



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

August 23, 2023

To:

Hon. Samantha R. Bastil
Circuit Court Judge
Electronic Notice

Zachary J. Davis
Electronic Notice

Chris Koenig
Clerk of Circuit Court
Sheboygan County Courthouse
Electronic Notice

Jeffrey M. Montpetit
Electronic Notice

Jeffrey T. Nichols
Electronic Notice

Gregory J. Cook
Electronic Notice

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

2022AP1381

Karen M. Brabham v. Embers, LLC (L.C. #2018CV652)

Before Gundrum, P.J., Neubauer and Lazar, 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).

Karen M. Brabham appeals from an order granting summary judgment in favor of Embers, LLC. She also appeals from an order denying her motion for reconsideration. Brabham argues there are genuine issues of material fact that preclude summary judgment on her negligence claim. 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 (2021-22).¹
We affirm.

On August 21, 2016, a fire occurred at a one-story, forty unit apartment building owned by Embers. At that time, Brabham’s sister, Deborah Marsh, rented an apartment from Embers. Marsh died in the fire. Brabham brought suit against Embers, alleging that Embers was “negligent and careless in failing to install a smoke alarm/smoke detector in [Marsh’s unit], as required by law” and that Embers’ negligence caused Marsh’s death.

The undisputed facts in the record establish Marsh began renting the apartment in 2014. On January 15, 2014, Marsh signed a “Landlord/Tenant Agreement For Smoke Detector Condition” form in which she acknowledged there was a functional smoke detector installed in her unit, the detector was tested and operational, her landlord explained the manufacturer’s recommendations as to testing, and she was required to notify the landlord or manager if a defect developed with the smoke detector. *See* WIS. STAT. § 101.145(4) (requiring an owner to install a smoke detector in each residential unit); § 101.145(3)(c) (requiring the occupant to maintain the unit’s smoke detector).² Marsh never notified Embers, or property manager Patricia Davis, regarding a defect in her smoke detector.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

² WISCONSIN STAT. § 101.145(3)(c) provides, in relevant part:

The occupant of a unit in a residential building shall maintain any smoke detector in that unit, except that if an occupant ... gives written notice to the owner that a smoke detector in the unit is not functional the owner shall provide, within 5 days after receipt of that notice, any maintenance necessary to make that smoke detector functional.

Davis testified she became friends with Marsh and would check in on her once a week. Davis replaced or checked the batteries in Marsh's smoke detector on nearly a monthly basis. Marsh smoked cigarettes in her apartment and would routinely remove the smoke detector's batteries. When this happened, Davis would replace the batteries. Davis saw a smoke detector in Marsh's apartment days before the fire. Marsh's neighbor, Leonard Zimmer, testified he was in Marsh's unit on one or two occasions and saw a smoke detector in her unit. Following the fire, no smoke detector was found in the debris of Marsh's unit, and there were no mounting bracket screws found in the wall.

Embers moved for summary judgment, asking the court to conclude Embers complied with WIS. STAT. § 101.145 and that Brabham was unable to meet her burden of proof that Embers was causally negligent for the fire and Marsh's death. Embers' motion was based in part on several undisputed material facts: Embers installed a functional smoke detector in Marsh's apartment when she moved into the unit; Marsh never reported a problem with her smoke detector; Marsh regularly took the batteries out of her smoke detector so that she could smoke cigarettes in her apartment; and the cause of the fire was classified as "undetermined."

Brabham responded with three affidavits from former Embers tenants. Two averred they did not know whether their smoke detectors worked and one averred hers did not work. At the summary judgment hearing, Brabham argued Embers was negligent in failing to maintain the smoke detector in Marsh's unit and this negligence caused Marsh's death.

Ultimately, the circuit court granted Embers' motion for summary judgment. The circuit court first concluded Embers complied with WIS. STAT. § 101.145. The court then reasoned:

In looking at the evidence in the light most favorable to the Plaintiff, there were the three affidavits that were submitted on May 5th of 2022. Those affidavits do not reference Ms. Marsh's unit specifically and nothing in those affidavits indicate anything contrary to Ms. Davis's affidavit ... so there is nothing in there which triggers the Defendants having a duty to go in within five days and make the smoke detector functional.

The fact that there is no smoke detector found during the fire investigation and this issue about the screws, doesn't negate the fact that the evidence on the record indicates that Ms. Marsh had a working smoke detector on January 15th of 2014, had never notified the Defendants that her smoke detector wasn't functioning properly, and, furthermore, the evidence indicates that Ms. Marsh did not want her smoke detector to function properly because she preferred to smoke in her 600 square foot apartment at Embers.

Brabham appeals.

“Summary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law.” *Tews v. NHI, LLC*, 2010 WI 137, ¶42, 330 Wis. 2d 389, 793 N.W.2d 860. “[O]nce sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial ‘to make a showing sufficient to establish the existence of an element essential to that party’s case.’” *Transportation Ins. Co. v. Hunzinger Const. Co.*, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (Ct. App. 1993) (citation omitted).

On appeal, Brabham argues the circuit court erred by granting Embers' motion for summary judgment. Brabham does not address the application of the safety statute, WIS. STAT. § 101.145. Instead, Brabham bases her appeal on whether Embers had a “common law duty of reasonable care to maintain smoke detectors.” Brabham argues that if Embers had maintained the smoke detector in Marsh's unit, then Marsh would have been alerted to the fire and would have had time to escape.

To prevail on a negligence claim, Brabham must prove, in part, that Embers and/or Davis were the legal cause of Marsh's injuries.³ Legal cause "is made up of two components, cause-in-fact and 'proximate cause,' or policy considerations." *Miller v. Wal-Mart Stores, Inc.*, 219 Wis. 2d 250, 261, 580 N.W.2d 233 (1998) (citation omitted). Regarding cause-in-fact, the question is whether the breach of the duty was a substantial factor in causing the harm from which damages are claimed. *Id.* at 261-62; *see also Fondell v. Lucky Stores, Inc.*, 85 Wis. 2d 220, 227, 270 N.W.2d 205 (1978).

Whether a party's negligence is a substantial factor in bringing about the harm and thus is the legal cause of the accident; an unbroken sequence of events must be proven wherein the negligence of a party is actively operating at the time of the injury producing accident and this actively operating negligence was a cause in fact of the accident.

Fondell, 85 Wis. 2d at 227.

We conclude that Brabham has failed to offer sufficient evidence that demonstrates Embers and/or Davis are casually negligent. There is no evidence in this record of any act or omission on the part of Embers/Davis that was a substantial factor in producing her injury. *See Miller*, 219 Wis. 2d at 261-62. There are no facts to show that Embers/Davis removed the smoke detector from Marsh's unit. There are no facts to show Embers/Davis knew the smoke detector was missing or lacked batteries or that Embers/Davis, knowing this information, did not replace a missing smoke detector and/or batteries. Instead the undisputed facts show that Marsh signed a form, indicating there was a functional smoke detector in her apartment and that she

³ To maintain a cause of action for negligence, the plaintiff must prove: "(1) A duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." *Miller v. Wal-Mart Stores, Inc.*, 219 Wis. 2d 250, 260, 580 N.W.2d 233 (1998) (citation omitted).

would notify the property manager or landlord if a defect developed. The admissible evidence shows Davis routinely replaced the batteries in the smoke detector and Marsh routinely removed them so she could smoke in her unit. The circuit court's grant of summary judgment in favor of Embers was proper. *See Tews*, 330 Wis. 2d 389, ¶42.

IT IS ORDERED that the orders of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals