COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 99-0521-FT

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

CINCINNATI INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

SUSAN DIEHL,

INVOLUNTARY-PLAINTIFF,

V.

MAYFAIR PROPERTY, INC., THE YARMOUTH GROUP PROPERTY MANAGEMENT, INC., GERLING AMERICA INSURANCE COMPANY, ABC CORPORATION, DEF INSURANCE COMPANY, GHI COMPANY, UVW INSURANCE COMPANY, XYZ INSURANCE COMPANY AND RST INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Cincinnati Insurance Company (Cincinnati) sued to recover certain worker's compensation payments it made to Susan L. Diehl (Diehl) for injuries she suffered in the parking lot of the Mayfair North Tower Building (Mayfair) on December 15, 1994. The trial court's judgment granted the summary judgment motion filed by the defendants, Mayfair Property, Inc., the owner of the property, Yarmouth Group Property Management, Inc. (Yarmouth), the property manager, and Gerling America Insurance Company, the insurer of the property. Cincinnati contended that Diehl slipped on a patch of ice in the parking lot. The trial court concluded that Cincinnati failed to submit proof establishing that the defendants had notice of the alleged ice patch on which Diehl fell. The trial court concluded that in the absence of such proof, Cincinnati failed to make a *prima facie* case of the defendants' violation of the safe place statute, § 101.11(1), STATS., or common law negligence. Because we conclude that Cincinnati submitted sufficient evidence to support the inference that the defendants had constructive notice of the icy conditions in the parking lot where Diehl fell, we reverse the trial court's judgment.[1]

BACKGROUND

¶2 The trial court considered the motion for summary judgment in light of certain undisputed facts. Snow began falling on December 15, 1994, at approximately 6:00 a.m. When Diehl arrived at Mayfair at approximately 6:45 a.m., the parking lot was covered with snow and slush. Diehl broke her ankle as she departed from Mayfair at approximately 12:55 p.m.

[1] This is an expedited appeal under RULE 809.17, STATS.

¶3 It was undisputed that Yarmouth was aware of the morning's weather conditions on the day of the accident. A snow removal report, identified by the director of operations, acknowledged that snow, accumulating to approximately one inch, began falling at 6:00 a.m., and that the temperature hovered in the mid-thirties. It was undisputed that Yarmouth had contracted with a snow removal contractor and owned a vehicle equipped with a plow; nevertheless, the Mayfair parking lot was not plowed on the day of the accident. Instead, Yarmouth's staff cleared the sidewalks of snow by hand. The snow removal report also indicated that Yarmouth's staff salted the entire parking lot and that "most areas melted by 12:00 noon."

¶4 Diehl testified at her deposition that she slipped and fell on a patch of ice in the Mayfair parking lot, approximately five feet from the curb of the sidewalk on the north side of the building. Diehl testified that there was no evidence of sand or salt having been spread in the area of the patch of ice on which she fell.

¶5 The trial court's decision focused on Cincinnati's failure to establish "how long the ice existed, the extent of the ice, or whether there were additional ice patches in the parking lot. The fact that it began snowing at 6:00 [a.m.] for a total of approximately one inch does not by itself demonstrate constructive notice." From this summation of the evidence, the trial court concluded that Cincinnati failed to provide "any length of time evidence that establishe[d] constructive notice. Additionally, defendants patrolled the parking lot and conducted snow removal in a vigilant manner without discovering any ice patch." The trial court granted the defendants' motion for summary judgment. Cincinnati appeals.

STANDARD OF REVIEW

¶6 We review the trial court's grant of summary judgment *de novo. See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Section 802.08(2), STATS., sets forth the standard by which summary judgment motions are to be judged: "The judgment sought shall be rendered 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." Summary judgment should be granted only where the moving party shows "a right to a judgment with such clarity as to leave no room for controversy[.]" ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 477 (1980).

