COURT OF APPEALS
DECISION
DATED AND FILED

October 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1774

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

THOMAS BOERNER,

PLAINTIFF-APPELLANT,

V.

RELIANCE NATIONAL INDEMNITY COMPANY AND GLENDALE RACQUET CLUB, INC.,

DEFENDANTS-RESPONDENTS,

CONNECTICUT GENERAL LIFE INS. CO.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Thomas Boerner appeals from a judgment granting summary judgment to Glendale Racquet Club, Inc. and its insurer, Reliance

National Indemnity Co. (collectively, "Le Club"), and dismissing his complaint, which alleged causes of action for common law negligence and safe-place statute violations arising out of his slip and fall on the sidewalk outside Le Club. Boerner argues that the trial court erred in dismissing his action against Le Club because, he contends, the athletic club had notice of the ice on the day of his fall. We affirm.

I. BACKGROUND

At approximately 11:30 a.m. on February 18, 1994, Boerner was injured as he was walking from Le Club to his car to retrieve his weight lifting belt. Boerner testified that as he was returning to his car he noticed a puddle of water in the middle of the sidewalk within a few feet of his car. According to his deposition, Boerner tried to step over the puddle so that he would not get his tennis shoes wet, but couldn't because it was too large. When he stepped in the puddle, he slipped on a patch of ice, which was beneath the water, and fell backwards, injuring his head.

Boerner filed suit against Le Club alleging common law negligence and violation of the safe-place statute. Le Club moved for summary judgment, arguing that, as a matter of law, it had no notice of the condition of the sidewalk. In support of its motion for summary judgment, Le Club submitted the affidavits of its employees, Dale Coffey and Janise Holmes. Coffey testified that when he arrived at the athletic club on the morning of Boerner's accident, no snow or ice was on the sidewalks. Coffey also stated that immediately after he learned of Boerner's accident, he inspected the entire length of sidewalk where Boerner had fallen and found no snow or ice on the sidewalk. Holmes stated that when she arrived to work at Le Club, she walked along the same sidewalk on which Boerner

fell and that she did not see any ice or snow on the sidewalk. She also stated that when she went out for mail at approximately 12:30-1:00 p.m. that day, there was no snow or ice on the sidewalk at that time.

The trial court granted summary judgment, concluding that Boerner had failed to establish that Le Club had notice of the alleged icy condition of the sidewalk.

II. ANALYSIS

Section 802.08, STATS., governs summary judgment methodology. That methodology has been set forth many times, *see, e.g.,* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980), and need not be repeated here. Summary judgment is appropriate if the submissions establish "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." RULE 802.08(2), STATS. Our review of a trial court's grant of summary judgment is *de novo.* *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987).

The safe-place statute requires every employer to "furnish a place of employment which shall be safe for employes therein and for frequenters thereof …." Section 101.11(1), STATS. In order to recover for a safe-place violation, the plaintiff must prove that there was an unsafe condition, i.e., that the premises were not as safe as the nature of the employment will reasonably permit, that the employer had either actual or constructive notice of the unsafe condition, and that the unsafe condition caused the plaintiff's damages. *See* ***Topp v. Continental Ins. Co.***, 83 Wis.2d 780, 787-88, 266 N.W.2d 397, 402 (1978). Because "the owner of a place of employment is not an insurer of frequenters of his premises, in order to be held liable for a failure to correct a defect, he must have actual or constructive

notice of it." ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis.2d 51, 54, 150 N.W.2d 361, 362 (1967) (citations omitted). Similarly, unless the property owner had actual or constructive notice of the defect or dangerous condition where the plaintiff fell, the owner cannot be held liable for common law negligence. *See* ***Wallow v. Zupan***, 35 Wis.2d 195, 200, 150 N.W.2d 329, 331 (1967).

Boerner first argues that Le Club had actual notice, based on the deposition of Alice Exharos, a Le Club employee, who testified that she observed ice in the parking lot on her way into work that day. Exharos also testified that Le Club did not regularly shovel and salt the premises. Le Club responds, however, that Boerner, in the trial court, did not argue that Le Club had actual notice, apparently conceding that ice in the parking lot does not establish an icy condition on the sidewalk. Boerner offers no reply to Le Club's argument that he waived the actual notice theory. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments not refuted are deemed admitted). Accordingly, we conclude that Boerner waived his argument of actual notice.

Boerner next argues that the trial court erred in finding that no evidence supports his claim that Le Club had constructive notice of the icy sidewalk. Constructive notice is a fiction used to attribute knowledge of a fact to a person "as if he had actual notice or knowledge although in fact he did not." ***Strack***, 35 Wis.2d at 54-55, 150 N.W.2d at 363.

> "The general rule is that constructive notice is chargeable only where the hazard has existed for a sufficient length of time to allow the vigilant owner or employer the opportunity to discover and remedy the situation." Ordinarily, constructive notice cannot be found when there is no evidence as to the length of time the condition existed.

Kaufman v. State St. Ltd. Partnership, 187 Wis.2d 54, 59, 522 N.W.2d 249, 251-52 (Ct. App. 1994) (citations omitted).

Boerner presented testimony from two regular patrons of Le Club who testified that Le Club was generally derelict in its duty in keeping the premises free of snow and ice in January and February 1994. He also presented climatological data for February 1994 which established that it had snowed six days prior to his fall, and that the high and low temperatures on the day before and the day of the fall were 50 degrees and 34 degrees, and 53 degrees and 36 degrees, respectively. However, as Le Club points out:

> The plaintiff confuses and equates precipitation (snow) with ice on the sidewalk. Simply because it snowed six days earlier does not mean that ice had been present for six days. Not only did [Le Club] employees testify that on the day of the accident, the sidewalk was free of ice, the plaintiff, himself, testified that the "majority of [the sidewalk] was free and clear of any kind of ice."

The trial court, granting summary judgment, concluded, "the fact that it snowed six days before, the fact that the weather was not conducive to [freezing], the jury would have to speculate as to whether or not there was ice present at the time in question. It's all too far in time, too speculative to establish that the property owner had reasonable notice …." We agree. This evidence leaves the issue of whether a vigilant owner or employer had the opportunity to discover and remedy the situation wholly in the realm of speculation. Therefore, because the evidence fails to support Boerner's claim that Le Club had constructive notice of the ice on which he slipped and fell, we affirm the judgment dismissing Boerner's action.

By the Court.—Judgment affirmed.

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