COURT OF APPEALS
DECISION
DATED AND FILED

April 20, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2202 **Cir. Ct. No. 01CV007558**

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

JEAN HOBBS,

PLAINTIFF-APPELLANT,

V.

MILWAUKEE SCHOOL OF ENGINEERING,

DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,

KEMPER CASUALTY INSURANCE COMPANY,
MILWAUKEE COUNTY DEPARTMENT OF HUMAN SERVICES,

DEFENDANTS-RESPONDENTS,

V.

LUMBERMAN'S MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Jean Hobbs appeals from an order granting summary judgment in favor of the Milwaukee School of Engineering (MSOE) and Lumberman's Mutual Insurance Company, dismissing Hobbs's complaint alleging negligence and violation of the safe place statute, WIS. STAT. § 101.11 (2001-02).[1] Hobbs claims the trial court erred in determining that the defect that caused the mirror to fall and cause injury in this case constituted an unsafe condition associated with the structure rather than a structural defect. Because there are issues of material fact as to whether the defect that caused the mirror to fall was a structural defect, we reverse the order and remand for further proceedings.

BACKGROUND

¶2 On May 13, 1999, Hobbs was injured when a bathroom mirror fell off the wall and crashed on her head while she was using the second floor women's bathroom in a building located at 1000 North Market Street, Milwaukee, Wisconsin. Hobbs was employed by Bank One Corporation, which leased the Market Street facility from the owner, MSOE.

¶3 Several facts are undisputed: (1) the bathroom was constructed sometime in either 1980 or 1981 when the general offices were originally created in the Market Street building; (2) the bathroom mirror was a part of that original construction; and (3) MSOE had no notice that the bathroom mirror was in need of repair or about to fall off the wall.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 Hobbs filed a complaint against MSOE and its insurer, Lumberman's, alleging negligence and safe place statute violations. MSOE filed a motion seeking summary judgment on the ground that the mirror constituted an unsafe condition rather than a structural defect and because MSOE had no notice of the unsafe condition, it cannot be held liable. Hobbs filed an affidavit from an expert witness in opposition to the summary judgment motion. In this affidavit, Brian Tom Fischer, a registered architect and registered professional engineer, opined that the defect that caused the mirror to fall constituted a structural defect.

¶5 The trial court ruled that the defect causing the mirror to fall was an unsafe condition and because MSOE had no notice, either actual or constructive, Hobbs could not maintain this action against MSOE and dismissed the case. Hobbs now appeals.

DISCUSSION

¶6 This case arises from a grant of summary judgment. Our standard of reviewing summary judgment motions is well known and need not be repeated here. *See* WIS. STAT. § 802.08(2); ***Mullen v. Walczak***, 2003 WI 75, ¶11, 262 Wis. 2d 708, 664 N.W.2d 76. Our review is *de novo*. ***Mullen***, 262 Wis. 2d 708, ¶11. This case involves the interpretation of the safe place statute, which also presents a question of law subject to this court's independent review. ***Waters ex rel. Skow v. Pertzborn***, 2001 WI 62, ¶37, 243 Wis. 2d 703, 627 N.W.2d 497.

¶7 The safe place statute provides: "Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe." WIS. STAT. § 101.11(1). Generally, an owner is liable for three types of unsafe conditions that cause injury, but only two types are at issue

here: (1) structural defects; and (2) unsafe conditions associated with the structure of the building. *See* ***Ruppa v. American States Ins. Co.***, 91 Wis. 2d 628, 639-40, 284 N.W.2d 318 (1979); *see also* HOWARD H. BOYLE, JR., WISCONSIN SAFE-PLACE LAW REVISED 139 (1980). If the condition which caused the injury is a structural defect, the owner is liable "regardless of whether he or she knew or should have known that the defect existed." ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶22, 245 Wis. 2d 560, 630 N.W.2d 517. If the condition which caused the injury is an unsafe condition associated with the structure, the owner will be liable only if he or she had actual or constructive notice of the defect. ***Rizzuto v. Cincinnati Ins. Co.***, 2003 WI App 59, ¶13, 261 Wis. 2d 581, 659 N.W.2d 476.

¶8 The issue in this case is how to categorize the condition of the bathroom mirror which fell on Hobbs, causing injury. "A structural defect is 'a hazardous condition inherent in the structure by reason of its design or structure.'" ***Id.***, ¶12 (citation omitted). It "arises from a breach of the statutory duty to construct a safe building. A defect is structural if it arises 'by reason of the materials used in construction or from improper layout or construction.'" ***Barry***, 245 Wis. 2d 560, ¶28 (citation omitted).

¶9 "An unsafe condition associated with the structure of the building arises when an originally safe structure is not properly repaired or maintained." ***Rizzuto***, 261 Wis. 2d 581, ¶13. It "arises from a breach of the statutory duty to repair or maintain …." ***Barry***, 245 Wis. 2d 560, ¶28.

¶10 Hobbs argues that the defect causing the mirror to fall was structural because the mirror was originally installed in an unsafe manner, using improper materials. MSOE responds that the defect causing the mirror to fall constituted an

unsafe condition associated with the structure because its failure to adhere to the wall was the result of adhesive deteriorating over the course of time. We conclude that there is a material dispute of fact as to the proper categorization of the hazardous condition in this case.

¶11 MSOE claims that this case is identical to ***Rizzuto***. In ***Rizzuto***, a granite tile fell off an elevator wall, striking Rizzuto on the head. 261 Wis. 2d 581, ¶2. The elevator tiles were not an original part of the building, but had been added during a remodeling project. ***Id.*** The tiles were attached to the walls of the elevator with adhesive. ***Id.*** It was undisputed that the adhesive had deteriorated over time, causing the tile to fall and strike Rizzuto. ***Id.*** We held that because Rizzuto failed to produce any evidence that the original installation of the tiles was unsafe, the condition could not be a structural defect. ***Id.***, ¶20.

¶12 The facts in this case are distinguishable from ***Rizzuto***. First, Hobbs has produced evidence demonstrating that the original construction of the bathroom and installation of the mirror was done in an unsafe manner. She has an expert who testified to his professional opinion that the original design was defective. Second, in ***Rizzuto***, the granite tiles were added to an originally safe elevator. Here, the mirror was a part of the original construction of the bathroom. Accordingly, ***Rizzuto***'s conclusion does not govern this case.

¶13 Hobbs produced evidence in opposition to the motion for summary judgment that the improperly installed mirror falling off the wall was a structural defect, rather than an unsafe condition associated with the structure. Although Hobbs's case may appear similar to ***Rizzuto*** because both involved the failure of adhesive, resulting in heavy objects failing off the wall causing injuries, Hobbs has presented evidence that the use of adhesive in the original construction of the

bathroom mirror was a structural defect. Accordingly, the trial court erred in granting summary judgment in favor of MSOE.

¶14 Hobbs asks this court to *sua sponte* grant summary judgment in her favor and hold that, as a matter of law, the defect that caused the mirror to fall off the wall constituted a structural defect. We decline this invitation. To support her proposition, Hobbs filed an affidavit from her expert in opposition to the motion for summary judgment. Based on the scheduling order governing the case, Hobbs should have disclosed any expert witnesses and provided expert reports long before the motion for summary judgment. It is clear from the record that if the trial court had not granted summary judgment, it would have amended the scheduling order to allow for Hobbs's late expert witness filing and to allow MSOE time to have its own expert respond. Thus, the record before us is incomplete in this regard. On remand, the trial court shall amend the scheduling order to allow for additional discovery with respect to Hobbs's expert and to afford MSOE an opportunity to respond.

¶15 Based on this record, however, there is a material dispute of fact. The question is whether using adhesive to attach the mirror to the wall was originally safe and this accident occurred as a result of MSOE's failure to maintain or repair the mirror over a period of time *or* whether using adhesive instead of brackets to fasten the mirror to the wall constituted a structural defect from the moment of construction. Accordingly, summary judgment was improvidently

granted. We reverse the order and remand for further proceedings consistent with this opinion.[2]

By the Court.—Order reversed and cause remanded.

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

[2] MSOE refers to a statute of limitations defense in the procedural status portion of its brief. The trial court, however, never addressed this issue and, therefore, we decline to do so for the first time on appeal.