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DISTRICT IV

February 22, 2016

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

2014AP2889 Jason D. Blakley v. Christmas Mountain Village Property Owners' Association, Inc. (L.C. # 2013CV202)

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

Jason Blakley appeals from an order granting summary judgment dismissing his negligence and safe-place statute claims. *See* WIS. STAT. § 101.11 (2013-14).[1] Blakley was injured when, on June 27, 2010, he fell from a porch attached to a cottage at Christmas Mountain Village Resort. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

We review decisions on summary judgment de novo, applying the same methodology as the circuit court. *See* ***M & I First Nat'l Bk. v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995); WIS. STAT. § 802.08(2). 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. *See* ***M & I First Nat'l Bk.***, 195 Wis. 2d at 496-97.

The sole issue on appeal is whether WIS. STAT. § 893.89 bars Blakley's claims. This presents a question of statutory interpretation that we review de novo. *See* ***Mair v. Trollhaugen Ski Resort***, 2006 WI 61, ¶15, 291 Wis. 2d 132, 715 N.W.2d 598.

WISCONSIN STAT. § 893.89 "is a statute of repose that sets forth the time period during which an action for injury resulting from improvements to real property must be brought." ***Kohn v. Darlington Cmty. Sch.***, 2005 WI 99, ¶13, 283 Wis. 2d 1, 698 N.W.2d 794. WISCONSIN STAT. § 893.89(2) states, in relevant part:

> [N]o cause of action may accrue and no action may be commenced … against the owner or occupier of the property or against any person involved in the improvement to real property after the end of the exposure period, to recover damages … for any injury to the person … arising out of any deficiency or defect in the design, land surveying, planning, supervision or observation of construction of, the construction of, or the furnishing of materials for, the improvement to real property.

The "exposure period" is "the 10 years immediately following the date of substantial completion of the improvement to real property." WIS. STAT. § 893.89(1). The statute applies to claims resulting from injuries caused by a structural defect, and a structural defect has been defined as "a hazardous condition inherent in the structure by reason of its design or construction." ***Mair***, 291 Wis. 2d 132, ¶22 (quoted source omitted). A structural defect arises

from "materials used in the construction, improper layout of the structure or improper construction." ***Rosario v. Acuity***, 2007 WI App 194, ¶16, 304 Wis. 2d 713, 738 N.W.2d 608.

In support of its summary judgment motion, Christmas Mountain[2] presented affidavits averring that the cottage involved in the accident, Cottage 363, was built in 1989 or 1990. Prior to Blakley's fall, the porch attached to Cottage 363 never had a guardrail in the area of the fall. Blakley did not point to any contrary evidence. Thus, there was no dispute that the design and construction of Cottage 363 and its porch were unchanged since 1990, well beyond the statutory ten-year exposure period. Therefore, Christmas Mountain is entitled to protection under WIS. STAT. § 893.89. *See* ***Crisanto v. Heritage Relocation Serv., Inc.***, 2014 WI App 75, ¶¶17-18, 355 Wis. 2d 403, 851 N.W.2d 771.

Blakley challenges the credibility of one of the affiants, William Mellentine, by pointing to various parts of Mellentine's deposition which, in Blakley's view, defeats Mellentine's credibility. None of the deposition excerpts cited by Blakley, however, are germane to the controlling factual issue, namely, whether the porch to Cottage 363 had a guardrail in the area of the fall when constructed in 1990 or at any time before Blakley's injury. Moreover, because Blakley's argument is largely undeveloped, we decline to address it further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court need not address undeveloped argument).

[2] The defendants are various entities involved in the construction, ownership, and operation of the Christmas Mountain Village Resort. For ease of reference, we refer to all of the defendants as Christmas Mountain.

Blakley asserts that WIS. STAT. § 893.89 should not be applied because Christmas Mountain knew of the danger created by the unguarded porch. An exception for structural defects known to the owner "would effectively swallow the rule" and has been rejected by the supreme court. *See* ***Crisanto***, 355 Wis. 2d 403, ¶¶22-24. Therefore, Blakley's argument fails.

Blakley next points out that the statute "does not guard against fraud and concealment" but does not elaborate why that statutory exception, found in WIS. STAT. § 893.89(4)(a), should apply in this case. We need not discuss this point further. *See* ***Pettit***, 171 Wis. 2d at 646.

Blakley also relies on Christmas Mountain's failure to produce any "structural, or occupancy permits" relating to Cottage 363. The absence of such documentary evidence, however, does not render irrelevant or not credible other evidence presented by Christmas Mountain that established the design of the cottage when built.

Finally, we note that Blakley did not file a reply brief, thus conceding Christmas Mountain's responsive arguments. *See* ***United Coop. v. Frontier FS Coop.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (appellant's failure to respond in a reply brief to an argument made in respondent's brief may be taken as a concession).

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals