COURT OF APPEALS
DECISION
DATED AND FILED

December 29, 2015

Diane M. Fremgen
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. 2015AP543 **Cir. Ct. No. 2014CV77**

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

THERESA M. JOHNSON AND STEVEN M. JOHNSON,

PLAINTIFFS-APPELLANTS,

V.

HELLO THE HOUSE, LLC,

DEFENDANT,

JONATHAN S. PICARD, KATHLEEN M. PICARD, AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND BLUE CROSS BLUE SHIELD OF MINNESOTA,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for St. Croix County: HOWARD W. CAMERON, JR., Judge. *Affirmed*.

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

¶1 PER CURIAM. Theresa Johnson and her husband, Steven Johnson, sued Jonathan and Kathleen Picard and their insurer, American Family Mutual Insurance Company, as a result of Theresa's slip and fall on an icy sidewalk in front of a building owned by the Picards. The circuit court dismissed the Johnsons' claims on summary judgment, concluding the Picards had no duty to Theresa because the ice accumulation on which she slipped was natural, as opposed to artificial. We agree with that conclusion. We also agree with the Picards that, even if the accumulation of ice was artificial, the Johnsons' claims are barred by WIS. STAT. § 893.89, the ten-year statute of repose for claims alleging injuries resulting from improvements to real property.[1] We therefore affirm.

BACKGROUND

¶2 The Picards own a five-unit commercial building located at 226 Locust Street in Hudson. Photographs in the record show that the building has a flat, rubber roof. On the side of the building nearest the street, a portion of the roof projects away from the building and hangs over the sidewalk. The roof slopes up to the top of this overhang, which appears to be at least one foot higher than the flat portion of the roof. The overhang has a metal edge that appears to be a few inches wide.

¶3 On March 5, 2013, Theresa slipped and fell on ice located on a municipal sidewalk in front of the Picards' building. The Johnsons sued the Picards, asserting negligence and safe place claims. In her deposition, Theresa

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

asserted the ice on the sidewalk had formed as a result of water dripping off the edge of the building's overhang. She described a "row of ice under that edge of that awning" that was four to eight inches wide.

¶4 Jonathan Picard testified at his deposition that he and his wife had owned the Locust Street building for ten years. Picard testified the overhang was in place when they purchased the building, and its condition had not changed since that time. Picard further testified he first noticed water dripping from the overhang "probably as soon as [he] bought the building." He also opined that the building's poor insulation might have contributed to snow melting and dripping from the edge of the overhang onto the sidewalk. He confirmed the insulation had not been modified since he and his wife purchased the property.

¶5 The Picards moved for summary judgment, arguing: (1) they had no duty to Theresa to clear the sidewalk in front of their building because the accumulation of ice was natural, rather than artificial; and (2) even if the accumulation of ice was artificial, the Johnsons' claims were barred by WIS. STAT. § 893.89.

¶6 In opposition to the Picards' motion, the Johnsons argued there was evidence the water dripping from the overhang was caused by negligent maintenance, which would render the accumulation of ice on the sidewalk artificial. The Johnsons also argued WIS. STAT. § 893.89 did not apply because "it [was] not the design of the roof drainage system that [was] claimed to be the problem, but rather a failure to properly repair or maintain it."

¶7 In support of their arguments, the Johnsons submitted an affidavit of Scott Harris, a roofing expert. Harris averred, in relevant part:

> 6. It is my opinion to a reasonable degree of professional probability that the roof defects, as outlined in Exhibit A, are the result of a failure to properly maintain and repair the roof.
>
> 7. It is my opinion to a reasonable degree of professional probability that the roof defects, as outlined in Exhibit A, are causing rain water and melting snow/ice to discharge onto the public sidewalk in front of the building.

Exhibit A, in turn, noted holes in the building's rubber roofing and evidence of water ponding "due to inadequate roof tapered system." Exhibit A also stated, "The edge metal at the front of the building should be tapered towards the roof, however due to possible structure failure or lack of proper design/build there are sections of the edge metal that are directing water over the front entry of the building."

¶8 The circuit court granted the Picards summary judgment, concluding the accumulation of ice on the sidewalk was natural. The court reasoned the source of the dripping water was the edge of the overhang, rather than poor insulation or any defects in the rubber roofing on the flat portion of the roof. As for the metal edge of the overhang, the court observed Harris had merely stated it was "possible" that the edge had suffered a structural failure causing water to drip onto the sidewalk, as opposed to having been initially designed or built with a slope toward the sidewalk. Accordingly, the court concluded Harris' opinion was insufficient to create a genuine dispute of material fact regarding whether the ice accumulation was artificial.

DISCUSSION

¶9 We review a grant of summary judgment independently, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when

there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

I. The accumulation of ice on the sidewalk where Theresa slipped was natural.

¶10 In Wisconsin, when ice or snow accumulates on a public sidewalk abutting private property, the property owner owes no duty to pedestrians to clear or scatter abrasive material on the sidewalk. ***Holschbach v. Washington Park Manor***, 2005 WI App 55, ¶10, 280 Wis. 2d 264, 694 N.W.2d 492. However, the owner may be liable for injuries caused by an artificial, as opposed to natural, accumulation of ice or snow. ***Id.***

¶11 Whether an accumulation of ice or snow was natural or artificial is a question of law that we review independently. ***Id.*** "[W]henever land grading and structures on the property are built in a usual and ordinary way and not for the purpose of accumulating and discharging runoff on a public sidewalk, the courts will deem the incidental drainage that results natural." ***Id.***, ¶11. Conversely, "when a property owner by negligent omission allows water to accumulate where one would only expect to find a normal amount thereof—for example by failing to properly repair a drainage system—then an artificial condition exists." ***Id.***

¶12 Here, the Johnsons argue the accumulation of ice on the sidewalk in front of the Picards' building was artificial because it was caused either by defects in the building's roof or inadequate insulation. Neither contention has merit.

¶13 The Johnsons rely on Harris' affidavit to support their contention that defects in the building's roof were to blame for the accumulation of ice on the sidewalk. In the affidavit, Harris averred, to a reasonable degree of professional probability, that the defects "outlined in Exhibit A" were causing water to be

discharged onto the sidewalk and were caused by the Picards' failure to properly maintain and repair the roof. A careful review of Exhibit A shows that Harris identified defects in two areas of the building's roof.

¶14 First, Exhibit A states there are holes in the building's rubber roofing and evidence of water ponding "due to inadequate roof tapered system." These defects are immaterial, for purposes of this case, because they pertain to the flat portion of the roof. It is undisputed that the accumulation of ice on the sidewalk where Theresa fell was caused by water dripping off the edge of the overhang, which is at least one foot above the flat portion of the roof. The Johnsons and their expert do not explain how any defects in the flat portion of the roof could have caused water to travel upward over one foot in order to drip off the edge of the overhang.

¶15 Exhibit A also states the metal edge of the overhang is defective because it should be tapered toward the roof, but it is instead directing water onto the sidewalk in front of the building. There is no evidence the metal edge was designed or built in this way for the purpose of discharging water onto the sidewalk. *See* ***id.*** Instead, the Johnsons argue the Picards failed to properly maintain the metal edge, and, as a result, "[t]he amount of discharge on the sidewalk due to [that defect] is more than incidental and more than one would expect if the roof was properly maintained."

¶16 However, the Johnsons have not submitted sufficient evidence on this point to create a genuine issue of material fact requiring a trial. Exhibit A merely states the metal edge is defective "due to *possible* structure failure *or* lack of proper design/build[.]" (Emphasis added.) The *possible* occurrence of a structural failure, by some unexplained means, is insufficient to support a finding

that the ice accumulation was the result of the Picards' failure to repair the edge of the overhang.[2] That the edge may have been improperly designed or built in the first place is not a basis to determine the resulting ice accumulation was artificial, unless the edge was designed with the intent to divert water onto the sidewalk. Again, there is no evidence of that intent.

¶17 The Johnsons' theory that the ice accumulation was artificial because it was caused by the building's poor insulation is also unavailing. Again, there is no evidence the building was poorly insulated for the purpose of discharging water onto the sidewalk. Moreover, a building's degree of insulation is an aspect of its design and construction, and the undisputed evidence shows that the building's insulation has remained unchanged since the Picards purchased the property over ten years ago. There is no evidence to suggest that the Picards failed to repair the insulation, so as to render any ice accumulation that it may have caused artificial.

¶18 The Wisconsin Supreme Court's decision in ***Corpron v. Safer Foods, Inc.***, 22 Wis. 2d 478, 126 N.W.2d 14 (1964), supports our conclusion that the circuit court properly determined the ice accumulation in this case was natural. In ***Corpron***, the plaintiffs slipped on ice that formed as a result of water dripping off the edge of a canopy extending from the defendant's building. ***Corpron***, 22 Wis. 2d at 480. The supreme court concluded the ice accumulation was natural, reasoning:

[2] Although Harris stated his opinions were to a reasonable degree of professional probability, an opinion to a reasonable degree of professional probability that the defect in the metal edge was *possibly* the result of structural failure is nevertheless insufficient to create a genuine issue of material fact.

> There is no contention that the canopy was constructed for the purpose of accumulating and discharging water onto the sidewalk. There was no proof that it was not built in the usual and ordinary manner for such structures. It was provided with a drain. There was no proof of defective maintenance of the canopy or drain.

Id. at 485.

¶19 The same analysis applies in this case. The Johnsons do not contend any part of the Picards' building was constructed for the purpose of accumulating water and discharging it onto the sidewalk. There is no evidence to suggest that either the metal edge of the overhang or the building's insulation was installed in an unusual or extraordinary manner. Finally, the evidence is insufficient for a reasonable juror to conclude that any defects in the edge or insulation are the result of the Picards' failure to repair the building. Accordingly, the circuit court properly concluded the ice accumulation on which Theresa fell was natural, and the Picards were therefore entitled to summary judgment.

II. WISCONSIN STAT. § 893.89 bars the Johnsons' claims.

¶20 Alternatively, the Picards argue WIS. STAT. § 893.89, the ten-year statute of repose for claims alleging injuries resulting from improvements to real property, bars the Johnsons' claims. Because we conclude the ice accumulation was natural, and the Picards are therefore entitled to summary judgment, we do not strictly need to address the Picards' argument regarding the statute of repose. However, the parties fully addressed the statute of repose in their briefing, and it provides an independent basis for our conclusion that the circuit court properly granted the Picards summary judgment. We therefore choose to address the issue.

¶21 The interpretation of WIS. STAT. § 893.89 presents a question of law for our independent review. ***Mair v. Trollhaugen Ski Resort***, 2006 WI 61, ¶15, 291 Wis. 2d 132, 715 N.W.2d 598. Section 893.89(2) provides, in relevant part:

> [N]o cause of action may accrue and no action may be commenced … against the owner or occupier of the property … after the end of the exposure period, to recover damages for any injury to property, for any injury to the person, or for wrongful death, arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property.

The statute defines the term "exposure period" as "the 10 years immediately following the date of substantial completion of the improvement to real property." Sec. 893.89(1). However, the ten-year statute of repose does not apply to "[a]n owner or occupier of real property for damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property." Sec. 893.89(4)(c).

¶22 It is undisputed that the overhang on the Picards' building was designed and constructed more than ten years before Theresa's accident. It is also undisputed that the building's insulation was installed more than ten years before the accident. Thus, unless the exception set forth in WIS. STAT. § 893.89(4)(c) applies, the statute of repose bars the Johnsons' claims.

¶23 The Johnsons argue the exception applies because the roof of the Picards' building is in poor condition and needs repair or replacement. While that may be true, it is immaterial for purposes of this case, for the reasons noted above. *See supra*, ¶14. Again, the record demonstrates that any holes or water ponding on the building's roof are not the cause of the ice on the sidewalk. Rather, it is undisputed that the accumulation of ice is caused by water dripping off the metal

edge of the overhang, which is at least a foot above the flat surface of the roof. As discussed above, the evidence is insufficient to support a conclusion that the metal edge sustained a structural failure that the Picards negligently failed to repair. *See supra*, ¶¶15-16.

¶24 The Johnsons also cite several cases for the proposition that WIS. STAT. § 893.89 bars claims arising from structural defects but does not bar claims arising from unsafe conditions associated with the structure. *See* ***Anderson v. Proctor & Gamble Paper Prods. Co.***, 924 F. Supp. 2d 996, 1005 (E.D. Wis. 2013); ***Mair***, 291 Wis. 2d 132, ¶¶17-18; ***Calewarts v. CR Meyer & Sons Co.***, No. 2011AP1414, unpublished slip op. ¶35 (WI App July 3, 2012). Relying on ***Calewarts***, the Johnsons argue insulation is not a structural defect. Consequently, they contend the Picards "cannot claim that [§ 893.89] protects them from liability [for] the artificial accumulations … caused by poor insulation."

¶25 ***Calewarts*** is easily distinguishable from this case. The defendant in ***Calewarts*** manufactured and printed wrappers for various types of food. ***Calewarts***, No. 2011AP1414, ¶3. The defendant's operations were housed in a building owned by another entity. ***Id.*** The defendant installed steam-powered printing presses in the building, and the steam pipes running to the presses were wrapped with asbestos insulation. ***Id.***, ¶5. Workers routinely tore off and replaced sections of the insulation when they needed to repair the steam pipes. ***Id.***, ¶6. The plaintiff alleged her husband, who worked in the facility, had contracted mesothelioma and died as a result of exposure to the asbestos insulation. ***Id.***, ¶2.

¶26 One issue in ***Calewarts*** was whether, for purposes of the safe place statute, the deceased's exposure to asbestos was caused by a structural defect or an

unsafe condition associated with the structure. ***Id.***, ¶¶23-24. On appeal, we observed:

> A defect is structural if it arises "by reason of the materials used in construction or from improper layout or construction." Thus, unlike a condition associated with the structure, which may develop over time, a structural defect is a hazardous condition inherent in the structure by reason of its design or construction.

Id., ¶23 (quoted source omitted). Applying these principles, we concluded the deceased's asbestos exposure resulted from an unsafe condition associated with the structure because there was "no evidence that the insulation was improperly installed or otherwise defective" and it was "well-known that [asbestos] is harmless if not disturbed." ***Id.***, ¶24.

¶27 Unlike ***Calewarts***, which involved insulation wrapped around steam pipes that were installed in a building after its construction, this case involves insulation of a building itself. Further, unlike the insulation in ***Calewarts***, there is no evidence the insulation at issue in this case was routinely torn out, replaced, or otherwise altered. To the contrary, the undisputed evidence demonstrates that the insulation has remained unchanged since at least the time the Picards purchased the building. As a result, ***Calewarts*** does not compel a conclusion that the insulation in this case is an unsafe condition associated with the structure rather than a structural defect.

By the Court.—Order affirmed.

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