COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1665 **Cir. Ct. No. 2003CV3817**

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

JOSEPH SORREL,

PLAINTIFF-APPELLANT,

V.

LIVESEY COMPANY LLC AND LIBERTY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

UPHOFF COMPANY, INC. AND RURAL MUTUAL INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Reversed and cause remanded.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Joseph Sorrel appeals a summary judgment order dismissing his safe-place lawsuit against Livesey Company and its insurer (collectively, the mall) for injuries Sorrel sustained when he slipped on ice in a mall parking lot. We conclude there are material issues of fact regarding whether the ice Sorrel slipped on had formed as the result of a structural defect in the parking lot drainage system. Therefore, we reverse the summary judgment order and remand the matter for trial.

BACKGROUND

¶2 For the purpose of this appeal, we view the facts in a light most favorable to the appellant. Sorrel slipped and fell on ice in the mall parking lot on a January afternoon shortly after exiting his vehicle. The ice extended from the sidewalk across the entire parking lot in a strip about three-to-four feet wide. Near the end of the ice patch closest to the mall, there was a downspout that was heated by electrical tape. The downspout discharged water directly onto the parking lot. The parking lot was nearly flat, but had a two-inch deep dip, or trough, about four-to-five feet wide leading to a storm drain 105 feet from the sidewalk. It was along this trough from the downspout to the drain that the ice patch had formed.

¶3 There was no precipitation recorded the day of the incident. There had been trace snowfall the day before the incident, 0.2 inches of snowfall the day before that, and 3.6 inches the day before that. The temperature had not risen above thirty-two degrees for nearly a month preceding the incident. A maintenance man with responsibility for keeping the sidewalks clear also regularly checked the parking lot for ice, but had not done so the day of the incident. The lot had last been plowed and salted two days before the incident. Additional facts from the summary judgment materials will be set forth as necessary below.

STANDARD OF REVIEW

¶4 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). The summary judgment methodology is well established and need not be repeated here. *See, e.g.,* ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Frost v. Whitbeck***, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325 (citations omitted), *aff'd* 2002 WI 129, 257 Wis. 2d 80, 654 N.W.2d 225.

DISCUSSION

¶5 Under WIS. STAT. § 101.11 (2003-04),[1] an owner of a place of employment or a public building has a duty to construct, repair, or maintain the premises, and to provide such safety devises or safeguards as reasonably required to render the premises safe. *See* ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis. 2d 51, 54, 150 N.W.2d 361 (1967). This safe-place statute does not create an independent cause of action; rather, it codifies the existence of a common law duty from a premises owner to a frequenter and sets forth a standard of care to be used in determining negligence. *See* ***Krause v. Veterans of Foreign Wars, Post No. 6498***, 9 Wis. 2d 547, 552, 101 N.W.2d 645 (1960).

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶6 Case law generally recognizes three categories of hazardous property conditions: (1) structural defects; (2) unsafe conditions associated with the structure; and (3) unsafe conditions unassociated with the structure. ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶21 and n.4, 245 Wis. 2d 560, 630 N.W.2d 517. A structural defect is "a hazardous condition inherent in the structure by reason of its design or construction." ***Id.***, ¶28. Structural defects relate to the duty to construct a safe building, while unsafe conditions relate to the duties to repair and maintain the premises. ***Id.***, ¶¶27-28.

¶7 "A property owner or employer is liable for injuries caused by structural defects regardless of whether he or she knew or should have known that the defect existed." ***Id.***, ¶22 (citations omitted). However, in cases involving the repair or maintenance of a condition associated with a structure, the owner must ordinarily have actual or constructive notice of the condition before liability may be imposed. ***Id.***, ¶23. An exception exists when a hazardous condition was created by an affirmative act of the owner, rather than a passive failure to correct the condition. ***Kosnar v. J.C. Penney Co.***, 6 Wis. 2d 238, 242, 94 N.W.2d 642 (1959).

¶8 Sorrel sets forth three distinct theories of liability here. First, he asserts that the ice patch formed as a result of a structural defect in the design of the parking lot drainage system. Alternatively, Sorrel contends, if the court views the discharge of water from the downspout to the parking lot as an unsafe condition associated with the premises rather than a structural defect, the condition was created by an affirmative act of the mall in maintaining the drainage system such that no constructive notice was required. Finally, Sorrel argues that, even if the ice patch resulted from an unsafe condition that the mall passively failed to

correct, there was still a material dispute over whether the mall had constructive notice of the condition.

¶9 We first note that the classification of an alleged defect for purposes of determining whether notice is required is a question of law, if the material facts are not disputed. ***Barry***, 245 Wis. 2d 560, ¶17-31. We see nothing in the summary judgment materials to suggest that the mall replaced or repaired the downspout or adjusted its placement prior to the accident. Consequently, we are satisfied that, if Sorrel could establish that the ice in the parking lot formed as a result of the design of the drainage system, that would constitute a structural defect rather than an unsafe condition associated with the structure of the premises actively created by the mall. We therefore conclude that Sorrel's second theory of liability lacks a factual basis, and will address only his first and third theories of liability.

¶10 With regard to the design of the drainage system, Sorrel hired engineer John DeRosia as an expert witness. When asked at his deposition what structural defects the parking lot had, DeRosia testified in relevant part:

> It—the parking lot itself is at a very shallow angle.
>
> … It's very close to being flat. The drainage sewer is approximately 105 feet from the sidewalk which requires the water from the downspout to migrate across a relatively flat parking lot. In the wintertime, that is, you know—it's not possible for water that's heated by the heat tape that falls out onto the parking lot to get to the storm drain without some means of keeping it liquid.
>
> … It means it won't drain and that there's portions of the parking lot that — where water accumulates.
>
> … It was raining at the time of my inspection. … There are distinct areas of ponding on that asphalt surface. If the asphalt had been sloped, the rain that I saw … would not

> have accumulated, so it would have been a wet surface, but it wouldn't have been ponded.
>
> … What I mean is that the reason the heat tape is in the pipe is because the temperature is below freezing. If the temperature—if the ice in the downspout turns to water, it dumps out into the parking lot. The parking lot is at ambient temperature. Without a way of keeping the water liquid, it will just stay ice.
>
> … When it hits the parking lot, it becomes ice.

DeRosia further opined—given the descriptions of the ice pattern in the parking lot given by Sorrel and his companion, plus the lack of anything more than trace snowfall since the last time the lot had been plowed—that the ice Sorrel fell on could only have come from snow that melted on the roof of the mall and flowed down the downspout onto the parking lot.

¶11 The mall contends that DeRosia's opinions were insufficient to create a material factual dispute because they were based solely on conjecture and speculation. We disagree with that characterization. Although DeRosia admitted he had insufficient information to calculate the exact rate of water flow from the downspout or the time at which the flowing water would have frozen into ice, such calculations would only be material if notice were at issue. As we have already explained, notice is not at issue under the structural defect theory.

¶12 DeRosia's opinion on the relevant topic of how the ice had formed was based both upon his own observations of water flow in the parking lot and upon others' descriptions of the weather, ice pattern, and plowing and salting history on the day of the incident. Experts are often called upon to give opinions assuming certain facts to be true, leaving it to the jury to determine whether the underlying facts have actually been established and how much weight to give to the expert's opinion. We conclude, therefore, that the summary judgment

materials were sufficient to entitle Sorrel to a trial on the issue of whether the ice he slipped on had formed as the result of a structural defect in the parking lot's drainage system.

¶13 If Sorrel could not establish that the ice he slipped on formed as a result of the design of the drainage system—for instance, if it had simply formed as the result of compacted or melting snow that had not been plowed—he would still need to show that the mall had actual or constructive notice of the ice patch. "Ordinarily, constructive notice cannot be found when there is no evidence as to the length of time the condition existed." ***Kaufman v. State St. Ltd. P'ship.***, 187 Wis. 2d 54, 59, 522 N.W.2d 249 (Ct. App. 1994). Here, there was nothing in the summary judgment materials to show that any employee of the mall had actual knowledge of an ice patch in the parking lot or to establish exactly how long the ice patch had been there. We therefore conclude the circuit court properly determined that there was no material dispute entitling Sorrel to trial on that theory of liability.

¶14 In sum, we conclude that the circuit court's summary judgment order should be reversed and the matter remanded for trial solely on the theory that the ice patch formed where it did due to a structural defect in the drainage system.

By the Court.—Order reversed and cause remanded.

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