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DISTRICT II

January 26, 2022

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

2020AP2053 Janice M. Buckley v. ThedaCare Medical Center - Berlin, Inc. (L.C. #2019CV103)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

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).

Janice M. Buckley appeals from a circuit court order dismissing her case against ThedaCare Medical Center - Berlin, Inc., its insurers, and various other defendants (collectively, ThedaCare) after the court granted ThedaCare's summary judgment motion. Buckley sued ThedaCare for an alleged violation of Wisconsin's safe place statute and negligence after a self-closing door caught Buckley on her heel, allegedly causing her to fall and break her hip at a

ThedaCare hospital meeting room. She argues the circuit court erred in granting summary judgment on the ground that Buckley's lawsuit was time-barred as a matter of law by the statute of repose found at WIS. STAT. § 893.89 (2019-20).[1] 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.

Buckley was present at a meeting in the basement-level conference room of ThedaCare's hospital facility in Berlin, Wisconsin on June 18, 2017. On the evening of her fall, Buckley offered to deliver some literature to a meeting in an adjacent room. To enter the adjacent room from the interior hall of the building, Buckley had to pass through the door in question, which opened outward into the hallway. She entered the room without incident, but on her way out of the room, when Buckley was almost entirely through the doorway, the door allegedly closed on her heel and she fell**.**

Buckley filed this lawsuit on September 9, 2019, to recover for personal injuries she sustained in the fall. She claims that the meeting room door, which had a hydraulic closing mechanism, closed too quickly and caused her to fall. She specifically alleged the incident was caused by ThedaCare's "failure [to] monitor or check the mechanics and/or proper operation of the internal doors." Buckley sued ThedaCare under theories of common law negligence and violation of Wisconsin's safe place statute.

In his deposition, ThedaCare's facilities manager, Wesley Blaisdell, testified that the door in question and its closing mechanism were installed at ThedaCare in 1969. Blaisdell stated that

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

he had been trained on how to adjust the doors and that they were generally only adjusted based on the room use if someone requested an adjustment through a work order. He further testified that he had never personally adjusted the automatic door closer in question and was unaware of any adjustments to it, though he would "assume" that it may have been adjusted at some point. Additionally, Blaisdell stated that the manufacturer did not provide or establish standards related to the appropriate closing speed and that, in his opinion, the door in question needed no repair or maintenance at the time of Buckley's fall.

ThedaCare moved for summary judgment, arguing that Buckley's lawsuit was time-barred as a matter of law by the statute of repose set forth at WIS. STAT. § 893.89 because there was no evidence that the door in question or its closer had been adjusted since their installation in 1969. In response, Buckley argued that her case fell within the exception to the statute of repose set forth in § 893.89(4)(c), "for damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property."

Buckley submitted the affidavit of an engineering expert who opined that the door involved in Buckley's accident closed too quickly and that "Buckley's fall was due to improper maintenance of the door closer of the door that she was walking through." The expert analyzed the door and concluded that "the [average] sweep time of the [door in question] was approximately 2.2 seconds, considerably less time than allowed under the 1986 standard and less than half the minimum time required since 2003." By contrast, ThedaCare's automatic door located some 20 feet away down the corridor "took over 8.1 [seconds] to sweep to near closed and 10.5 seconds total open to closed, well within the timing required by the standard."

After the parties briefed the issues, the circuit court issued a written decision and order granting ThedaCare's summary judgment motion and dismissing Buckley's lawsuit as barred by the statute of repose, WIS. STAT. § 893.89. The court determined that Buckley's claim is time-barred due to her failure to show that (1) the closing mechanism on the door in question was altered or adjusted in any way from the time of its installation in 1969 to the date of the incident; (2) the door operated differently on the day of the incident than how it had originally operated when the door was installed in 1969; (3) the door operated differently on the day of the incident than it had ever operated due to wear and tear over time or failure to be maintained/serviced properly; and (4) ThedaCare was required or should have known to inspect or repair the door since its installation. Buckley appeals.[2]

Whether a claim is time-barred by WIS. STAT. § 893.89 is a matter of statutory interpretation, which presents a question of law that we review de novo. *See* ***Mair v. Trollhaugen Ski Resort***, 2006 WI 61, ¶15, 291 Wis. 2d 132, 715 N.W.2d 598. We also review the circuit court's grant of summary judgment de novo, applying the same methodology that the court applied. *See* ***id.***, ¶14.

To be successful on summary judgment, the movant has the burden of proving that there is no dispute of material fact entitling the plaintiff to a jury trial. ***Id.*** The burden then shifts to the plaintiff to demonstrate sufficient evidence to go to trial. ***Kaufman v. State St. Ltd. P'ship***, 187 Wis. 2d 54, 58, 522 N.W.2d 249 (Ct. App. 1994). If the plaintiff fails to demonstrate there

[2] Buckley also argued to the circuit court that ThedaCare waived its right to argue that the action was time-barred when it did not raise the statute of repose issue in its original answer. She does not raise this issue on appeal and we therefore deem it abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos***., 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (an issue raised in the circuit court but not raised on appeal is deemed abandoned).

are any disputed issues of material fact, the defendant is entitled to summary judgment as a matter of law. ***Id.***

The statute of repose curbs an individual's right of action for negligence and under the safe place statute. WIS. STAT. § 893.89. Explaining further, statutes of repose such as the one here bar claims brought a fixed number of years after an occurrence of some defined event, "even if this period ends before the plaintiff has suffered any injury." *See* ***Landis v. Physicians Ins. Co. of Wis.***, 2001 WI 86, ¶28, 245 Wis. 2d 1, 628 N.W.2d 893 (citation omitted). Statutes of repose are designed to protect property owners from claims "in which the truth may be obfuscated by death or disappearance of key witnesses, loss of evidence, and faded memories." ***Id.***, ¶52 (citation omitted). The applicable statute of repose provides in pertinent part as follows:

> [N]o 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. This subsection does not affect the rights of any person injured as the result of any defect in any material used in an improvement to real property to commence an action for damages against the manufacturer or producer of the material.

Sec. 893.89(2).

The "exposure period" at the time of Buckley's fall was defined as "10 years immediately following the date of substantial completion of the improvement to real property." *See* WIS.

STAT. § 893.89(1) (2015-16).[3] We have defined "substantial completion of the improvement to real property" as the point at which "construction is sufficiently completed so that the owner or his representative can occupy or use the improvement for the use it was intended." ***Holy Fam. Cath. Congregation v. Stubenrauch Assocs.***, 136 Wis. 2d 515, 523, 402 N.W.2d 382 (Ct. App. 1987) (citation omitted). It is undisputed that the door closing mechanism is an improvement to the property that was substantially completed in 1969.

Determining whether the statute of repose bars Buckley's claims involves the interplay between that statute and the safe place statute, WIS. STAT. § 101.11(1). The safe place statute "is a negligence statute that imposes a heightened duty on employers and owners of places of employment and public buildings to *construct, repair, or maintain* buildings safely." ***Mair***, 291 Wis. 2d 132, ¶19 (emphasis added).

At the time of Buckley's fall, "[WIS. STAT. §] 893.89 bar[red] safe place claims resulting from injuries caused by structural defects, but not by unsafe conditions associated with the structure, beginning ten years after a structure is substantially completed." *See* ***Mair***, 291 Wis. 2d 132, ¶29. "A structural defect arises 'by reason of the materials used in construction or from improper layout or construction.... [A] structural defect is a hazardous condition inherent in the structure by reason of its design or construction.'" ***Id.***, ¶22 (alteration in original; citation omitted). The statute, however, includes an exception, on which Buckley relies, that permits claims to proceed in instances in which "[a]n owner or occupier" is negligent "in the

[3] WISCONSIN STAT. § 893.89 (2015-16) was amended effective April 5, 2018. 2017 Wis. Act 235, §§ 27, 28. As applicable to this appeal, among the changes made to the statute was to shorten the "exposure period" from ten years to seven years. *See* ***id.***, § 27. Because the longer exposure period was in effect at the time of Buckley's fall, the longer exposure period applies to Buckley's claims. The parties do not argue that any of the other changes to the statute are relevant to this appeal.

maintenance, operation or inspection of an improvement to real property." *See* § 893.89(4)(c). The exception encompasses negligence and safe place claims based on unsafe conditions associated with the structure when the structure is not properly repaired or maintained. ***Mair***, 291 Wis. 2d 132, ¶23.

Buckley argues that she has proffered enough evidence to survive summary judgment, asserting that the circumstances fall within the negligent acts'—negligent inspection, operation, or maintenance—exception in WIS. STAT. § 893.89(4)(c). As the moving party invoking the exception, Buckley has the burden of submitting evidence sufficient to create a material dispute of fact warranting a trial. *See* ***Acuity Mut. Ins. Co. v. Olivas***, 2007 WI 12, ¶44, 298 Wis. 2d 640, 726 N.W.2d 258. We agree with the circuit court that Buckley has not met her burden of proof.

Buckley relies on two points of evidence, neither of which establish a material factual dispute. First, Buckley relies on the deposition testimony of Blaisdell, ThedaCare's facilities manager. However, Blaisdell could only state that he *assumed* that adjustments were made on the door. This testimony is purely speculative and therefore insufficient to meet Buckley's burden of establishing a material factual dispute that the door closer was not in its original condition.[4] *See* ***North Highland Inc. v. Jefferson Mach. & Tool Inc.***, 2017 WI 75, ¶34, 377 Wis. 2d 496, 898 N.W.2d 741 ("speculation is insufficient to create a genuine issue of material

[4] In her reply brief, Buckley also argues that "[t]he fact that ThedaCare's counsel did not object to its own employee's damning deposition testimony as 'speculative' made it admissible and usable, certainly for purposes of the [circuit] court's inquiry on [s]ummary [j]udgment." However, she cites to no legal authority in support of this argument and, thus, we do not address the argument further. *See* ***Borsellino v. DNR***, 2000 WI App 27, ¶11, 232 Wis. 2d 430, 606 N.W.2d 255 ("We will not consider arguments unsupported by reference to legal authority.").

fact on summary judgment"). Consequently, there is no evidence that improper repairs had been made to the door mechanism.

Second, Buckley relies on the affidavit filed by an engineering expert, in which he opined that the door in question closed too quickly and that "Buckley's fall was due to improper maintenance of the door closer of the door that she was walking through." In support, the expert stated that "the sweep time of the [door in question] was approximately 2.2 seconds, considerably less time than allowed under the 1986 standard and less than half the minimum time required since 2003." By contrast, ThedaCare's automatic door located some twenty feet away down the corridor "took over 8.1 [seconds] to sweep to near closed and 10.5 seconds total open to closed, well within the timing required by the standard." Buckley suggests that ThedaCare was required to adjust the door closer as "maintenance" of the mechanism under current industry standards to make the premises safe.

However, as explained in ***Mair***, regardless of industry standards, the statute of repose applies because there is no evidence to show Buckley's claim is based on anything other than the alleged structural defect in the original condition of the door mechanism that permitted it to close at the speed it did. Mair argued that the design of a bathroom floor drain on the defendant's property caused her to slip and fall. ***Mair***, 291 Wis. 2d 132, ¶24. Her expert opined that the drain did not meet industry standards, testifying that "the drain was too deep, it violated normative and industry standards, and the slope was extensive beyond what the industry standards dictate." ***Id.*** However, the supreme court held that Mair could not overcome the statute of repose because the condition of the drain was substantially completed upon the construction of the building, beyond ten years before Mair slipped, and Mair offered no evidence to demonstrate that the condition of the drain, which may have given rise to the slip, had arisen at

some point after its substantial completion as a result of negligent inspection or maintenance by the building owner. ***Id.*** In short, the court rejected the attempt to apply industry standards to establish a failure to maintain or repair, given that the alleged defect, the drain on the bathroom floor, was unchanged from its original condition. *See also* ***Rosario v. Acuity & Oliver Adjustment Co.***, 2007 WI App 194, ¶19, 304 Wis. 2d 713, 738 N.W.2d 608 (statute of repose barred personal injury claim arising out of fall from step that was out of compliance with building code, where there was no evidence that any changes had been made to the step).

Similarly, Buckley cannot overcome the statute of repose because she offered no evidence to demonstrate that the alleged hazardous condition of the door or its closer, which permitted it to close at the current speed, did not exist when the improvement was substantially completed well over ten years ago, but instead, had arisen at some point after its substantial completion.

Buckley suggests that the adjustable mechanism needed to be routinely maintained due to wear and tear and that the building owner may have had internal policies requiring the same, but she offers no evidence in support of either contention. Buckley's expert testified that it is possible for mechanical parts and hydraulic seals in a mechanical door closer to "wear over time," but he did not offer any evidence that the door mechanism's condition had actually changed since its installation in 1969.

Moreover, the facilities manager, Blaisdell, testified that any adjustments made to the facilities' doors were based on room use. Blaisdell stated that the manufacturer did not provide or establish standards related to the appropriate closing speed and that, in his opinion, the door in question needed no repair or maintenance at the time of Buckley's fall. Buckley offers no

evidence in response. Thus, there is no evidence that the door closer had fallen into disrepair.[5] There is no evidence that the door closed more quickly than the design and construction permitted when it was installed in 1969.

We thus agree with the circuit court's determination that Buckley's claim is time-barred due to her failure to show that the closing mechanism was altered from the time of its installation in 1969 or that it had fallen into disrepair. On this record, the statute of repose applies because Buckley's claim is based on the design and construction of the door closer, as there is no evidence that it now closes more quickly than it did originally.

In sum, because the door installation was substantially completed in 1969 and Buckley fell on June 18, 2017, forty-eight years later, the ten-year statute of repose applies. Buckley has failed to present evidence that she suffered "damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property" and the exception she

[5] We also reject Buckley's legally and factually unsupported contention that a safe place duty to maintain encompasses a duty to inspect, which would have flagged a need to adjust the mechanism to bring it into compliance with industry standards. ThedaCare points to authority establishing that even an owner's alleged awareness of and failure to repair a supposed hazard in the structure that has existed since the time of substantial completion does not convert that hazard into an "unsafe condition associated with the structure" for purposes of the negligent maintenance exception to the statute of repose. *See* ***Crisanto v. Heritage Relocation Servs., Inc.***, 2014 WI App 75, ¶21, 355 Wis. 2d 403, 851 N.W.2d 771 (the fact the defendant was aware there was no safety gate on the elevator, a defect that could have easily been corrected, does not implicate the "negligent maintenance" exception to the statute of repose; if it did, then "every improvement that is negligently designed could be considered an ongoing nuisance that the owner or operator negligently maintains by failing to correct"; *see* ***id.***, ¶25(citation omitted)); *see also* ***Hocking v. City of Dodgeville***, 2010 WI 59, ¶50, 326 Wis. 2d 155, 785 N.W.2d 398 (holding that when the design and construction of city streets caused a water drainage problem, the city's failure to alter the streets to remedy the original problem was a not failure to maintain the streets under WIS. STAT. § 893.89(4)(c)). As these decisions point out, a contrary result would effectively nullify the statute of repose, since every negligently designed or constructed improvement could be characterized as an ongoing nuisance that the owner or occupier negligently maintained by failing to inspect and correct. *See* ***id.***, ¶47.

attempts to rely on does not apply. *See* WIS. STAT. § 893.89(4)(c). Buckley's claim is thus time-barred.

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals