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DISTRICT II

February 9, 2022

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

2021AP489 Deborah Anderson v. Benevolent Corporation Cedar Community (L.C. #2017CV557)

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).

Deborah Anderson[1] appeals from a circuit court order granting summary judgment for Benevolent Corporation Cedar Community, Cedar Community Foundation, Inc., and their insurers (collectively, Cedar Community), resulting in the dismissal of her safe place and

[1] Deborah Anderson brought this action on behalf of the Estate of Helen M. Munding as administratrix of the estate and on her own behalf as the daughter of Helen Munding. The other plaintiffs-appellants are children of Helen Munding. For ease of reading, we use "Anderson" to refer to all plaintiffs-appellants collectively.

negligence claims. Anderson argues that the circuit court erred in concluding that her claims are time-barred by the applicable statute of repose. 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 (2019-20).[2] We affirm.

At all times relevant to this action, Helen M. Munding was a resident at Cedar Bay West (Cedar Bay), a Residential Care Apartment Complex (RCAC),[3] owned by Cedar Community. According to the complaint, on October 4, 2014, "Munding … left her room [at Cedar Bay], exited the rear of the building, and fell off the end of a loading dock, suffering blunt traumas to her head and torso, which required medical care, and ultimately culminated in her death on October 7, 2014." Anderson alleged that Cedar Community's negligence and violation of the safe place statute, WIS. STAT. § 101.11(1), caused Munding's injuries and death.

Cedar Community filed a motion for summary judgment, arguing that Anderson's claims are barred by the statute of repose, WIS. STAT. § 893.89, because it is undisputed that there were no changes to the loading dock made for at least fourteen years prior to Munding's fall. Anderson opposed the motion, arguing that her claims are not time-barred because Cedar Community committed numerous safe place violations before Munding made her way to the loading dock, which violations also support her common law negligence claim. She argued that her case falls within the exception to the statute of repose set forth in § 893.89(4)(c), "for

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

[3] A RCAC is also commonly known as an independent living facility. *See* WIS. ADMIN. CODE § DHS 89.22(2) (Feb. 2015). It is undisputed that Munding was free to come and go when she wanted in this facility.

damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property." *See* ***id.***

In support of her position, Anderson submitted the report of an engineering expert who stated:

> It is my opinion, to a reasonable degree of engineering certainty, that the operators of the home where Helen Munding resided left in place a dangerous condition that exposed a 32 inch drop onto concrete to their employees, residents and visitors to their facility. The lack of guarding violated the Wisconsin Commercial Building Code, created an unsafe condition, and was a cause of Helen Munding's fall and subsequent death.

The 32-inch drop referred to by the expert describes the loading dock off which Munding fell.

Anderson later offered a supplemental report from her expert stating "that the operators of the home where Helen Munding lived failed to safeguard access to a known dangerous condition through the use of presence sensing systems until after her fall had occurred." In his supplemental report and subsequent deposition testimony, the expert included several measures that he opined Cedar Community could have taken to alert others of Munding's exit from the doors near the loading dock, such as having video monitoring, or an alarm that was turned on, or a key-fob system programed to set off an alarm.[4]

After reviewing the parties' summary judgment briefs and the evidence, the circuit court issued a written decision granting Cedar Community's motion and dismissing the action. The

[4] The parties indicate Munding first went through an internal employee exit door and then on to an outside door. The outside door opened to a sidewalk that led to a parking lot. The loading dock was adjacent to the sidewalk.

court determined that "[b]ecause this is a structural defect case, the plaintiffs' claims, all of them, are barred by [WIS. STAT.] § 893.89." Anderson appeals.

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 opposing party 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 movant fails to demonstrate there are any disputed issues of material fact, the opposing party 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 Munding'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) (2011-12).[5] 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., Inc.***, 136 Wis. 2d 515, 523, 402 N.W.2d 382 (Ct. App. 1987) (citation omitted). It is undisputed that the loading dock is an improvement to the property that was substantially completed in 2000.

Determining whether the statute of repose bars Anderson'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

[5] 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 Munding's fall in 2014, the longer exposure period applies to Anderson's claims. The parties do not argue that any of the other changes to the statute are relevant to this appeal.

employment and public buildings to *construct, repair, or maintain* buildings safely." ***Mair***, 291 Wis. 2d 132, ¶19 (emphasis added).

At the time of Munding'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 that permits claims to proceed in instances in which "[a]n owner or occupier" is negligent "in the 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.

As explained below, Anderson argues that she has proffered enough evidence to survive summary judgment. We disagree.

First, Anderson concedes that the loading dock and the safety measures surrounding it (such as a chain across the area and a warning sign) were built, and remained unchanged for, over ten years before Munding's fall.[6] She further concedes that WIS. STAT. § 893.89 bars negligence or safe place claims related to the structure and condition of the loading dock area for

[6] While the expert identified the loading dock area as the cause of Munding's fall, in his deposition, the expert conceded that he is unaware of any changes to the loading dock area between 2003 and Munding's fall. He further testified that he is unaware of any changes made to the bars, chain, or caution sign alerting individuals to the dangers in the loading dock area between 2003 and Munding's fall.

the same reason. Anderson identifies the exception for negligent inspection, operation, or maintenance associated with a structural defect set forth in § 893.89(4)(c), but she does not sufficiently develop this argument. The applicable case law makes it clear that the exception does not apply.

For example, Anderson's expert opined that Cedar Community should have had a risk management plan that would have identified the loading dock hazard, such that the risk could be "mitigated." Cedar Community points to authority establishing that even an owner's alleged awareness of and failure to repair a supposed hazard in a 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, e.g.*, ***Crisanto v. Heritage Relocation Servs., Inc.***, 2014 WI App 75, ¶¶21, 25, 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" (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 not a failure to maintain the streets under WIS. STAT. § 893.89(4)(c)).

Nevertheless, Anderson contends, there are "separate" negligent acts and/or safe place violations, independent of the loading dock area, that were substantial factors in causing Munding's fall. Namely, she identifies various measures that Cedar Community could have taken to prevent Munding's access to the loading dock.

As the moving party invoking the exception, Anderson 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, even if the absence of Anderson's suggested measures is considered an unsafe condition associated with a structural defect[7] or as grounds for a "separate and independent" negligence claim, Anderson has not met her burden of proof.

Specifically, Anderson contends Cedar Community was negligent and/or violated the safe place statute by "failing to properly observe the employee exit door, failing to monitor the video camera, failing to utilize proper administrative controls to protect the people who lived in this building, and failing to turn on the safety alarm attached to the premises." In order to meet her burden on this point, Anderson would have to prove "not only that the defendant's conduct was negligent, but also that the negligent conduct was 'the cause in fact or a substantial factor in causing the eventual injury.'" *See* ***Ollman v. Wisconsin Health Care Liab. Ins. Plan***, 178 Wis. 2d 648, 666, 505 N.W.2d 399 (Ct. App.1993) (citation omitted).

[7] Anderson does not address whether safe place liability attaches to the suggested measures. The safe place statute applies to *unsafe conditions associated with the structure* (the loading dock), such as a structure that has fallen into disrepair or otherwise become unsafe due to a failure to repair or maintain. Instead, Anderson argues that the omitted safety measures are separate and independent acts that support her common law negligence claim. *See* ***Gennrich v. Zurich Am. Ins. Co.***, 2010 WI App 117, ¶23, 329 Wis. 2d 91, 789 N.W.2d 106 (explaining that ordinary negligence focuses on negligent activities whereas safe place law focuses on the condition of the premises itself); *see also* ***Hofflander v. St. Catherine's Hosp. Inc.***, 2003 WI 77, ¶91, 262 Wis. 2d 539, 664 N.W.2d 545 ("Wisconsin's safe place statute governs only unsafe physical conditions of premises. It does not involve reckless or negligent acts of persons on the premises."). We need not reach the issue of whether safe place liability attaches to the suggested measures (and whether the measures to limit access are comparable to a failure to correct a structure or warn, rather than a failure to maintain) given our conclusion that the plaintiff has failed to provide any facts to show causation. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (when one issue is dispositive of an appeal, we need not reach other issues).

While Anderson relies on the conclusions from her expert's reports, the expert testified at his deposition that he could not state "to a reasonable degree of professional certainty" that any of the alleged additional safe place violations raised by Anderson could have prevented Munding's fall or that the absence of these additional suggested measures was a substantial factor in causing Munding's injuries.

Moreover, the record is devoid of facts to explain precisely how the accident happened. Video surveillance footage does show Munding walking toward the exit door near the loading dock, which she used to leave Cedar Bay, and a Cedar Community staff member reportedly saw a person on the loading dock from a second-story window, but there are key gaps in the evidence surrounding Munding's fall. To be specific, it is unclear precisely how Munding managed to get onto the loading dock[8] and there is no evidence regarding how much time elapsed from when Munding exited the building until she fell off the loading dock. As the expert testified in his deposition:

> We don't know the time that she took to walk down there. We don't know the time she took to decide whether to go through the gap between the thing. And we also don't know what the response in time of Cedar Creek Community would have been had there been an alarm.

[8] There is no evidence as to how Anderson ended up falling off the loading dock despite the fact that it was chained off with a warning sign, but both the expert and the police opined that she somehow slipped through the nine-inch gap between two poles that were off to the side of the loading dock.

