

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 10, 2018

Sheila T. Reiff
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. 2017AP479

Cir. Ct. No. 2015CV67

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

GEORGE HAYS AND WENDY HAYS,

PLAINTIFFS-APPELLANTS,

V.

**MILL CREEK LAND AND CATTLE Co., LLC AND AUTO-OWNERS
INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Buffalo County:
JOSEPH D. BOLES, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. George Hays and Wendy Hays appeal a circuit court order that dismissed the Hays' negligence action against Mill Creek Land and Cattle Co., LLC, and its insurer. The Hays argue that Mill Creek was

negligent in failing to install a handrail on the stairway in the property that the Hays rented from Mill Creek. We conclude that the circuit court properly dismissed the Hays' action because their claims are barred by a statute of repose, WIS. STAT. § 893.89 (2015-16)¹. We affirm.

¶2 The Hays filed this negligence action against Mill Creek after George Hays fell and sustained injuries while walking down the stairs in the house that the Hays rented from Mill Creek. The Hays alleged that George Hays' injuries were caused by Mill Creek's negligence in failing to provide a handrail for the stairs.

¶3 Mill Creek moved for summary judgment. It argued that the Hays' claims were barred by the statute of repose because no changes, modifications, or alterations had been made to the stairway in the nineteen years that it had owned the property prior to the accident.

¶4 The Hays opposed summary judgment. They argued that the rental agreement between the Hays and Mill Creek required Mill Creek to maintain the property and to comply with the building code, and that Mill Creek was therefore negligent by failing to provide a handrail for the staircase in violation of the building code. They argued that the statute of repose did not allow Mill Creek to disregard its obligation to follow the rental agreement and the building code.

¶5 The circuit court granted summary judgment to Mill Creek based on WIS. STAT. § 893.89. The court determined that the Hays' negligence claim was

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

barred by the statute of repose because the lack of a handrail was a structural defect and there had been no alteration to the stairway for at least nineteen years prior to the accident. The Hays appeal.

¶6 “A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law.” *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503 (citations omitted). Under our summary judgment methodology, we must examine the moving party’s submissions to determine whether they establish a prima facie case for summary judgment. *Id.* If the moving party has made a prima facie case for summary judgment, we then examine the opposing party’s submissions to determine whether there are material facts in dispute to preclude summary judgment. *Id.* “We review de novo the grant of summary judgment, employing the same methodology as the circuit court.” *Id.*

¶7 Any action for injury resulting from improvements to real property is subject to the builder’s statute of repose, WIS. STAT. § 893.89. See *Mair v. Trollhaugen Ski Resort*, 2006 WI 61, ¶¶16-35, 291 Wis. 2d 132, 715 N.W.2d 598. The statute of repose bars claims based on structural defects starting ten years after the structure is completed, but does not apply to claims of “negligence in the maintenance, operation or inspection of an improvement to real property.” *Id.*, ¶29; WIS. STAT. §§ 893.89(1), (2) and (4)(c).

¶8 The Hays contend that the statute of repose does not bar their negligence action because, according to the Hays, the failure to install a handrail is “negligence in the maintenance, operation or inspection of an improvement to real property.” They assert that the lack of a handrail is not a “structural defect” that would be covered by the statute of repose but, rather, an “unsafe condition

associated with the structure” arising from Mill Creek’s failure “to repair or maintain the property ... in a safe manner” that is excepted from the statute of repose. See *Mair*, 291 Wis. 2d 132, ¶23. Hays also contend that the rental agreement expressly required Mill Creek to comply with WIS. STAT. § 704.07 by keeping the premises in a reasonable state of repair and in compliance with building codes, and to comply with WIS. ADMIN. CODE § ATCP 134.04 by disclosing that the lack of a handrail was a building code violation. Hays point to the affidavit of a property manager that they submitted in opposing summary judgment, in which the property manager opined that Mill Creek failed to meet the standard of care required of a landlord by failing to install a handrail. The property manager asserted that the building codes required a handrail for the stairs, and that a reasonable landlord would have been aware of the requirement for a handrail and would have had one installed. The Hays contend that summary judgment should not have been granted because there is a disputed issue of material fact as to whether Mill Creek was negligent by failing to comply with the rental agreement and the building codes.

¶9 We conclude that there is no genuine issue of material fact, and the Hays’ action is barred by the statute of repose because the lack of a handrail is a structural defect rather than an unsafe condition associated with the structure. “[A] structural defect is a hazardous condition inherent in the structure by reason of its design or construction.” *Id.*, ¶22 (quoting *Barry v. Employers Mut. Cas. Co.*, 2001 WI 1, ¶28, 245 Wis. 2d 560, 630 N.W.2d 517). In contrast, “an unsafe condition associated with the structure arises from ‘the failure to keep an originally safe structure in proper repair or properly maintained.’” *Id.*, ¶23 (quoting *Barry*, 245 Wis. 2d 560, ¶27). Our supreme court has explained that unsafe conditions associated with a structure “generally involve the structure

falling into disrepair or not being maintained in a safe manner.” *Id.* Here, the Hays assert that the stairway was unsafe based on its design; that is, a winding narrow stairway without a handrail. The Hays do not contend that the stairway was unsafe due to disrepair, such as having a broken handrail that had previously rendered the stairway safe. Because the Hays’ claims are based on an allegedly negligent design of the staircase, those fall squarely within the statute of repose.

¶10 In reaching this conclusion, we reject the Hays’ attempts to avoid the statute of repose by describing the lack of a handrail as an unsafe condition associated with the structure rather than a structural defect. They assert that Mill Creek was required to install a handrail as “maintenance” of the premises under the lease agreement and building codes to make the premises safe. However, even if Mill Creek was obligated under the rental agreement and building code to install a handrail, its failure to do so does not amount to an unsafe condition associated with the structure. As explained above, the undisputed evidence establishes that the stairway was designed and constructed without a handrail more than ten years prior to the accident, and there is no evidence that any condition associated with the stairs had fallen into disrepair. Thus, regardless of whether the rental agreement or the building code required Mill Creek to install a handrail, the statute of repose applies because the stairway was designed and constructed without a handrail more than ten years prior to the accident. In other words, even if Mill Creek breached its standard of care under the rental agreement and the building codes by failing to install a handrail, the Hays’ claim based on that negligence is barred by the statute of repose because it is based on the design and construction of the stairway.

¶11 Our decision is consistent with prior cases from this court and the supreme court applying the statute of repose to bar claims of negligence based on

a failure to remedy the original unsafe condition of a property. *See Mair*, 291 Wis. 2d 132, ¶25 (rejecting the plaintiff’s argument that the failure to modify a floor drain to comply with modern safety standards created an unsafe condition associated with the structure, and concluding instead that the defect was structural); *Crisanto v. Heritage Relocation Serv., Inc.*, 2014 WI App 75, ¶25, 355 Wis. 2d 403, 851 N.W.2d 771 (rejecting the plaintiff’s argument that the failure to install a safety gate on an elevator fell within the maintenance exception to the statute of repose, “because every improvement that is negligently designed could be considered an ongoing nuisance that the owner or operator negligently maintains by failing to correct”). Because the allegedly unsafe condition was the design of the stairway, which existed for more than ten years prior to the accident, the Hays’ claims are barred by the statute of repose. Accordingly, we affirm the order dismissing the Hays’ claims on that basis.

By the Court.—Order affirmed.

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

