COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2537-FT **Cir. Ct. No. 2012CV88**

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

SANDRA L. EESLEY,

PLAINTIFF-APPELLANT,

V.

THE HOWARD YOUNG MEDICAL CENTER, INC., MMIC HEALTH IT, INC., A/K/A MMIC INSURANCE, INC. AND SECURITY HEALTH PLAN OF WISCONSIN, INC./ADVOCARE,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Oneida County: PATRICK F. O'MELIA, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM.[1] Sandra Eesley appeals an order for summary judgment dismissing her safe-place and negligence claims against The Howard Young Medical Center and its insurers (collectively, Howard Young). Eesley argues the circuit court erroneously determined that she could not prove actual or constructive notice and that an exception did not apply. We affirm.

BACKGROUND

¶2 Howard Young is a seventy-bed hospital. Eesley had knee replacement surgery at Howard Young on February 2, 2011. After her immediate recovery period, she was placed in a room on the medical-surgical floor. Between February 2 and the morning of February 4, Eesley urinated with the use of a catheter and a portable commode placed near her bed. Shortly after noon on February 4, Eesley used the toilet located in the bathroom. She had not previously entered the bathroom.

¶3 Eesley used her walker to transfer to the bathroom, and did not activate the call light for nurse assistance. She turned the bathroom light on and did not notice any water on the floor. When approaching the toilet, she took two small steps and turned. At that point, the walker flew out of her hand and she fell. Eesley did not see water on the floor after falling, but she felt it. Eesley then got up, returned to her bed, and activated the call light.

¶4 The responding nurse went into the bathroom, but did not initially observe any water. However, after stooping over, the nurse informed Eesley she

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2011-12 version.

could see water on the floor. The nurse testified at deposition that she observed water along the baseboard behind the toilet, and that it continued to the left side of the door. She stated it appeared the water was dripping from a sprayer hose.

¶5 Two workers had entered Eesley's bathroom prior to her fall. Earlier in the morning, after breakfast, a female staff member emptied Eesley's portable commode into the toilet. Additionally, Dennis Pierson, the housekeeper, testified he cleaned Eesley's room sometime between 7:30 a.m. and noon. His two to five-minute bathroom cleaning routine included cleaning the sink, vanity top, toilet, and shower; emptying the garbage; and mopping the floor. Even if a bathroom was not used, he would still clean it. If Pierson came across a leak, he would mop it up and report it to maintenance. He did not report a leaking sprayer hose in Eesley's room during the week of her fall.

¶6 Anthony Nedbal, the head of building maintenance, testified he confirmed evidence of a leaky bedpan sprayer in Eesley's bathroom. Most of the bedpan sprayers, including the one in Eesley's room, were original to when the hospital was built in 1975. He further testified they had problems with the sprayers periodically and it was not uncommon for them to leak. After a leak was discovered, they would shut off the water and have the part either rebuilt or upgraded to a different unit. Nedbal testified they probably repair three or four of the seventy sprayers per year. The maintenance department performed periodic inspections of the entire building, but also relied on housekeeping staff to report problems because they are in the rooms daily.

¶7 Eesley brought safe-place and negligence claims. Howard Young moved for summary judgment, arguing there was no evidence of actual or constructive notice. The circuit court granted summary judgment dismissing the

claims because Eesley failed to establish sufficient evidence of how long the water existed on the floor before her fall, and the case did not fit within the ***Strack*** exception. *See* ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis. 2d 51, 150 N.W.2d 361 (1967). Eesley appeals.

DISCUSSION

¶8 Eesley argues the circuit court erroneously granted summary judgment dismissing her claims.[2] Summary judgment is appropriate when "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08. When determining whether there are genuine factual issues, the facts must be viewed in the light most favorable to the nonmoving party. ***Kraemer Bros. v. U.S. Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). We review grants of summary judgment de novo. ***Donaldson v. Urban Land Interests, Inc.***, 211 Wis. 2d 224, 229-30, 564 N.W.2d 728 (1997).

¶9 The owner of a public building is required to construct, repair, or maintain the premises as safe as the nature of the place would reasonably permit. *See* WIS. STAT. § 101.11. The law, however, "does not require an … owner of a public building to be insurers of frequenters of the premises." ***Megal v. Green Bay Area Visitor & Convent. Bureau, Inc.***, 2004 WI 98, ¶9, 274 Wis. 2d 162, 682 N.W.2d 857. "What constitutes 'a safe place depends upon the facts and conditions present, and the use to which the place [is] likely to be put.'" ***Rosario***

[2] Eesely does not separately address her ordinary negligence claim. We therefore confine our analysis to safe-place liability.

v. Acuity, 2007 WI App 194, ¶10, 304 Wis. 2d 713, 738 N.W.2d 608 (source omitted; brackets in ***Rosario***).

¶10 The owner is liable for both structural defects and unsafe conditions associated with the structure of the building. ***Id.***, ¶11. An unsafe condition associated with the structure arises when an originally safe structure is not properly repaired or maintained. ***Id.*** A property owner must have actual or constructive notice of the defect to be liable for an unsafe condition associated with the structure of the building. ***Id.***, ¶12.

> 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 … the opportunity to discover and remedy the situation. 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. (quoting ***May v. Skelley Oil Co.***, 83 Wis. 2d 30, 36-37, 264 N.W.2d 574 (1978)).

¶11 We agree with Howard Young's observation that Eesley's argument "is a bit unclear." It is clear, however, that Eesley does not contend she has any evidence of how long the water was on the bathroom floor. Eesley's brief purports to present a single argument, but it consists of several rambling, poorly delineated arguments.[3]

[3] Eesley's single argument heading provides: "The trial court erred in finding Howard Young … did not have actual or constructive notice of the water accumulation on the floor of the bathroom of their patient, … and that this case does not fit within the ***Strack*** exception." *See* ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis. 2d 51, 150 N.W.2d 361 (1967).

