COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1880

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

MACK J. HOLT, JR.,

PLAINTIFF-RESPONDENT,

V.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, A FOREIGN CORPORATION, AND THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF METROPOLITAN MILWAUKEE, INC.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: LOUISE M. TESMER, Judge. *Reversed.*

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

PER CURIAM. National Union Fire Insurance Company of Pittsburgh and the Young Men's Christian Association of Metropolitan Milwaukee, Incorporated, appeal from a judgment entered in favor of Mack H.

Holt, Jr., imposing liability on the YMCA for injuries Holt sustained while playing basketball.[1] The YMCA argues that the evidence was insufficient to support the verdict because there was no evidence that the YMCA was on notice of any substance on the floor that may have caused Holt to slip and injure himself.[2] We agree, and, therefore, we reverse.

BACKGROUND

On November 3, 1992, Holt went to the YMCA to play basketball. There was already a game in progress when he arrived, so he shot baskets on another court until the game ended. Holt played in the next game of basketball, and, about five minutes into the game, Holt injured himself when he jumped to recover a rebound.

At trial, Holt testified that his left foot slipped when he came down from his jump, and his knee then popped out of place. He testified that he never saw anything on the floor before he slipped, but that after he slipped he brushed the floor with his hand and noticed a very fine dust or powder on the floor. Holt said that he had previously seen the same type of dust on the floor and on some mats that were used for aerobics classes that were held in the gym on an alternating basis with the basketball games. He also said that he had previously complained to employees of the YMCA about the dust from the mats. Holt testified, however, that on the night that he injured himself, he did not notice any

[1] Throughout this opinion we refer to National Union Fire Insurance Company and the Young Men's Christian Association jointly as the "YMCA."

[2] The YMCA raises other issues that we do not address because the notice issue is dispositive. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (if a decision on one point disposes of an appeal, the appellate court will not decide the other issues raised).

problems with the floor prior to the time that he slipped, and he did not notice any slippery spots on the floor, other than the spot where he slipped. He also testified that the dust on which he slipped was so fine that it was invisible "unless you rub your hands" in it.

The jury returned a verdict in favor of Holt, finding that the YMCA was negligent in failing to maintain the gym floor in a safe condition, and that the YMCA's negligence caused Holt's injury. The trial court entered judgment accordingly.

DISCUSSION

The YMCA argues that the evidence is insufficient to support the jury's verdict. Specifically, the YMCA argues that there is no evidence that it had either actual or constructive notice of any dust on the gym floor, and therefore, the evidence was insufficient from which to conclude that they were negligent in failing to clean the dust from the gym floor.

We will not overturn a verdict unless, after considering all credible evidence, and all reasonable inferences that can be drawn from the evidence, in the light most favorable to the verdict, there is no credible evidence to sustain the challenged finding. *See* ***Kuklinski v. Rodriguez***, 203 Wis.2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996); § 805.14(1), STATS. A jury may not, however, base its findings on conjecture and speculation. *See* ***May v. Skelley Oil Co.***, 83 Wis.2d 30, 35, 264 N.W.2d 574, 576 (1978), *overruled on other grounds by* ***Reiter v. Dyken***, 95 Wis.2d 461, 290 N.W.2d 510 (1980); ***Rodenkirch v. Johnson***, 9 Wis.2d 245, 248, 101 N.W.2d 83, 85 (1960).

Under Wisconsin's safe-place statute, the YMCA was required to so maintain its building "as to render the same safe." Section 101.11, STATS.[3] The supreme court has stated, however, that "[s]ince the owner of a place of employment [or public building] 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." ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis.2d 51, 54, 150 N.W.2d 361, 362 (1987) (citations omitted). In order for an owner or employer to be charged with constructive notice of a defect, the defect must have "existed for a sufficient length of time to allow the vigilant owner or employer the opportunity to discover and remedy the situation." ***Skelly Oil Co.***, 83 Wis.2d at 36, 264 N.W.2d at 577; *see also* ***Gerdmann v. United States Fire Ins. Co.***, 119 Wis.2d 367, 371, 350 N.W.2d 730, 733 (Ct. App. 1984) ("An employer has constructive notice of an unsafe condition if it existed long enough before the accident so that the employer, in the exercise of reasonable diligence, should have discovered it in time to take reasonable precautions to remedy the situation.").[4]

We conclude that the evidence, viewed in the light most favorable to the verdict, is insufficient to support a finding that the YMCA had either actual or constructive notice that there was dust on the floor of the gym. Significantly, there

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[3] Section 101.11, STATS., provides, in relevant part: "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."

[4] Indeed, the jury was instructed as follows:

> To find that YMCA failed to maintain the premises in question as safe as the nature is reasonably permitted, you must find that YMCA had actual notice of the alleged defect in time to take reasonable precautions to remedy the situation or that the defect existed for such a length of time before the accident, that YMCA or its employees in the exercise of reasonable diligence should have discovered the defect in time to take reasonable precautions to remedy the situation.

was no evidence that anyone had complained to the YMCA about the presence of dust on the floor on the night that Holt was injured, and the evidence disclosed that the dust was not openly observable. Holt testified that, on the night he was injured, he never saw or slipped on any dust on the floor, until after he injured himself, and then only upon almost microscopic scrutiny. As noted, Holt testified that he discovered the dust only after he slipped, and that the dust was so fine that it was invisible "unless you rub your hands" in it. Although where a defect or a dangerous condition is caused by the affirmative acts of the owner or his agent, he needs no notice because he has knowledge of the acts creating the hazard, *see* ***Kosnar v. J.C. Penney Co.***, 6 Wis.2d 238, 242, 94 N.W.2d 642, 644 (1959), there is no evidence that the YMCA did anything to put the almost invisible dust on the floor the day that Holt fell. The mere fact that mats used for aerobics had left dust sufficiently visible to spur complaints in the past is not sufficient to establish either that the YMCA was negligent in connection with the dust on which Holt fell or that it had actual or constructive notice of that dust.

By the Court.—Judgment reversed.

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