COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 12, 1996

NOTICE

No. 96-0997

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

RAYMOND CROWELL and
JANICE JEAN CROWELL,

Plaintiffs-Appellants,

v.

SUPERAMERICA GROUP, a division
of Ashland Oil, Inc., and
POPE AND TALBOT OF WISCONSIN, INC.,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Chippewa County: RODERICK A. CAMERON, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Raymond and Janice Crowell appeal a summary judgment dismissing their slip and fall action against SuperAmerica. The Crowells allege that SuperAmerica was negligent and violated the safe place statute because water draining through a hole in the canopy above the service

island created the ice patch. The trial court granted summary judgment because the Crowells had no evidence that SuperAmerica had actual or constructive notice of the hole in the canopy. The Crowells argue that material issues of fact remain unresolved regarding SuperAmerica's notice of the defect and that notice is not required because SuperAmerica was actively negligent. We reject these arguments and affirm the summary judgment.

The owner of a business is not an insurer of its frequenters and will be held liable for failure to correct a defect only when there is actual or constructive notice of the defect. ***Strack v. Great Atlantic & Pacific Tea Co.***, 35 Wis.2d 51, 54, 150 N.W.2d 361, 362 (1967). An owner is deemed to have constructive notice of a defect in the premises where there is evidence that a hazard existed for a sufficient time to allow a vigilant owner the opportunity to discover the situation.[1] ***May v. Skelley Oil Co.***, 83 Wis.2d 30, 36, 264 N.W.2d 574, 577 (1977).

The evidence submitted on summary judgment does not establish or allow an inference that SuperAmerica had actual or constructive knowledge of the hole in the canopy or the ice accumulation. Raymond Crowell testified in his deposition that the ice formed during the two or three minutes he was in the store paying for his purchases. A two or three minute time period is not sufficient to provide even the most vigilant owner with constructive notice of a defect. SuperAmerica employees testified that they were unaware of any holes in the canopy and had not previously observed any accumulation of water or ice under the canopy. They inspected the area one-half hour before the accident. The Crowells offer a strained construction of the employees' depositions in an effort to show knowledge of a defect or a water accumulation problem at the edge of the canopy. In context, the employees' depositions cannot be reasonably construed to suggest prior knowledge of any defect in the premises. The Crowells offered nothing but speculation to support their assertion that the hole existed earlier than two or three minutes before Crowell's accident. The trial court properly disregarded assertions that were not based on

[1] If the defect results from the owner's course of conduct or method of operation, the owner is charged with constructive notice without passage of an appreciable period of time. ***Kaufman v. State St. Ltd. Partnership***, 187 Wis.2d 54, 65, 522 N.W.2d 249, 254 (Ct. App. 1994). The Crowells have not identified any course of conduct or method of operation by SuperAmerica upon which constructive notice could be charged.

admissible evidence. *See* ***Hopper v. City of Madison***, 79 Wis.2d 120, 130, 256 N.W.2d 139, 143 (1977).

Finally, citing ***Kosnar v. J.C. Penney Co.***, 6 Wis.2d 238, 242, 94 N.W.2d 642, 644 (1959), the Crowells argue that notice is not required because the accident was due to SuperAmerica's active negligence. The negligent acts they describe, however, building and maintaining the canopy and failing to inspect or repair it, do not constitute "active negligence" as that term is used in ***Kosnar***. There, the store created a hazardous condition by placing a rubber mat in front of the door that was habitually pushed up by the swinging door. The mat created a danger that would not have existed had J.C. Penney not created the dangerous condition. The service island canopy at SuperAmerica created no such additional danger.

By the Court.—Judgment affirmed.

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