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**DISTRICT II**

August 14, 2013

*To*:

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You are hereby notified that the Court has entered the following opinion and order:

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2013AP797-FT Thelma Trevino v. The Netherlands Insurance Company (L.C. # 2012CV921)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Thelma and Hector Trevino appeal from an order dismissing on summary judgment their claims against the property owner, Bruesewitz Investments LLC and its insurer, The Netherlands Insurance Company (hereafter "property owner"), and a tenant restaurant, Grater Tater LLC, and its insurer, Nationwide Insurance, for injuries Thelma sustained in a fall on the sidewalk outside Grater Tater. They alleged negligence on the part of the property owner and the restaurant and a WIS. STAT. § 101.11 (2011-12)[1] safe place violation. Pursuant to a presubmission conference

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

and this court's order of April 29, 2013, the parties submitted memorandum briefs. Upon review of those memoranda and the record, we affirm the dismissal of the Trevinos' claims because the Trevinos did not establish either a genuine issue of material fact on the question of whether the property owner and the restaurant were negligent or that the sidewalk was subject to the safe place statute.

The restaurant operates on property owned by Bruesewitz. The sidewalk at issue abuts the property. Thelma fell on the icy sidewalk in December 2010, and she and Hector sued the property owner and the restaurant for her injuries. The Trevinos alleged that the property owner and the restaurant "exercise[d] complete dominion and control over the walkways, entrances and parking areas." The Trevinos alleged that the property owner and the restaurant were negligent with regard to the care and maintenance of an awning on which the restaurant had installed decorative lights. Ice and water accumulated on the lights and dripped onto the sidewalk, causing the unsafe condition that led to Thelma's fall. The Trevinos also alleged that the sidewalk was subject to the safe place statute. The property owner and the restaurant denied liability.

The property owner and the restaurant sought summary judgment. The parties argued that the sidewalk was not a place of employment and they had no liability for the condition of the sidewalk. The Trevinos opposed summary judgment.

After concluding that the undisputed facts warranted summary judgment, the circuit court granted summary judgment and dismissed the Trevinos' claims against the property owner and the restaurant. We recite the facts as set out by the circuit court:

> [Trevino fell on the sidewalk after she exited Grater Tater.] A canopy/awning was affixed to the building over the front entrance and extended several feet over the sidewalk. Grater Tater strung

> decorative lights along the outer edge of the canopy. The decorative light strings dangled approximately one foot below the lower edge of the canopy, pointing toward the ground. Icicles formed on the light strings as precipitation flowed from the slanted canopy toward the outer edge. As melting occurred, water eventually fell on the sidewalk. There is a drip line evident on the sidewalk approximately five feet from the building. On the day of the fall, moisture and black ice were evident on the sidewalk from the drip line extending roughly another two feet to a snow pile along the curb line.

The circuit court concluded that by installing decorative lights, neither the property owner nor the restaurant created an artificial accumulation such that liability arose. The court also concluded that the safe place statute did not apply to the sidewalk because there was no evidence that the property owner or the restaurant exercised dominion and control over the sidewalk. The Trevinos appeal.

We review decisions on summary judgment by applying the same methodology as the circuit court. ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not "repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***Id.*** at 496-97.

A WIS. STAT. § 101.11(1) safe place claim arises if the place where the injury occurred was either a public building or a place of employment. ***Hoepner v. City of Eau Claire***, 264 Wis. 608, 611-12, 60 N.W.2d 392 (1953) (addressing predecessor statute). Wisconsin courts have long held that a sidewalk is not a public building. ***Buckley v. Park Bldg. Corp.***, 31 Wis. 2d 626, 631, 143 N.W.2d 493 (1966). However, exceptions arise under extraordinary conditions, such as when the abutting landowner exercises almost exclusive dominion and control over the public sidewalk. *See* ***id.*** at 632. Absent such extraordinary circumstances, an abutting landowner is not

liable under the safe-place statute for injuries to a person who slips and falls on naturally-occurring snow or ice on a public sidewalk. *See* ***id.*** at 633.

We turn to whether the Trevinos established a genuine factual issue on the question of whether the sidewalk was a place of employment. For a public sidewalk to become a place of employment, the employer must exercise sufficient dominion and control over the sidewalk to render the sidewalk a place of employment. ***Petroski v. Eaton Yale & Towne, Inc.***, 47 Wis. 2d 617, 620-21, 178 N.W.2d 53 (1970). The Trevinos argue that by clearing snow and salting the sidewalk, the restaurant rendered the sidewalk a place of employment. We disagree. In ***Petroski***, the court observed that an abutting landowner who merely removes snow from a sidewalk accessible to all without the landowner's permission does not, by that activity, exercise dominion and control over the sidewalk to transform the sidewalk into a place of employment for purposes of safe place liability. ***Id.***

Similarly, having patrons wait on the sidewalk before entering the restaurant or traverse the sidewalk to reach the restaurant does not create the requisite level of dominion and control under the safe place statute. *See* ***Miller v. Welworth Theatres of Wis.***, 272 Wis. 355, 359, 75 N.W.2d 286 (1956). There is no indication that the restaurant's control over the sidewalk impeded the public's use of it.

The Trevinos did not create a material factual issue on the question of whether the restaurant's snow removal efforts and incidental use of the sidewalk transformed the sidewalk into a place of employment. Summary judgment was appropriate on the safe place claim.

We turn to the Trevinos' negligence claim. Although a property owner is not liable when a person slips on snow or ice that accumulates on a public sidewalk from natural conditions, the

owner may incur liability for injuries arising from artificial conditions. ***Holschbach v. Washington Park Manor***, 2005 WI App 55, ¶10, 280 Wis. 2d 264, 694 N.W.2d 492; ***Gruber v. Village of North Fond du Lac***, 2003 WI App 217, ¶¶18-19, 267 Wis. 2d 368, 671 N.W.2d 692. Whether a condition is artificial or natural presents a question of law that we decide independently of the circuit court. ***Id.***, ¶3.

When "structures are built in the usual and ordinary way, and not for the purpose of accumulating and discharging water on a public sidewalk, drainage that results only incidentally and is not caused by negligent maintenance is deemed natural and ordinary." ***Id.***, ¶2. In contrast, "where the presence of a normal amount of water would be anticipated, but where it is allowed to accumulate because of the negligent omission of the party sought to be liable, such as a failure to keep a drainage system in repair, then it is an artificial condition" to which liability may attach. ***Id.***

Here, there is no indication in the summary judgment record that the water falling from the decorative lights was other than incidental drainage, natural and ordinary, and therefore not a basis for liability. There is no indication that the decorative lights were not working as intended. *See* ***Holschbach***, 280 Wis. 2d 264, ¶14. And, unless "the canopy was constructed for the purpose of accumulating and discharging water onto the sidewalk," ***Corpron v. Safer Foods, Inc.***, 22 Wis. 2d 478, 485, 126 N.W.2d 14 (1964), the accumulation of water was incidental and natural, not artificial, ***Gruber***, 267 Wis. 2d 368, ¶2. There is no evidence that the lights were intended to alter the flow of water off the canopy. In other words, that water came off the canopy and caught on the decorative lights does not render the accumulation artificial because the water would have come off the canopy even if the lights had not been present. Summary judgment was appropriate on the Trevinos' negligence claim.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is affirmed.

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*Diane M. Fremgen*
*Clerk of Court of Appeals*