Inn's motion for summary judgment. Enders appeals the judgment.

¶4 Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08. We review an order for summary judgment applying the same

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] Enders also pled an alternative theory of negligence. Enders does not raise his claim of negligence on appeal.

methodology as the trial court, ***M&I First Nat'l Bank v. Episcopal Homes Mgmt.***, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995), and owing no deference to the trial court's determination. ***Waters v. United States Fid. & Guar. Co***., 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). We will reverse a summary judgment if the trial court incorrectly decided a legal issue or if material facts were in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

¶5 Enders argues that under the safe place statute, the Inn owes him a legal duty to keep the public sidewalk at its entrance clear of snow and ice. We conclude the record fails to support Enders' argument. Under the safe place statute, an employer has the duty to maintain a place of employment safe for both employees and frequenters. ***Schwenn v. Loraine Hotel Co.***, 14 Wis. 2d 601, 607-08, 111 N.W.2d 495 (1961). The accumulation of ice and snow has been found to be a safe place statute violation. ***Id.*** at 608-09. However, our supreme court has ruled "for an area open to the public to be deemed a place of employment, the owner of the adjoining premises must have almost complete dominion and control over the area in question." ***Gordon v. Schultz Savo Stores***, 54 Wis. 2d 692, 697, 196 N.W.2d 633 (1972).

¶6 In ***Schwenn***, a hotel was found to have controlled a driveway near its entrance where the plaintiff fell. Although the city owned the driveway, it was undisputed that general vehicular traffic never used the semi-circular driveway in front of the hotel. ***Id.*** at 604. The driveway

> was not used for general public vehicular or pedestrian travel, but almost exclusively for the loading and unloading of guests and luggage from taxis and private autos. There was evidence that the city had never removed snow from the driveway; that the city had no signs posted in and along

> the driveway; that the city police never ticketed cars parked in that area.
>
> A full-time doorman was employed by the hotel to assist arriving and departing guests at vehicles in the driveway. The doorman was so assisting a guest of the hotel when the accident happened. The hotel kept two private "no parking" signs on the drive. It also owned and maintained a "no parking, taxi stand" sign. One of the doorman's duties was to keep unauthorized vehicles out of the driveway. Officers of the hotel sometimes parked there. The doorman and other hotel employees occasionally cleaned the driveway of snow and the hotel permitted other private parties to plow it.

Id. On these facts, the driveway was found to be a place of employment under the safe place statute.

¶7 Here, the proofs fail to raise a material issue of fact with respect to the Inn's control and dominion. The only evidence of control or dominion is Spencer's testimony that he shoveled and salted the public sidewalk abutting his establishment. There is no evidence that he excluded members of the general public, erected signs indicating a private way or employed a doorman to assist customers entering or exiting the Inn. We conclude that the evidence of shoveling and salting falls short of creating an issue of dominion and control.

¶8 Enders argues, nonetheless, that the doorman in ***Schwenn*** shoveled snow, and control need not be exclusive. He adds: "The ***Schwenn*** case contains no facts that show that the hotel deliberately excluded members of the public from using the public walk way."[3] We disagree. ***Schwenn*** points out that the hotel "maintained a doorman whose work included keeping the driveway free of

[3] Because the ***Schwenn*** involved a fall in the "driveway," we assume Enders' reference to "walk way" was intended to mean "driveway." *See* ***Schwenn v. Loraine Hotel Co.***, 14 Wis. 2d 601, 603, 111 N.W.2d 495 (1961).

unauthorized vehicles." ***Id.*** at 606. The hotel permitted parking only by guests, hotel personnel, and taxicabs. ***Id.*** ***Schwenn*** does not support Enders' contention that merely shoveling snow and salting ice fulfill the requisite dominion and control factor. We conclude that the circuit court correctly entered summary judgment in favor of Northwoods Inn and its insurer.

By the Court.—Judgment affirmed.

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