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**DISTRICT II**

April 22, 2020

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

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2019AP86

Timothy Mahoney v. Fox River Brewing Co., LLC, Society Insurance, City of Oshkosh and The League of Wisconsin Municipalities Mutual Insurance (L.C. #2016CV225)

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

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Timothy Mahoney appeals from circuit court orders dismissing on summary judgment his claims against Fox River Brewing Company, LLC, the City of Oshkosh and their insurers and denying his motion for reconsideration. 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 (2017-18). We agree with the circuit court that Mahoney's claims are barred by the statute of repose. We affirm.

In May 2015, Mahoney suffered personal injuries when he tripped and fell over an elevated manhole cover in a grassy area on property owned by Fox River Brewing Company, LLC, d/b/a Fratello's, a restaurant and bar. Mahoney alleged that the area in which he fell was subject to an easement in favor of the City of Oshkosh. Mahoney further alleged that Oshkosh negligently failed to monitor and maintain the easement and Fox River Brewing negligently failed to monitor and maintain its property.

Fox River Brewing and Oshkosh sought summary judgment on multiple grounds including that the statute of repose, WIS. STAT. § 893.89 (2015-16),<sup>1</sup> barred Mahoney's claims against them. Based on the undisputed facts in the summary judgment record, the circuit court concluded that the elevated manhole cover was installed in 1995 and had not changed in the intervening years until Mahoney tripped on it and fell in 2015. Because Mahoney's injury arose from the manhole cover's structural defect, the statute of repose applied, and Mahoney's claims were barred. Mahoney sought reconsideration, which the circuit court denied. Mahoney appeals.

We review the circuit court's grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). "We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

matter of law.” *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

An action for injury resulting from improvements to real property is subject to the statute of repose, WIS. STAT. § 893.89. The statute of repose, WIS. STAT. § 893.89, states:

(1) In this section, “exposure period” means the 10 years immediately following the date of substantial completion of the improvement to real property.

(2) Except as provided in sub. (3), no cause of action may accrue and no action may be commenced, including an action for contribution or indemnity, 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 property, for any injury to the person, or for wrongful death, 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.

Fox River Brewing is the property owner. Mahoney argues that Oshkosh had an easement over Fox River Brewing’s property in the area of the manhole cover. Even though Oshkosh denied on summary judgment that it had an easement, for purposes of this opinion we assume without deciding that Oshkosh had an easement.

No party disputes that the manhole cover improvement to Fox River Brewing’s real property was completed more than ten years before Mahoney tripped over it and fell. There was no factual dispute that the manhole cover was designed to be elevated and remained in that

condition from the time it was constructed until Mahoney encountered it.<sup>2</sup> Therefore, it was undisputed that Mahoney’s injury resulted from a condition inherent in the manhole cover’s “structure by reason of its design or construction,” i.e., a structural defect. *Mair v. Trollhaugen Ski Resort*, 2006 WI 61, ¶22, 291 Wis. 2d 132, 715 N.W.2d 598 (citation omitted). We conclude that the statute of repose barred Mahoney’s claims against Fox River Brewing and Oshkosh arising from this structural defect. WIS. STAT. § 893.89(2).

Mahoney argues that two exceptions to the statute of repose apply: the exception for negligence in the maintenance of an improvement and the warranty exception. We conclude that neither exception applies.

The statute of repose does not bar claims that an owner or occupier of real property was “negligen[t] in the maintenance, operation or inspection of an improvement to real property.” WIS. STAT. § 893.89 (4)(c). Mahoney argues that this exception applies because Fox River Brewing and Oshkosh, the easement holder, failed to maintain or negligently maintained the manhole cover improvement. However, this exception does not apply to an improvement that was defective from the time of construction and which the owner failed to correct. *See Crisanto v. Heritage Relocation Servs., Inc.*, 2014 WI App 75, ¶25, 355 Wis. 2d 403, 851 N.W.2d 771. Mahoney did not offer facts showing that the elevated condition of the manhole

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<sup>2</sup> In so concluding, we consider Mahoney’s post-deposition affidavit. That affidavit makes various claims about the conditions in the area of the elevated manhole cover that allegedly obscured the manhole cover. However, the affidavit does not change Mahoney’s central claim that he tripped over the manhole cover.

cover was other than a construction defect.<sup>3</sup> We conclude that this is a structural defect case, not a negligent maintenance case.

Mahoney next argues that the warranty exception to the statute of repose, WIS. STAT. § 893.89(4)(b), applies because Oshkosh’s 1971 and 1974 easements over the property, which were granted by Fox River Brewing’s predecessor in title, contain warranty language. Section 893.89(4)(b) states that the statute of repose does not apply to “[a] person who expressly warrants or guarantees the improvement to real property, for the period of that warranty or guarantee.” Mahoney relies upon language in the easements that if Oshkosh exercises its rights under the easement and causes a disturbance to the property, Oshkosh “shall cause the property, soil and grass to be repaired and replaced” and pay to the title holder actual damages arising from the “installation, operation, repair or removal” of the sanitary sewer on the property. Notwithstanding this language, Wisconsin law is clear that the warranty exception only applies to the parties to the easement contract. *See Hocking v. City of Dodgeville*, 2010 WI 59, ¶¶29, 31, 326 Wis. 2d 155, 785 N.W.2d 398; *Cianciola, LLP v. Milwaukee Metro. Sewerage Dist.*, 2011 WI App 35, ¶16, 331 Wis. 2d 740, 796 N.W.2d 806. While Mahoney addresses these cases, he does not confront the dispositive fact: Mahoney was not a party to the easement contract. The warranty exception to the statute of repose does not apply.

In his reply brief, Mahoney argues that the manhole cover and its environment constituted an unsafe condition, not a structural defect. However, it is undisputed that Mahoney tripped on the manhole cover, whose condition had not changed since construction. *See Mair*,

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<sup>3</sup> See footnote two.

291 Wis. 2d 132, ¶22. Because the condition of the manhole cover has not changed since its construction, this is a structural defect case, not an unsafe condition case. *See id.*, ¶26.

The circuit court denied Mahoney’s motion for reconsideration because the parties briefed and had ample opportunity to argue summary judgment. Entertaining a motion for reconsideration of summary judgment is committed to the circuit court’s discretion. *See Envirologix Corp. v. City of Waukesha*, 192 Wis. 2d 277, 287, 531 N.W.2d 357 (Ct. App. 1995) (suggesting that the circuit court’s decision to substantively reconsider summary judgment is subject to a claim that discretion was misused).

Mahoney’s motion for reconsideration relied upon the existence of Oshkosh’s easement, the conditions surrounding the manhole cover, and the warranty language in the easement. We have addressed these issues, and we have upheld the circuit court’s summary judgment ruling. We see no misuse of circuit court discretion in denying his motion for reconsideration.

We conclude that Mahoney’s claims against Fox River Brewing and Oshkosh were barred by the statute of repose. The circuit court did not err in granting summary judgment or in denying Mahoney’s motion for reconsideration.<sup>4</sup>

Upon the foregoing reasons,

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<sup>4</sup> To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

IT IS ORDERED that the orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21 (2017-18).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*