Without this, there is no basis from which a jury could conclude that an alarm, increased video surveillance, an alert system, or a key-fob system that set off an alarm would have prevented Munding's injuries.[9]

Anderson's failure to provide factual support or to elicit expert testimony regarding causation results in an insufficiency of proof sufficient to withstand summary judgment. *See* ***Ollman***, 178 Wis. 2d at 667. As noted, rather than testify that the absence of the other safety precautions Anderson proposes were a substantial factor in causing Munding's injuries, the expert conceded that he does not know any of the factors necessary to determine whether measures such as an alarm system, continuous security video monitoring, or a key-fob system that would have set off an alarm, would have changed the outcome. He responded to questions regarding whether any additional measures could have prevented Munding's injuries with statements such as "I don't have any way of knowing," "I don't have an opinion," and "I would believe." Thus, there are no facts, nor is there expert testimony, to show that the proposed safety precautions would have made a difference—that their absence was a cause, much less a substantial factor, in causing Munding's injury. The factual vacuum provides for nothing upon which a jury could determine liability but speculation. *See* ***id.*** ("[T]he lack of expert testimony on the question of causation results in an insufficiency of proof where the issue involves

[9] Even as to these proposed measures, the expert's additional testimony underscores the speculative and attenuated nature of the suggested measures. For example, he testified that the facility would not be expected to have continuous video monitoring (and as noted, he could not say whether video surveillance would have prevented the fall). The expert further testified that a key-fob system would involve assessing and identifying residents by "treating personnel" to determine whether they would present a hazard if they left the facility and, if so, their exit would set off an alarm based on a key-fob system. Anderson has not identified any such assessment as it pertains to Munding or any evidence to show this was required for her, much less that the failure to implement such an assessment and system violates a standard of care applicable to an independent living facility where residents are free to come and go. Indeed, the expert stated that he had no opinion regarding the care and supervision of Munding.

technical, scientific or medical matters which are beyond the common knowledge or experience of jurors and the jury could only speculate as to what inference to draw." (citation omitted)); ***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 fact on summary judgment"). Consequently, Anderson presented no evidence to create a material factual dispute sufficient to withstand summary judgment.[10]

In sum, Anderson cannot overcome the statute of repose in WIS. STAT. § 893.89 because she offered no evidence to demonstrate that the alleged hazardous condition of the loading dock, which Anderson does not contest caused Munding's injuries, did not exist when the improvement was substantially completed well over ten years ago. We thus agree with the circuit court's determination that Anderson's claim is time-barred due to her failure to show that

[10] Without any factual or expert testimony to support her, Anderson baldly claims in her brief that the facility should have prevented Munding from opening the door. First, it is undisputed that Munding was free to come and go when she wanted in this independent living facility. Second, Anderson's expert testified that the facility should *not* have locked the door leading to the parking lot. Clearly, precluding exit altogether would require a showing that such a measure was permissible and/or that it would not compromise the safety of the residents. Ultimately, however, Anderson's expert merely opined that a key-fob system would have set off an alarm, not that it would have prevented her exit altogether. As noted above, as with an alarm or video surveillance, there is no evidence that the absence of such a measure was a cause of Munding's fall.

We further note that Anderson's expert also conceded that he is not in a position to provide expert opinion testimony on the appropriate standards of care for a RCAC. Cedar Community contends that an expert was necessary to opine as to the appropriate standards of care for a RCAC as it pertains to such measures as alarms when a resident exits, for example, when it is undisputed that the residents were permitted to come and go as they pleased. Cedar Community persuasively argues that, without guidance as to an appropriate standard of care for this type of independent living, a jury would be left to speculate as to whether the facility was negligent. *See, e.g.*, ***Christianson v. Downs***, 90 Wis. 2d 332, 338, 279 N.W.2d 918 (1979) ("Unless the situation is one where the common knowledge of laymen affords a basis for finding negligence, expert … testimony is required to establish the degree of care and skill required ….") We need not reach this issue given our conclusion that the plaintiff has failed to provide any facts to show causation. *See* ***Berge***, 113 Wis. 2d at 67 (when one issue is dispositive of an appeal, we need not reach other issues).

the loading dock was altered from the time of its substantial completion. Furthermore, Anderson has failed to present evidence that Munding suffered "damages resulting from negligence in the maintenance, operation or inspection of an improvement to real property" and the exception on which she attempts to rely does not apply. *See* WIS. STAT. § 893.89(4)(c). There is no factual evidence or expert testimony that independent, unsafe conditions arising from the absence of measures designed to alert the facility that Munding had exited a door were a substantial cause of Munding's fall. Anderson'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