**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 25, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP1494** **Cir. Ct. No. 2000CV2723**

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

---

**JAMES HARRIS AND MARILYN HARRIS,**

**PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,**

**V.**

**MENARD, INC.,**

**DEFENDANT-APPELLANT-CROSS-RESPONDENT,**

**RELIANCE INSURANCE COMPANY,**

**DEFENDANT-(IN T.CT.),**

**BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,**

**SUBROGATED DEFENDANT-(IN T.CT.).**

---

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Judgment affirmed; order reversed and cause remanded.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Menard, Inc. (Menards) appeals from a judgment finding it liable to James Harris and his wife (collectively, Harris) on theories of negligence and a violation of the safe-place statute for injuries Harris suffered when he tripped over a pallet in a Menards warehouse. Menards contends the trial court improperly directed a verdict on the safe-place claim and improperly gave the jury a spoliation of evidence instruction. Harris cross-appeals from an order denying his motion for an award of expenses for trying the safe-place violation claim because Menards failed to admit the violation. We conclude the trial court properly directed a verdict on the safe-place claim and properly gave a spoliation of evidence instruction, but that it applied the wrong legal standard and failed to make necessary factual findings when it denied Harris' motion for expenses related to proving the safe-place claim. We therefore affirm the judgment, but reverse the order and remand with directions that the trial court reconsider Harris' motion for expenses.

## BACKGROUND

¶2 Menards maintained a warehouse in Madison, Wisconsin, with merchandise stacked on shelves along walls on opposite sides of the building. Between the shelves was an area wide enough for two cars, where customers could drive through and pick up merchandise. There was a yellow line approximately forty to forty-eight inches away from and parallel to a shelved wall. Menards' employee, Timothy Inboden, testified that customers would ordinarily walk "inside" the yellow line along the shelved wall, while cars would drive "outside" the line in the main drive-through area.

¶3 Harris was shopping for lumber at the warehouse. Inboden asked Harris to follow him through the warehouse to the location of the lumber he was seeking. Inboden led Harris just outside of the yellow line because there was a pallet with merchandise blocking the aisle inside the yellow line. Harris did not see the pallet, however, and tripped and fell over the corner of it, fracturing his wrist.

¶4 Harris eventually sued Menards, alleging negligence and violation of the safe-place statute. At the close of evidence, the trial court found a violation of the safe-place statute as a matter of law, and directed a verdict on that question in Harris' favor.

¶5 The trial court also issued a jury instruction on spoliation of evidence to be considered with the negligence claim. The instruction stated:

> Evidence has been received in this case that Timothy Inboden prepared a written report concerning the incident, but that Menard, Inc. no longer has possession of this report.
>
> It was the duty of Menard, Inc. to preserve evidence essential to James Harris' claims. If you determine that Menard, Inc. breached this duty and that Timothy Inboden's report was essential evidence to this claim, then you may infer from the loss or destruction of the report while it was under Menard, Inc.'s exclusive control that the report contained information unfavorable to Menard, Inc.

¶6 The jury found Menards liable on both the safe-place and negligence claims, but also found that twenty-five percent of Harris' injuries could be attributed to his own contributory negligence.

¶7 Finally, Harris filed a postverdict motion seeking costs and attorney fees under WIS. STAT. § 804.12(3) (2003-04),[1] based on Menards' refusal to admit, prior to trial, that it had violated the safe-place statute with regard to the pallet. The trial court denied the motion, stating that there was no reason to believe that Menards had acted in bad faith.

## DISCUSSION

### *Safe-Place Statute*

¶8 When reviewing a trial court's decision to direct a verdict, this court applies the same standard as the trial court, giving substantial deference to the trial court's better position for assessing the evidence. ***Tanner v. Shoupe***, 228 Wis. 2d 357, 375, 596 N.W.2d 805 (Ct. App. 1999). The standard is whether, viewing the evidence most favorably to the party against whom the verdict is sought to be directed, the evidence is materially undisputed or so clear and convincing as to reasonably permit only one conclusion. ***Id.*** at 375-76.

¶9 Wisconsin's safe-place statute requires every employer to "furnish a place of employment which shall be safe for employees therein and for frequenters thereof." WIS. STAT. § 101.11(1). Harris provided expert testimony regarding what is required to make a workplace reasonably safe. His safety expert, Kenneth Yost, testified that a retailer such a Menards has a duty pursuant to state and federal codes to maintain unobstructed pathways for customers at all times. According to Yost, Inboden's description of the ordinary use of the yellow line

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

showed that it was such a designated pathway. In the event that a designated pathway might be temporarily obstructed, Yost noted that an alternate pathway could be established with yellow barricades, safety cones, caution tape, floor easels or rope. Yost further pointed out that Menards' own policy required its employees to warn frequenters on its premises of any objects located in areas designated as pathways. Yost opined that Menards had violated the safe-place statute by failing to maintain an unobstructed pathway, or to give warning of the obstruction.

¶10 Menards did not present any expert evidence disputing Yost's opinion that the retailer was required to provide unobstructed passageways or warning about obstructions and that it had violated the safe-place statute by failing to do so. Nor did Menards present any evidence to dispute Harris' testimony that he had tripped over a pallet while following the Menards employee, Inboden, through the Menards warehouse, and that no one had warned Harris about the pallet. To the contrary, Harris' account was supported by Inboden's testimony and a photograph of the pallet taken by another Menards' employee shortly after the incident.

¶11 Menards nonetheless argues that its compliance with the safe-place statue should have been a jury issue because the two-car-wide lane between the yellow lines used for vehicular traffic was wide enough to have been considered a safe passageway for pedestrians. However, both the former Menards employee and Harris' expert witness provided undisputed testimony that the area between the yellow line and the shelved wall where the pallet was lying was the intended and usual walkway for pedestrians going through the warehouse. No one testified that the driving lane was ever intended as a passageway for pedestrians. Moreover, even if the driving lane could be considered a temporary alternate

passageway, the photograph taken on the day of the incident showed that the pallet extended over the yellow line into the driving lane, thus partially obstructing it, as well. In fact, it was undisputed that Harris was actually in the driving lane when he tripped over the pallet. In sum, we agree with the trial court that the evidence presented in this case was so clear and convincing as to permit only one reasonable conclusion—that Menards had violated the safe-place statute by placing a pallet in the usual pedestrian walkway without providing any warnings of the obstruction or marking off an alternate unobstructed pedestrian route with standard yellow caution signs. Therefore, the court properly directed a verdict on that question.

*Jury Instruction on Spoliation*

¶12 The trial court has wide discretion in fashioning jury instructions, and we will uphold the instructions so long as they are not erroneous and adequately inform the jury of the law to be applied. ***Anderson by Snow v. Alfa-Lavil Agri***, 209 Wis. 2d 337, 344-45, 546 N.W.2d 788 (Ct. App. 1997). Here, the parties dispute what showing must be made before the jury may be instructed on the spoliation of evidence. We do not address that issue, however, because we are satisfied that, even if Menards is correct that clear and convincing evidence of intentional destruction or withholding of evidence is required, that standard has been satisfied here.

¶13 Inboden testified that he had prepared a written report of the incident shortly after it occurred. Menards did not produce Inboden's report during discovery. Menards did not, however, claim that it had lost Inboden's report, however. Rather, it asserted that Inboden had never produced any written report. Menards' assertion was belied by the direct quotation of statements attributed to

Inboden in the affidavit prepared by one of its corporate officers during litigation. Menards has never offered any other source for the Inboden quotations other than the report whose existence it disclaimed, and it defies credibility to believe that the corporate officer who signed the affidavit would have any personal knowledge of what statements a former employee might have made years earlier. Menards' quotation of Inboden provides clear and convincing evidence that Menards had Inboden's report at some point during the discovery process and intentionally failed to turn it over. Therefore, we are satisfied that the trial court properly issued a spoliation instruction to the jury.

*Expenses on Failure to Admit*

¶14 WISCONSIN STAT. § 804.12(3) provides:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under s. 804.11, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in the making of that proof, including reasonable attorney fees. The court shall make the order unless it finds that (a) the request was held objectionable pursuant to sub. (1), or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (d) there was other good reason for the failure to admit.

Harris contends the trial court was obligated to award him costs under this statute because Menards had no reasonable ground to contest that it had violated the safe-place statute. In support of its contention, Harris points out that Menards named no safety expert and called no witnesses on that issue. Menards argues that it was not obligated to admit it had violated the safe-place statute at the time the requests

for admissions were made because Harris had not yet submitted his expert's opinion at that time.[2]

¶15 The trial court concluded that Menards was acting in good faith when it refused to admit the safe-place violation. The statutory standard, however, is not whether a party was acting in good faith, but whether it "had reasonable ground to believe that [it] might prevail on the matter." WIS. STAT. § 804.12(3). Although it may be logically inferred that a party who is acting in bad faith has no reasonable basis for a denial, the reverse is not true. In order to have a "reasonable ground" to deny an admission request, a party should at a minimum have a legal theory supported either by precedent or a plausible argument for the extension of current law, and either facts supporting its legal position or some reason to believe that additional investigation might reveal such facts.

¶16 Here, the trial court made no findings as to what Menards' legal position was, what authority Menards was relying upon for that position, or what facts it had in its possession that it believed supported its position. Although we are unaware of anything in the record showing that Menards had a reasonable basis for its refusal to admit, we will not make factual findings for the trial court, or exercise its discretion for it. Therefore, we remand the question of expenses on the refusal to admit to the trial court, with directions that it make the appropriate factual findings and consider the matter under the correct standard, namely, whether Menards had a "reasonable ground" for its refusal to admit a safe-place violation.

[2] We note that that argument is disingenuous at best. In the first place, Menards should have been well aware of its statutory obligation to maintain safe pathways. Moreover, it had already had several years to obtain its own expert opinion by that time.

*By the Court.*—Judgment affirmed; order reversed and cause remanded.

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