¶12 Eesley first appears to contend there was a material issue of fact in dispute because her expert witness opined that, if Howard Young had conducted proper preventive maintenance by routinely replacing the sprayer hose parts that were subject to failure, the hazardous floor condition would not have occurred. This argument does not address the issue of notice. Thus, any alleged factual dispute is immaterial because the summary judgment decision dismissing the action was decided on the issue of notice.

¶13 Eesley next argues constructive notice can be inferred where an adequate inspection was not performed. *See* ***Gennrich v. Zurich Am. Ins. Co.***, 2010 WI App 117, ¶18, 329 Wis. 2d 91, 789 N.W.2d 106. Howard Young responds that ***Gennrich*** is inapplicable because its holding applies only to employers, as opposed to owners of public buildings. *See* ***id.***, n.2. We agree. Moreover, Eesley concedes the issue by failing to respond in her reply brief. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶14 Next, in her primary argument, Eesley relies on ***Megal*** to argue a constructive-notice exception applies. Ordinarily, constructive notice requires evidence as to the length of time that the hazardous condition existed. ***Megal***, 274 Wis. 2d 162, ¶12. However, our supreme court has "carved out a limited exception to the general rule that temporal evidence is required before constructive notice can arise." ***Id.***, ¶13.

> "[W]hen 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."

Id. (quoting ***Strack***, 35 Wis. 2d at 55; citing ***Steinhorst v. H. C. Prange Co.***, 48 Wis. 2d 679, 683-84, 180 N.W.2d 525 (1970)).

¶15 In ***Strack***, the plaintiff was shopping in a grocery store near tables displaying fruit when she slipped on a prune on the floor. ***Strack***, 35 Wis. 2d at 53-54. Though the plaintiff had no evidence that the prune had been on the floor for any appreciable amount of time, as would be required under the general rule for constructive notice, the court determined that the grocery store had constructive notice because of its method of merchandizing articles for sale to the public in the area of the store where the injury occurred. *See* ***id.*** at 55-56.

¶16 Similarly, in ***Steinhorst***, the store's method of merchandizing articles for sale in the area of the store where the injury occurred gave rise to constructive notice. ***Steinhorst***, 48 Wis. 2d at 684. There, the plaintiff was shopping in a store and slipped on spilled shaving foam when walking next to the men's cosmetic counter. The cosmetic counter displayed a number of aerosol shaving foams, including "tester" bottles that customers were encouraged to sample. ***Id.*** at 681. Although the plaintiff presented no evidence as to how long the shaving foam was on the floor before she slipped on it, the court determined that the ***Strack*** exception applied. ***Id.*** at 684.

¶17 Thus, as summarized in ***Megal***, "[W]hile constructive notice of an unsafe condition usually requires temporal evidence relating to the condition, temporal evidence may be unnecessary when the method of merchandizing articles for sale to the public in the area in which the injury occurred makes the harm that occurred at that location reasonably foreseeable." ***Megal***, 274 Wis. 2d 162, ¶15.

¶18 Eesley argues the ***Strack*** exception applies here because the wet floor resulted from Howard Young's "method of operation," *see* ***Megal***, 274

Wis. 2d 162, ¶13, which was to not replace sprayer hose parts until after they failed. Eesley reads the ***Strack*** "limited exception," *see* ***id.***, far too broadly. As explained above, that exception is limited to the sale and merchandizing of products in such a manner that it is reasonably foreseeable that a hazard will result.

¶19 Finally, Eesley relies on ***Low v. Siewert***, 54 Wis. 2d 251, 195 N.W.2d 451 (1972), to argue a constructive notice exception applies. In ***Low***, the court observed that if a dangerous condition is caused by the affirmative actions of the owner or his or her agent, the owner needs no notice because he or she has knowledge of the acts creating the hazard. ***Id.*** at 254. There, a light bulb had burned out, and the plaintiff fell in an unlit parking lot. ***Id.*** at 251-52. The court refused to apply the affirmative-actions exception, holding, "The failure of the light is not such a defect as results from the active negligence of the owner or his [or her] agent, or of third persons; rather, it is a defect which results from passive negligence or an omission to act on the part of the owner or his [or her] agent." ***Id.*** at 253. The court then explicitly distinguished ***Strack*** and ***Steinhorst***, holding that "defects arising out of failure of electric lights to burn and other similar conditions of neglectful maintenance must exist for a longer period of time before the owner should be charged with notice." ***Id.*** at 254.

¶20 Thus, ***Low*** actually undercuts Eesley's position. We are not persuaded by her argument that Howard Young should have expected the sprayer in her bathroom to fail based on similar parts having occasionally failed in the past. Light bulbs occasionally fail too. Yet, in ***Low***, the court stated it "is not prepared to hold that an owner of property must make an hourly inspection to discover burned out light bulbs on a parking lot." ***Low***, 54 Wis. 2d at 254. Here, there was no reason to expect the specific sprayer hose in Eesley's bathroom to

fail. We likewise are not prepared to hold that the owner of a seventy-bed hospital must make an hourly inspection of every bathroom to ensure none of the plumbing has failed.

¶21 Accordingly, we agree with the circuit court's thorough and well-reasoned summary judgment decision dismissing Eesley's claims. There was no evidence that Howard Young had actual notice of the wet floor and no evidence of how long the water was present on the bathroom floor. Further, this is not one of the rare cases where duration of the risk need not be proved. Thus, as a matter of law, Eesly's claims fail because she cannot prove actual or constructive notice of the dangerous condition.

By the Court.—Order affirmed.

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