COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP4

Cir. Ct. No. 2005CV366

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

TRACY WALCZAK,

PLAINTIFF-APPELLANT,

PRIMAX RECOVERIES, INC.,

INVOLUNTARY-PLAINTIFF,

V.

KUM AND GO, LC AND ABC INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Barron County: JAMES C. BABLER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Tracy Walczak appeals a summary judgment dismissing her safe place and negligence claims against Kum and Go, LC.

Walczak allegedly slipped on a patch of ice outside the convenience store and seriously injured herself. Walczak contends the circuit court erroneously dismissed her claims because factual issues exist for a jury to resolve. We conclude Walczak failed to offer sufficient evidence to survive summary judgment and, accordingly, we affirm the judgment.

Background

¶2 On February 28, 2005, Walczak stopped at Kum and Go to mail a letter. The mailbox was located on the sidewalk outside the store, under its canopy, a few feet from where the sidewalk meets a portion of the parking lot painted with hash marks. At some spot, Walczak slipped, ostensibly on a patch of ice, and fell, tearing her rotator cuff and requiring surgery. The injury and resulting scar tissue have left her permanently unable to use her right arm above waist level and have affected her employment.

¶3 Walczak asserted she slipped on ice formed by an improperly maintained rain gutter and downspout system. According to Walczak, snow and ice on the roof would melt during sunny days, the water would run through the downspout, and the water would freeze overnight on the ground. She alleged both common law negligence and a safe place violation.

¶4 On September 22, 2006, Kum and Go moved for summary judgment, arguing that Walczak could not show it had adequate notice of the ice because she could not establish how long the ice had been on the ground. Further, Kum and Go asserted Walczak failed to produce any evidence to support her negligence claim.

¶5 In response, Walczak argued that the downspout was a course of conduct or method of operation, eliminating her need to establish notice under safe place requirements. Regarding her negligence claim, she referred the court back to her complaint. The court granted Kum and Go's motion, and Walczak appeals.

Discussion

¶6 We review summary judgments de novo, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). "A party seeking summary judgment must establish a record sufficient to demonstrate … there is no triable issue of material fact on any [of the] issues presented." ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993) (citation omitted). Sometimes, however, "a party moving for summary judgment can only demonstrate that there are no facts of record that support an element on which the opposing party has the burden of proof…." ***Id.*** at 291. Thus, it becomes "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.'" ***Id.*** at 291-92 (citation omitted).

I. The Safe Place Claim

¶7 Employers and owners of public buildings are required to provide a place safe for employees and frequenters, and "Every employer and every owner of a place of employment or a public building … shall so construct, repair or maintain such place … as to render the same safe." WIS. STAT. § 101.11(1).[1]

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

"'Safe' does not mean completely free of any hazards." ***Megal v. Green Bay Area Visitor & Conv. Bureau, Inc.***, 2004 WI 98, ¶10, 274 Wis. 2d 162, 682 N.W.2d 857. Just because a place could be made safer, it does not necessarily mean the owner or employer has breached the duty of care imposed by statute. ***Id.*** Rather, the employer or owner must simply make the place as safe as the nature of the premises reasonably permits. ***Id.***

¶8 The safe place statute addresses only unsafe conditions, not negligent acts. ***Id.***, ¶9. In order for an owner or employer to be subject to the duty of WIS. STAT. § 101.11(1), he or she must have notice of the unsafe condition. ***Megal***, 274 Wis. 2d 162, ¶11. Notice may be actual or constructive. ***Id.*** Walczak asserts Kum and Go had both actual and constructive notice of an unsafe condition. However, we conclude Walczak offered no evidence the store had notice of either type.

A. Actual Notice

¶9 Walczak argues a jury could infer Kum and Go had actual notice of a hazard based on manager Jeffrey Kamrath's testimony that he had previously seen ice form in the hash-marked area of the parking lot and that "you're going to have ice at a downspout if it freezes." Walczak also relies on the following exchange between her attorney and Kamrath:

> Q: So that would typically be one area where you would check here, is where this downspout is?
>
> A: We would check that area plus the – the entire area. We check the entire parking lot.
>
> Q: Okay. All right. Just so I'm clear on this, you had noticed, prior to February 28th of 2005, ice in the area of this downspout by where the sidewalk hits the parking area?

A: Closer to the downspout, yes.

¶10 This information, however, does not demonstrate Kum and Go had actual knowledge of the ice on which Walczak says she fell. All it shows is that Kamrath knew, at some undefined date prior to Walczak's fall, he had seen ice form closer to the downspout. But Walczak has not shown that the *particular* ice on which she slipped on that *particular* day in February came from the downspout. Indeed, a Kum and Go employee testified that, prior to opening the store, she checked the premises and saw no hazards, including ice, requiring treatment.

¶11 Walczak also lacks any evidence of the source of the ice. Rather, the evidence is nearly uncontroverted that the ice did not come from the downspout. Although Walczak stated that she fell where the hash-marked pavement meets the sidewalk, she also stated, more vaguely, that she fell on the sidewalk. However, portions of the sidewalk are uphill and around the corner from the downspout, and Walczak has not offered an explanation as to how water from the downspout might defy gravity to flow up the concrete. Further, Kamrath testified that when he sees ice, it is usually "closer to the downspout" than the area in which Walczak claims to have fallen.

¶12 Moreover, Walczak emphasizes, albeit in a different part of her argument, that Kamrath allegedly expressed to her a problem with water dripping off the roof. That, however, undercuts her claim the water came from the purportedly hazardous downspout. In fact, the only "evidence" Walczak offers about the downspout as source of the ice is her own unsubstantiated opinion, but this is no evidence at all. S*ee* ***Moulas v. PBC Prods., Inc.***, 213 Wis. 2d 406, 417, 570 N.W.2d 739 (Ct. App. 1997) (personal opinion of affiant absent a validating

basis does not constitute evidentiary fact). The court properly concluded there was no evidence Kum and Go had actual notice of a hazard.

B. Constructive Notice

¶13 If constructive notice is relied upon in a safe place claim, evidence of the length of time the unsafe condition existed is generally required. ***Megal***, 274 Wis. 2d 162, ¶18. Walczak lacks any evidence as to how long the ice was on the ground and therefore attempts to convince us that the downspout was a "method of operation," thereby allowing her to apply the exception in ***Strack v. Great Atlantic & Pacific Tea Co.***, 35 Wis. 2d 51, 57-58, 150 N.W.2d 361 (1967), and to avoid proving the temporal element.

¶14 ***Strack*** involved a grocery store that displayed fruit "in such a way that they may be handled by customers and dropped or knocked to the floor unintentionally…." ***Id.*** at 56. One customer slipped and fell on an Italian prune, ***id.*** at 54, and brought a safe place claim without evidence of how long the prune had been on the ground. The supreme court held:

> we think that in circumstances where there is a reasonable probability that an unsafe condition will occur because of the nature of the business and the manner in which it is conducted, then constructive knowledge of the existence of such an unsafe condition may be charged to the operator and such constructive notice does not depend upon proof of an extended period of time within which a shop owner might have received knowledge of the condition in fact.

Id. at 57-58.

¶15 Walczak contends that the location of the downspout is a manner of conducting business. We reject this argument—in this particular case, the exterior

construction of the Kum and Go building has nothing to do with "the nature of the business and the manner in which it is conducted." ***Strack*** is inapposite.

¶16 Because Walczak lacks proof of the length of time the ice was outside the store, she cannot prove constructive notice. Without proof of notice, either actual or constructive, Walczak cannot prevail on a safe place claim. The court properly dismissed that claim.

II. Common Law Negligence

¶17 Walczak alleged Kum and Go committed common law negligence, the elements of which are a duty of care, a breach of that duty, a causal connection between the conduct constituting the breach and the injury, and actual loss or damage as a result of the injury. *See* ***Transportation Ins. Co.***, 179 Wis. 2d at 293. On appeal, Walczak asserts Kum and Go's duty was to exercise "due care to refrain from any act which will cause foreseeable harm to others" and that the store breached this duty by its "failure to remedy the dangerous condition [of] the downspout emptying on the sidewalk…."[2] In her complaint, Walczak merely alleged Kum and Go "negligently maintained the sidewalk…."

¶18 Walczak's negligence claim suffers, in much the same way as her safe place claim, from an utter lack of proof: she has not shown the downspout could or did produce ice where she fell. To begin, it is evident from her

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[2] Walczak also complains the circuit court dismissed her negligence claim after concluding it could not survive once the safe place claim failed. This is an inaccurate characterization of the court's decision. It dismissed her negligence claim because Walczak "relies only on the claim of common law negligence in the Complaint. [She] did not provide any other evidence by virtue of affidavits to support this claim."

photographs of the area in question that the downspout does not empty onto the sidewalk. It empties into the parking lot.

¶19 Moreover, although Walczak has not been entirely specific as to the location of where she fell, she does claim to have fallen on some part of the sidewalk. This is problematic because portions of the sidewalk—even portions of the small area between the mailbox and the parking lot—are uphill and around the corner from the downspout.

¶20 Walczak also lacks any evidence as to the actual condition of the property on the day of her accident. Her theory of ice formation was that when ice and snow melted on the roof during sunny days, the water trickled down through the downspout and refroze on the ground overnight. However, Walczak had no photos of the area from the day she fell, and when Walczak returned to Kum and Go the day after, the mailbox-sidewalk-parking lot area was completely dry.

¶21 Walczak points to information she allegedly received from Kamrath when she informed him of her accident:

> He -- he did point out that the -- the -- it was dripping off the roof right outside the window of his office. You could look out -- he pointed and said, see, it is dripping, I have a problem with that ice out there all the time; he said, I repeatedly put stuff on it, but can't keep control of it.

However, this concern about water coming from the roof fails to illuminate any problems with the downspout. Walczak has not alleged any negligence in the maintenance of the roof.

¶22 Again, the only evidence Walczak offers that the ice came from the downspout is her own opinion. Despite her insistence to the contrary, her personal opinion is not an evidentiary fact. It is speculation at best and an assertion of

ultimate fact at worse. Neither is a sufficient submission for defending a summary judgment motion. *See* ***Helland v. Froedert Mem'l Luth. Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999) (speculation) and ***Maynard v. Port Publ'ns, Inc.***, 98 Wis. 2d 555, 562, 297 N.W.2d 500 (1980) (ultimate facts).

¶23 Ultimately, there is simply no admissible evidence that the patch of ice on which Walczak claimed to have fallen came from the downspout. For that reason, the court properly granted Kum and Go summary judgment on the negligence claim.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.