DISCUSSION

¶7 '"The elements in a cause of action for negligence are: (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.'" ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis.2d 281, 293, 507 N.W.2d 136, 140 (Ct. App. 1993) (citation omitted). The safe place statute provides in pertinent part:

> **101.11 Employer's Duty to Furnish Safe Employment and Place.** (1) Every employer shall furnish employment which shall be safe for the employes therein and shall furnish a place of employment which shall be safe for employes therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes and frequenters. Every employer and every owner of a place of employment or a public building now

> or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.

In order to prevail on a claim of negligence, a claimant must demonstrate that the defendant had actual or constructive notice of the defect causing the claimant's injury. *See* ***Low v. Siewert***, 54 Wis.2d 251, 253-54, 195 N.W.2d 451, 453 (1972). Violation of the safe place statute also requires proof of actual or constructive notice. *See* ***Kaufman v. State St. Ltd. Partnership***, 187 Wis.2d 54, 57-59, 522 N.W.2d 249, 251 (Ct. App. 1994).

¶8 In this case, the defendants denied any actual notice of the patch of ice on which Diehl fell; Cincinnati was unable to submit proof of the defendants' actual notice. However, we conclude that Cincinnati submitted ample evidence to create a jury question regarding whether or not the defendants had constructive notice of the icy conditions in the parking lot, including the ice patch on which Diehl injured herself.[2]

¶9 It was undisputed that Yarmouth knew that snow and ice had accumulated in the parking lot for hours prior to Diehl's injury. Yarmouth responded to these conditions by having its staff shovel the walks by hand and spread salt on the parking lot. Yarmouth was unable to produce any evidence indicating when or whether the spot where Diehl fell had been salted. Yarmouth's own records indicated that most *but not all* of the snow and ice on the parking lot melted by noon, shortly before Diehl slipped and fell. In light of these facts, we conclude that the record submitted to the trial court was not susceptible to resolution on a motion for summary judgment as a question of law.

[2] We confine our decision to addressing this issue since it is dispositive of the appeal. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 633, 665 (1938).

¶10 In reaching this conclusion, we rely on ***Werner v. Gimbel Brothers***, 8 Wis.2d 491, 99 N.W.2d 708 (1959). In ***Werner***, a Gimbel's maintenance supervisor came to work at 6:00 a.m. ***Id.*** at 493, 99 N.W.2d at 709. The sidewalk adjacent to the Gimbel's store was icy at that time. ***Id.*** at 493a, 99 N.W.2d at 709. The plaintiff, Mrs. Werner, was injured in a fall at 10:30 a.m. ***Id.*** At the time of Mrs. Werner's accident, Gimbel's maintenance crew was sanding the parking lot; the part of the sidewalk where Mrs. Werner fell had not yet been sanded or salted. ***Id.***

¶11 The trial court determined that the issue of whether Gimbel's had actual or constructive notice of the icy condition of the sidewalk requiring it to take reasonably remedial action presented a question of law. ***Id.*** at 493-93a, 99 N.W.2d at 709. The trial court ruled in favor of Gimbel's and the Werners appealed. The Supreme Court reversed the trial court:

> The only issue on this appeal is the question of fact whether the defendants' actual or constructive notice of the unsafe condition of the walk warned them in time to require them to take reasonable precautions to prevent such an accident. We consider that the evidence bearing on that issue presents a jury question not to be determined as a matter of law.

Id. at 493, 99 N.W.2d at 709.

¶12 Our case shares key features with ***Werner***. In both cases, there was ample evidence of prevailing winter conditions that resulted in ice formation. In both cases, several hours passed between the time that each maintenance crew became aware of the icy condition and the time of the accident. Finally, in both cases, the moving parties, the property owners, were unable to submit positive

proof that the area where the accident occurred was salted or sanded by their respective staffs.

¶13 Accordingly, we hold that this case must proceed to trial so that a jury can decide whether enough time had elapsed between 6 a.m. and 12:55 p.m. to give Yarmouth constructive notice of the icy condition of that part of the parking lot where Diehl's accident occurred to require remedial action in addition to the action already taken by Yarmouth. Accordingly, we reverse the trial court's order and remand the case for trial.

By the Court.—Judgment reversed and cause remanded.

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