COURT OF APPEALS
DECISION
DATED AND FILED

May 22, 2008

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. 2007AP1431 **Cir. Ct. No. 2005CV660**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

WENDY CRARY AND PHILLIP A. CRARY,

PLAINTIFFS-APPELLANTS,

DEAN HEALTH PLAN, INC. AND WCA GROUP HEALTH TRUST,

PLAINTIFFS,

AMERICAN PROTECTION INSURANCE COMPANY P/K/A LIBERTY MUTUAL FIRE INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

V.

PIC WISCONSIN AND BEAVER DAM COMMUNITY HOSPITALS, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Higginbotham, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Wendy and Phillip Crary appeal the circuit court's order for summary judgment in favor of PIC Wisconsin and Beaver Dam Community Hospitals, Inc. (collectively, "BDCH"). We affirm in part and reverse in part.

¶2 Wendy Crary slipped on ice and fell in the parking lot of Beaver Dam Community Hospital as she was leaving work shortly after 5:00 p.m., injuring herself. Crary saw the ice around her car, but slipped and fell on it anyway. According to the affidavit of Wayne Schroeder, BDCH's director of maintenance, BDCH maintenance personnel policy and practice was to patrol the parking lots at dusk and at other times as weather conditions warranted. He averred that the parking lots were examined for melting snow and water turning to ice as the sun set and, if any problems were noticed, including ice patches and slippery conditions, then salt would be applied. He averred that three or four people were on maintenance duty at the time of the accident and that, when their shift began and weather conditions warranted, they would have begun to examine the parking lots. According to the affidavit of Kay Jezyk, an employee in the BDCH maintenance department who finished work at 2:30 p.m. on the day of the accident, she did not recall any problem with ice on the parking lot and, had a patch of ice been noticed and reported to her, she would have immediately remedied the problem.

¶3 Crary and her husband brought this action against BDCH alleging common-law negligence and a violation of the Wisconsin Safe Place Statute, WIS. STAT. § 101.11 (2005-06).[1] The circuit court granted summary judgment in favor of BDCH, concluding that the Crarys had failed to produce any evidence that BDCH had actual or constructive notice of the ice patch on which Wendy fell.

¶4 We review a circuit court's decision granting summary judgment de novo, applying the same methodology as the circuit court. ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2005 WI 114, ¶30, 283 Wis. 2d 384, 700 N.W.2d 27. "Summary judgment must be entered 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" ***Id.***, (*quoting* WIS. STAT. § 802.08(2)).[2] "All reasonable inferences drawn from the underlying facts contained in these documents … must be viewed in the light most favorable to the non-moving party." ***Id.*** "[T]his court does not resolve issues of fact on summary judgment, but rather decides whether genuine issues of material fact exist." ***Id.***

¶5 The Crarys first argue that the circuit court should have imputed constructive notice to BDCH on the safe place statute claim. That is, the Crarys argue that BDCH should be treated as if it had notice of the ice as a matter of policy although, in fact, it did not. We reject this argument.

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

[2] The decision cites the 2001-02 version of the Wisconsin Statutes, which is identical to the current version.

¶6 The safe-place statute "requires an employer or owner to make the place 'as safe as the nature of the premises reasonably permits.'" ***Megal v. Green Bay Area Visitor & Convention Bureau, Inc.***, 2004 WI 98, ¶10, 274 Wis. 2d 162, 682 N.W.2d 857 (*quoting* ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis. 2d 51, 54, 150 N.W.2d 361 (1967)). The owner or employer "is not an insurer of frequenters of his premises," so "in order to be liable for a failure to correct a defect, he [or she] must have actual or constructive knowledge of it." ***Kaufman v. State St. Ltd. P'ship***, 187 Wis. 2d 54, 59, 522 N.W.2d 249 (Ct. App. 1994) (*quoting* ***Strack***, 35 Wis. 2d at 54).

¶7 The general rule is that an employer or owner is deemed to have constructive notice under the safe place statute only where the hazard has existed for a long enough time that a reasonably vigilant owner would have discovered and repaired it. ***Megal***, 274 Wis. 2d 162, ¶12. "Ordinarily, constructive notice cannot be found when there is no evidence as to the length of time the condition existed." ***Kaufman***, 187 Wis. 2d at 59. However, courts have imputed constructive notice without evidence of the length of time a dangerous condition existed in a narrow class of cases where the nature of the business made the harm reasonably foreseeable. *See* ***Megal***, 274 Wis. 2d 162, ¶18 ("[w]e have refused to impute constructive notice where the area where the harm occurred is not an area where the owner was merchandizing articles for sale to the public in a way that made the harm that occurred reasonably foreseeable"); ***Kaufman***, 187 Wis. 2d at 64 (no exception because banana in a parking lot used by Walgreens and Pick N' Save customers was unrelated or only incidentally related to the operation of the stores, and thus not a foreseeable danger).

¶8 There is no dispute that Crary did not provide evidence indicating how long the ice had been in the parking lot. Absent this evidence, constructive

notice cannot be imputed to BDCH because there are no facts from which it could be inferred that the ice was present for a long enough period of time that a reasonably diligent owner would have found it. This case does not fit the narrow class of cases where the nature of the business makes the harm reasonably foreseeable because there is nothing about the hospital's business, taking care of people's medical needs, that makes it reasonably foreseeable that there would be ice in the hospital parking lot. Accordingly, we conclude that the circuit court properly granted summary judgment dismissing the claim under the safe place statute.

¶9 The Crarys next argue that the circuit court should not have granted summary judgment dismissing their common-law negligence claim. The circuit court dismissed the claim because the Crarys had not adequately shown that BDCH had actual or constructive notice of the ice on which Crary slipped.

¶10 "A person is negligent if the person, without intending to cause harm, either acts affirmatively or fails to act in a way that a reasonable person would recognize as creating an unreasonable risk of injury." ***Megal***, 274 Wis. 2d 162, ¶25. Even if a plaintiff has not shown that a defendant had actual or constructive notice of an unsafe condition that caused his or her injury, which is necessary to establish a violation of the safe-place statute with its higher standard of care, a plaintiff may be able to show that the defendant failed to exercise ordinary care, and thus prove a claim of common-law negligence. ***Id.*** In this case, the circuit court concluded that a showing of actual or constructive notice was a necessary component of a common-law negligence claim. That ruling is inconsistent with Wisconsin negligence law.

¶11 The summary judgment materials submitted by the parties raise an issue of fact as to whether BDCH acted reasonably in policing its parking lots for dangerous conditions. The affidavits established that BDCH had a policy of sending out employees to look for hazards and that a BDCH employee did not notice any ice several hours before the accident. The disputed questions of fact for the jury include: (1) to what extent did BDCH's employees follow its policy on the day of the accident; and (2) were BDCH's actions reasonable given the size of the parking lot where Crary fell and the weather conditions. Because these disputed factual issues preclude summary judgment on the negligence claim, we reverse the circuit court's decision as to that claim and remand for further proceedings.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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