

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 00-2160

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

RICHARD BARRINGER AND RITA BARRINGER,

PLAINTIFFS-APPELLANTS,

v.

**ASHLAND COUNTY TOWN INSURANCE, LEROY WATLAND,
SR., PRINCIPAL MUTUAL LIFE INS. CO. AND HEALTH
CARE RECOVERIES, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Bayfield County:
JOSEPH A. MC DONALD, Judge. *Affirmed.*

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

¶1 PER CURIAM. Richard and Rita Barringer appeal a summary judgment dismissing their claims for personal injury sustained when a cabin deck collapsed. They allege LeRoy Watland, Sr., negligently constructed, inspected,

and maintained the deck attached to his rental cabin. The Barringers argue: (1) the cabin is subject to WIS. STAT. § 101.11,¹ the safe place statute; (2) the statute of repose, WIS. STAT. § 893.89, does not apply to the safe place statute and does not bar their claims of failing to maintain and inspect; and (3) WIS. ADMIN. CODE § HFS 195 governs tourist rooming houses and requires the cabin to be maintained and inspected. We disagree and affirm.

BACKGROUND

¶2 In 1979, Watland designed and built a deck on his cabin located in Iron River. Prior to 1995, Watland began renting his cabin as part of a business. In 1995, James Lee rented the cabin and invited members of the local Lions Club to a party. During the party, the deck collapsed. The Barringers were on the deck at the time of the collapse and were injured.

¶3 The Barringers filed an action against Watland claiming that he failed to properly construct, maintain and inspect the deck. Watland moved for summary judgment. The circuit court found that the cabin was a public building, but that there was not a factual basis to support the negligent maintenance and inspection claims. The court granted Watland's motion because the statute of repose, WIS. STAT. § 893.89, barred the Barringer's negligent construction claim. This appeal followed.

¹ All references to the Wisconsin Statutes are to the 1995-96 edition unless otherwise noted.

STANDARD OF REVIEW

¶4 Whether summary judgment was appropriately granted presents a question of law that we review independently of the circuit court. *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 651-52, 476 N.W.2d 593 (Ct. App. 1991). When reviewing summary judgments, we utilize the same analysis as the circuit court and must apply the standards set forth in WIS. STAT. § 802.08(2). *Schultz v. Industrial Coils*, 125 Wis. 2d 520, 521, 373 N.W.2d 74 (Ct. App. 1985). In general, "summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Kenefick v. Hitchcock*, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994).

DISCUSSION

I. SAFE PLACE STATUTE

¶5 The Barringers first argue that the cabin is subject to WIS. STAT. § 101.11, the safe-place statute. The safe place statute requires every owner of a public building to construct, repair and maintain the building to make it safe. *See* WIS. STAT. § 101.11(1). The Barringers argue that as the owner of a public building, Watland was negligent in the construction, maintenance and inspection of the deck. They contend that the deck was improperly made and created an unsafe condition. We conclude however, that the cabin is not subject to the safe place statute.

¶6 A "public building" under WIS. STAT. § 101.01(12) is defined as:

[A]ny structure, including exterior parts of such building, such as a porch, exterior platform or steps providing means of ingress or egress, used in whole or in part as a place of

resort, assemblage, lodging, trade, traffic, occupancy, or use by the public or by 3 or more tenants.

The cabin cannot be considered a public building because it did not contain three or more tenants. The term “tenants” in WIS. STAT. § 101.01(12) refers to rental units in the building, not the number of individuals living in a single rental unit. *See Antwaun A. v. Heritage Mut. Ins. Co.*, 228 Wis. 2d 44, ¶39, 596 N.W.2d 456 (1999). Here, it is undisputed that the cabin was a single dwelling unit. Therefore, it does not fall within the definition of a public building.

¶7 The Barringers argue that at the moment of the accident, the deck was being used as a place of assemblage and was held open to the public. They contend that the cabin is a residential home being used as a public building. We disagree.

¶8 For a structure to be classified as a public building under WIS. STAT. § 101.01(12), at least some portion of the building must be held open to the public or to three or more tenants in common. *See id.* As previously stated, the cabin contained only one tenant. The only people present at the time of the accident were guests invited by Lee. There is nothing in the record to establish that the cabin was held open to the public. Therefore, we conclude that the safe place statute does not apply.

II. STATUTE OF REPOSE

¶9 The Barringers argue that the statute of repose, WIS. STAT. § 893.89, does not bar their claim of negligent construction, inspection and maintenance. We disagree.

¶10 WISCONSIN STAT. § 893.89(2) provides that "no cause of action may accrue" against "any person involved in the improvement to real property after the end of the exposure period." "[E]xposure period" is defined in § 893.89(1) as "the 10 years immediately following the date of substantial completion of the improvement to real property."

A. Negligent Construction

¶11 Here, Watland improved his real property by adding a deck onto his cabin. It is undisputed that the accident occurred in 1995 and that the deck was constructed in 1979. Under the statute, the ten-year exposure period has lapsed. The plain meaning of WIS. STAT. § 893.89 bars the Barringer's claim based upon defective construction of the deck.

B. Negligent Inspection and Maintenance

¶12 The statute of repose contains a number of exceptions to its application, including WIS. STAT. § 893.89(4)(c), which excludes an "owner or occupier of real property for damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property." The Barringers argue that because § 893.89(4)(c) contains the exceptions, summary judgment was improperly granted.

¶13 However, the Barringers have failed to establish a causal link between the deck's collapse and Watland's negligent maintenance and inspection of the deck. To establish a causal link, the Barringers must show that a non-negligent inspection would have prevented the collapse or at least decreased the possibility of the collapse. Causation is question of fact. *Wagner v. DHSS*, 163 Wis. 2d 318, 328, 471 N.W.2d 269 (Ct. App. 1991).

¶14 Stephen Schraufagnel, an architect who testified at deposition for the Barringers, concluded that the construction defects made the structure too weak to carry a normal deck load and that it collapsed solely because of improper construction. The record does not suggest the deck collapsed from anything other than improper nailing and the different sizes of the outer floor joist of the cabin. The record suggests that the deck did not gradually pull away from the cabin; rather its collapse was sudden and unexpected. Schraufagnel testified that any maintenance or inspection would not have revealed a problem in time to prevent the collapse.²

¶15 For negligence to lead to liability, it must be a cause of the harm. *Coffey v. City of Milwaukee*, 74 Wis. 2d 526, 531, 247 N.W.2d 132 (1976). An “actor’s negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.” *Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.*, 176 Wis. 2d 740, 788, 501 N.W.2d 788 (1993) (citation omitted). Here, the record lacks evidence suggesting the deck’s collapse could have been prevented even if Watland had maintained and inspected the deck. Because there is no evidence suggesting otherwise, the Barringers’ negligent inspection and maintenance theories fail for lack of causation.

² The Barringers argue that when a building is put to a new use, the owner must familiarize himself or herself with the construction of the building to ensure that the building is appropriate to the new use. See *Saxhaug v. Forsyth Leather Co.*, 252 Wis. 376, 388, 31 N.W.2d 589 (1948). However, this proposition has no relevancy to this case. Watland was familiar with the deck because he constructed it. Therefore, there was no need for him to inspect the deck to determine the nature of its construction.

III. WISCONSIN ADMINISTRATIVE CODE

¶16 Last, the Barringers argue that the cabin is subject to WIS. ADMIN. CODE § HFS 195. They contend that under the rules promulgated by the code, Watland failed to provide a safe place.

¶17 WISCONSIN ADMIN. CODE § HFS 195.01 applies rules to tourist rooming houses. The cabin is licensed as a tourist rooming house. Pursuant to WIS. ADMIN. CODE § HFS 195.10, every tourist rooming house “shall be maintained and equipped in a manner conducive to the health, comfort and safety of its guest.”

¶18 We agree that the code required Watland to maintain and inspect the deck. However, as explained earlier, the Barringers have not produced evidence showing a causal link between the deck’s collapse and the alleged negligent inspection and maintenance. However, we do not agree that WIS. ADMIN. CODE § HFS 195 applies to the construction of the deck. The code does not create a cause of action for negligent construction. Therefore, this argument fails.

By the Court.—Judgment affirmed.

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

