COURT OF APPEALS
DECISION
DATED AND RELEASED

January 28, 1997

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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0847

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

ROSIE M. BOWERS,

Plaintiff-Appellant,

v.

HERITAGE MUTUAL INSURANCE COMPANY and EMMETT RAMSEY,

Defendants-Respondents,

MAXICARE HEALTH INSURANCE COMPANY,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Affirmed.*

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

PER CURIAM. Rosie M. Bowers appeals from a judgment granting summary judgment and dismissing her claim against Heritage Mutual

Insurance Company and Emmett Ramsey. Bowers claims that the trial court: (1) erroneously permitted the defendants to incorporate "new" factual allegations in their reply brief during the summary judgment proceedings; (2) erroneously determined factual issues rather than determining whether there were material issues of fact; and (3) improperly awarded the defendants costs. We affirm.

Bowers sued her landlord and brother, Ramsey, for damages arising from injuries sustained in a slip and fall on the steps of her front porch. Bowers's complaint alleged that Ramsey caused her injuries by failing to remove ice, alleging negligence in count I, and a violation of the safe place statute in count II. *See* § 101.11, STATS.

Bowers testified at her deposition that she came home at 4:10 p.m. on March 10, 1993. At that time, there was no ice on the walkway, steps or porch leading to her front door. At approximately 10:45 p.m. that evening, Bowers left her home. After walking down the steps of the front porch, she slipped and fell on a patch of ice, injuring her ankle. Bowers testified that there was no snow on the date of the fall. Climatological data introduced by Bowers showed that the temperature was 32 degrees at 6 a.m., went up to 33 degrees at 9 a.m., and remained virtually unchanged until 9 p.m. when the temperature went down to 29 degrees. Bowers further stated that she had no knowledge as to when the ice patch formed prior to her fall.

Bowers's son and daughter, who lived in the house with Bowers, testified that they were also unaware of how or when the ice patch formed. Ramsey stated in an affidavit that he had been aware of a leaking gutter next to the front porch but had repaired it within the year before the accident. Both parties testified that Ramsey regularly and properly responded to Bowers's requests for repairs and that he had not been notified of any leaking gutters between the time of his repair and the time of the fall.

The trial court granted summary judgment to the defendants, determining that Ramsey did not have constructive notice of any ice that had formed allegedly as the result of leaking gutters.

Summary judgment is appropriate when there is no dispute of material fact and the moving party is entitled to judgment as a matter of law. RULE 802.08(2), STATS. Our review of the granting or denial of summary judgment is *de novo*. ***Green Springs Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987).

Bowers first argues that the trial court erred in permitting the defendants to incorporate "new" factual allegations in their reply brief during the summary judgment proceedings.[1] Further, Bowers states that she was not allowed to give a response to these "new" factual allegations contained in the defendants' reply brief. Bowers did not seek relief from the trial court in connection with the allegedly "new" material. We generally do not review matters that have not been presented first to the trial court. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980). We see no reason to deviate from that rule here. Moreover, Bowers did respond to the "new" facts by letter to the trial court three days before the summary judgment motion was heard.

Bowers next argues that the trial court erroneously decided issues of fact when it granted summary judgment, arguing there are genuine issues of material fact as to whether Ramsey had constructive notice of the icy condition. We disagree. The trial court determined there was no genuine issue of material fact regarding whether Ramsey was on constructive notice that ice existed on the front porch. Without any submissions raising a genuine issue of material fact showing Ramsey's constructive notice of the ice, Bowers cannot maintain her action in negligence or under the safe place statute.[2] *See* ***Strack v. Great Atl. and Pac. Tea Co.***, 35 Wis.2d 51, 54, 150 N.W.2d 361, 362 (1967) (The safe place statute requires that in order to be held liable for failure to correct a defect making a place of employment unsafe, the employer must have actual or constructive knowledge of it.); *see also* ***Kaufman v. State St. Ltd. Partnership***, 187 Wis.2d 54, 58-59, 522 N.W.2d 249, 251 (Ct. App. 1994) (unless he or she had

[1] The "new" factual material consists of an affidavit from Ramsey as well as deposition testimony from Bowers's children.

[2] The defendants argue that Bowers cannot state a claim for a violation of the safe place statute because the home in question is neither a "public building" nor a "place of employment" as required by § 101.11, STATS. Bowers does not respond to the defendants' argument; we deem this issue conceded by Bowers. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp***., 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

actual or constructive notice of the defect or dangerous condition where the plaintiff fell, a property owner cannot be held liable for negligence).

Even when viewing the record most favorably to Bowers, it contains no evidence to show that the ice was on the porch for a sufficiently long time for Ramsey to have constructive notice. Constructive knowledge is chargeable only where the hazard has existed for a sufficient length of time to allow a vigilant owner the opportunity to discover and remedy the situation. ***Kaufman***, 187 Wis.2d at 59, 522 N.W.2d at 251-252. Further, although Bowers testified that she had informed Ramsey of leaking gutters in the past, both Bowers and Ramsey testified that the leaking gutter was fixed well before the fall and that no further complaints had been made about the gutters. The trial court correctly determined that no material issue of fact existed with respect to the requisite notice, and properly granted summary judgment in favor of the defendants.

Finally, Bowers requests that we reverse the trial court's judgment for $789.41 in costs imposed against her. The record, however, does not indicate that she objected to the award of costs. Since Bowers did not move the trial court for review of taxation of costs within the ten days after taxation as required by § 814.10(4), STATS., she has waived her objection to costs. ***DILHR v. Coatings, Inc.***, 126 Wis.2d 338, 348, 376 N.W.2d 834, 839 (1985).

By the Court.—Judgment affirmed.

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