COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 27, 1996

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

NOTICE

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No. 95-1694

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

BRYAN NELSON, a/k/a LAVERN NELSON and LORI NELSON,

Plaintiffs-Respondents,

AETNA INSURANCE COMPANY,

Intervenor,

v.

KWIK TRIP, INC.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dunn County: JAMES A. WENDLAND, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Kwik Trip appeals a judgment awarding Bryan Nelson damages for injuries allegedly suffered when he slipped and fell from a footstep on his truck as he was washing the windshield. He brought this action under the safe-place statute contending that he stepped in a pool of spilled

diesel fuel making the soles of his shoes slippery. The jury found Kwik Trip 80% responsible for the accident. Kwik Trip argues: (1) Nelson failed to prove a violation of the safe-place statute because he introduced no evidence that Kwik Trip had actual notice of the spill or that the spill existed for a sufficient time to allow a finding of constructive notice; (2) erroneous evidentiary rulings prevented Kwik Trip from effectively cross-examining Nelson; and (3) the damage award was tainted by Nelson's attorney informing the jury that Kwik Trip had insurance and by an impermissible "per diem" argument. We reject these arguments and affirm the judgment.

The law regarding constructive notice under the safe-place statute was summarized in ***Strack v. Great Atlantic & Pacific Tea Co.***, 35 Wis.2d 51, 54-55, 150 N.W.2d 361, 362-63 (1967):

> The safe-place statute requires a place of employment to be kept as safe as the nature of the premises reasonably permits.
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> ....
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> Since the owner of a place of employment is not an insurer of frequenters of his premises ... in order to be liable for a failure to correct a defect, he must have actual or constructive notice of it.
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> ....
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> In order to promote sound policy, we attribute constructive notice of a fact to a person and treat his legal rights and interests as if he had actual notice or knowledge although in fact he did not.
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> ....
>
> Thus when an unsafe condition, although temporary or transitory, arises out of the course of conduct of the owner or operator of a premises or may reasonably be expected from his method of operation, a much shorter period of time, and possibly no appreciable

> period of time under some circumstances, need exist to constitute constructive notice.

....

While the use of self-service produce displays is not negligence as a matter of law, they do create marketing problems of safety and place upon the store operator the need for greater vigilance if he is to meet the higher than common-law standard of care required by the safe-place statute.

....

> While we do not go so far as to change the burden of proof, 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. (Citation omitted.)

Because of the nature of Kwik Trip's business, the trial court properly ruled that Kwik Trip had constructive notice of the diesel fuel spill. The fueling area is designed to allow a truck driver to simultaneously fill tanks on both sides of his truck. That process necessarily creates a danger of occasional spillage.

We reject Kwik Trip's argument that ***Kaufman v. State St. Ltd. Partnership***, 187 Wis.2d 54, 64, 522 N.W.2d 249, 254 (Ct. App. 1990), restricts application of the constructive notice requirement to an indoor setting. In ***Kaufman***, the plaintiff was injured when she slipped on a piece of banana in a parking lot owned by State Street and shared by two different retail stores. The court held that "ordinarily" constructive notice cannot be found when there is no evidence as to the length of time the condition existed. The court

acknowledged, however, that the length of time viewed as sufficient varies according to the nature of the business, the nature of the defect and the public policy involved. ***Id***. at 63, 522 N.W.2d at 253. Here, a substantial part of Kwik Trip's business occurs outdoors. We see no reason to restrict the constructive notice rule or application of the safe-place statute to the interior of a gas station.

We also conclude that the trial court properly exercised its discretion when it limited Kwik Trip's efforts to impeach Nelson's credibility. Kwik Trip attempted to show that Nelson used his deceased brother's name to commit fraud, and sought to present the details of Nelson's criminal history as well as hearsay testimony regarding an anonymous phone call alleging that Nelson was bragging about making a fraudulent claim. The jury heard Nelson's explanation for using his brother's name and was also informed that a warrant existed for his arrest. Kwik Trip then tried to introduce evidence regarding the details of his conviction. The trial court properly limited the extent of cross-examination to two questions: "Have you been convicted of a crime?" and "How many times?"[1] *See* ***Underwood v. Strasser***, 48 Wis.2d 568, 571, 180 N.W.2d 631, 632-33 (1970).

The trial court also limited inquiry into the circumstances surrounding the warrant. A warrant does not constitute proof of a crime or bad act. Neither the accusations of criminal conduct nor the details of the crimes is admissible under § 906.09, STATS.

Kwik Trip also attempted to attack Nelson's credibility by the use of extrinsic evidence. Specific instances of the conduct of a witness, other than conviction of a crime, may not be proved by extrinsic evidence. *See* § 906.08(2), STATS. While they may be inquired into on cross-examination under some circumstances, the trial court retains discretion to disallow the evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or if it causes undue delay, waste of time, or needless presentation of cumulative evidence. *See* § 904.03, STATS. The trial court properly restricted Kwik Trip's cross-examination to avoid the

[1] The trial court properly limited further cross-examination on the number of offenses because Kwik Trip had not disclosed the existence of an exhibit before trial. *See* ***Jenzake v. City of Brookfield***, 108 Wis.2d 537, 543, 322 N.W.2d 516, 520 (Ct. App. 1982).

introduction of extraneous matters and properly disallowed proof of specific instances of misconduct by extrinsic evidence.

The anonymous phone call claiming that Nelson bragged that his claim was fraudulent was inadmissible hearsay. Kwik Trip argues that the evidence was offered not to prove the truth of the matter asserted, but only for impeachment purposes to undermine Nelson's credibility. The proffered evidence does not impeach Nelson's credibility unless the matter asserted was true. The trial court properly exercised its discretion when it excluded this testimony because of the danger that the jury would misuse the hearsay testimony. ***Id.***

Kwik Trip has not established that it was prejudiced by Nelson's counsel's statements regarding insurance or his argument regarding per diem damages. The jury was already aware that an insurance company was involved in this case because its attorney participated in the trial. In addition, a jury would reasonably assume that a business has liability insurance. Nelson's attorney's question to Nelson's father, asking whether he was involved in any "insurance fraud" constituted a small part of the trial and only informed the jury of something it already had reason to know. Likewise, counsel's "per diem" argument did not taint the damage award. The trial court promptly cautioned the jury to disregard that argument and gave a specific curative instruction. The law presumes that a curative instruction removed the improper argument from the jury's consideration. *See* ***State v. Booth***, 147 Wis.2d 208, 216, 432 N.W.2d 681, 685 (Ct. App. 1988).

By the Court.—Judgment affirmed.

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