COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-3342

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

CAROL M. OBERBRECKLING,

PLAINTIFF-APPELLANT,

WISCONSIN PHYSICIANS SERVICE,

PLAINTIFF,

V.

WATERFORD SQUARE APARTMENTS AND
STATE FARM INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Carol Oberbreckling appeals from the trial court's order granting summary judgment to Waterford Square Apartments and dismissing her safe-place statute action. Oberbreckling asserts that because summary judgment is a drastic remedy; (1) the trial court erred by finding no material issue of fact as to notice; and (2) the trial court erred by finding no material issue of fact as to Waterford's negligence. We affirm.

I. BACKGROUND

¶2 On the evening of December 23, 1996, the sidewalk leading to Oberbreckling's apartment building was free of snow and ice. Early the next morning, however, Oberbreckling slipped and fell where a light dusting of snow covered glare ice on the sidewalk and sustained injuries. Oberbreckling brought a negligence and safe-place claim against the apartment building, alleging that the icy condition was not a natural one, but rather, one that resulted from Waterford's improper design, drainage and maintenance of the sidewalk. She claimed that rust spots found near the area where she slipped established constructive notice of the condition.

¶3 The trial court granted summary judgment to Waterford, determining that Oberbreckling had failed to establish any material issue of fact and the "evidentiary record here creates a clear inference that this was a natural and ordinary accumulation of snow and ice."[1] The trial court specifically noted "three glaring deficiencies" in the plaintiff's case for liability and notice: (1) no expert opinion as to negligence with respect to the area of ice at issue; (2) "no opinion

[1] Waterford argued four grounds for summary judgment to the trial court: (1) natural accumulation; (2) no notice; (3) public policy; and (4) release of liability. The trial court granted summary judgment on the first two grounds.

that any such negligence caused that particular spot of ice to occur"; and (3) no opinion to assist the jury on the issue of notice.

II. DISCUSSION

¶4 WISCONSIN STAT. § 802.08 governs summary judgment methodology. 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." WIS. STAT. § 802.08(2).[2] Our review of a trial court's grant of summary judgment is *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987).

¶5 The party with the burden of proof in the case must establish that there is at least a genuine issue of fact by submitting evidentiary material "set[ting] forth specific facts," *see* WIS. STAT. RULE 802.08(3), material to the elements of the case. ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 290–292, 507 N.W.2d 136, 139 (Ct. App. 1993) ("it is 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'") (quoted source omitted); ***Selerski v. Village of West Milwaukee***, 212 Wis. 2d 10, 16, 568 N.W.2d 9, 12 (Ct. App. 1997). We analyze the trial court's grant of summary judgment within this framework and conclude that Oberbreckling failed to submit any such evidentiary material supporting either her straight negligence or safe-place claims.

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

A. Safe Place

¶6 The safe-place statute requires every employer to "furnish a place of employment which shall be safe for employe[e]s therein and for frequenters thereof ...." WIS. STAT. § 101.11(1). In order to recover for a safe-place violation, a plaintiff must prove three elements: (1) that there was an unsafe condition; (2) that the employer or owner had either actual or constructive notice of the unsafe condition; and (3) that the unsafe condition caused the plaintiff's injury. ***Topp v. Continental Ins. Co.***, 83 Wis. 2d 780, 787–788, 266 N.W.2d 397, 402 (1978) (*quoting* ***Fitzgerald v. Badger State Mut. Cas. Co.***, 67 Wis. 2d 321, 326, 227 N.W.2d 444, 446 (1975)).

¶7 Oberbreckling first argues that summary judgment was erroneously granted to Waterford because constructive notice of a "negligently designed drainage system" can be inferred based on her testimony and the testimony of John Janke, the plaintiff's civil engineer expert. We disagree. As noted, a violation of the safe place statute requires proof of actual or constructive notice. *See* ***Kaufman v. State St. Ltd. Partnership***, 187 Wis. 2d 54, 59, 522 N.W.2d 249, 251 (Ct. App. 1994). "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." ***May v. Skelley Oil Co.***, 83 Wis. 2d 30, 36, 264 N.W.2d 574, 577 (1978) (footnote omitted). "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, 522 N.W.2d at 251; *see also* ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis. 2d 51, 54, 150 N.W.2d 361, 362 (1967) (because "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") (citations omitted).

¶8 Here, Oberbreckling failed to provide any submissions raising a genuine issue of material fact showing that Waterford had constructive notice of the snow and ice on the sidewalk. While Oberbreckling makes much of the fact that there were rust spots on the sidewalk, which she believes indicates a "negligently designed drainage system," as the trial court correctly noted, there could be many explanations for the rust spots and no expert opinion was provided to "fill[] that gap."[3] Additionally, the trial court properly found "no evidence of the hazard being present for … a sufficient length [of time] to allow for notice under these particular circumstances." Indeed, the record is devoid of any evidence as to when the ice formed. Oberbreckling testified that she did not know how long the ice was present before she fell.[4] Thus, without any submissions

[3] We note that in her deposition Oberbreckling said that she fell in one spot and then submitted an affidavit to say she fell where the rust spots were found. *See* ***Yahnke v. Carson***, 2000 WI 74, ¶21, 236 Wis.2d 257, 270–271, 613 N.W.2d 102, 108–109 ("[F]or purposes of evaluating motions for summary judgment pursuant to WIS. STAT. § 802.08, an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial."). Regardless of whether Oberbreckling slipped and fell where the rust spots were found, the existence of these rust spots fails to raise a genuine issue of material fact regarding constructive notice.

Waterford requests, in its response brief to this court, that portions of Oberbreckling's brief regarding the issue of the rust spots be stricken as "not supported by the record." We see no need to do so, however, since after considering Oberbreckling's argument, we agree with Waterford that these rust spots failed to raise a genuine issue of material fact.

[4] The record reflects that Oberbreckling did not know when the ice formed on the sidewalk:

> Q All right. Can you tell me how long that ice was present before you fell on it?
>
> [Plaintiff's attorney]: Object.
>
> [Oberbreckling]: How would I know that?

raising a genuine issue of material fact showing that Waterford had constructive notice of the ice, Oberbreckling cannot maintain her action under the safe-place statute.

B. Negligence

¶9 Oberbreckling next argues that the trial court erred by finding no material issue of fact as to Waterford's negligence. The trial court, granting summary judgment, concluded that no expert opinion was presented as to negligence with respect to the area of ice at issue, nor was any opinion presented that "such negligence caused that particular spot of ice to occur." We agree. The plaintiff's expert, Mr. Janke, testified that "I can't say that [the architect, engineer, or surveyor] were negligent." He testified that the sidewalks were properly designed. Although Mr. Janke testified that he believed the parking lot and catch basin were negligently designed, these areas were not near the site where Oberbreckling fell. Mr. Janke also stated that while the design of the downspouts could "create problems" he could not say "they were negligent." Moreover, Mr. Janke could not testify as to causal negligence attributable to Waterford. When asked whether improper drainage increased the probability of ice forming in that area, he responded: "Probability exists. I can't say that it happened on that day."[5] Thus, Oberbreckling failed to meet her burden "to make a showing sufficient to establish the existence of an element essential" to her case, s*ee* ***Hunzinger***, 179 Wis. 2d at 292, 507 N.W.2d at 139, and accordingly, the trial court properly granted summary judgment.

[5] Mr. Janke could not state whether or not water was backed up onto the sidewalk in December 1996 because his only visit to the site was in July 1999.

By the Court.—Order affirmed.

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