COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2360 **Cir. Ct. No. 2003CV3459**

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

PAMELA E. OXMAN,

PLAINTIFF-APPELLANT,

V.

ONE BEACON INSURANCE COMPANY AND HERMAN WEINGROD D/B/A PHOENIX BUILDING,

DEFENDANTS-RESPONDENTS,

CONTINENTAL CASUALTY COMPANY,

DEFENDANT-CO-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed.*

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

¶1 FINE, J. Pamela E. Oxman appeals a summary judgment dismissing her personal-injury claims against Herman Weingrod, d/b/a the Phoenix Building, and its insurer, One Beacon Insurance Company.[1] Oxman claims she was injured when she tripped on a floor mat and fell down a small set of stairs in the front entrance to the Phoenix Building. She asserts that there are genuine issues of material fact that preclude summary judgment. We affirm.

I.

¶2 The Phoenix Building is a seven-story office building in Milwaukee. The front entrance of the building has an outside set of doors, a set of stairs going up to a landing, and inside doors leading to a lobby. Oxman sued Weingrod and One Beacon Insurance Company, claiming that she tripped over a bunched-up floor mat that was holding the inside doors open and fell down the stairs. She alleged both common-law negligence and a violation of the Safe Place Statute, WIS. STAT. § 101.11.

¶3 According to Oxman's deposition testimony, she was leaving her work in the Phoenix Building around 3:30 p.m. on April 28, 2000, when she saw a floor mat "bunched up" between the doorframe and the doors. Oxman testified that she pushed the left door open and, as she stepped on the landing, she tripped on the floor mat and fell down the stairs. Oxman claimed that she did not know who put the floor mat there, or how long it had been there before she saw it. She testified that, in the past, someone had propped open the doors with bricks and

[1] Continental Casualty Company was named as a subrogated party because it paid to Oxman Worker's Compensation benefits. It filed a letter telling us that it joins in Oxman's brief on appeal.

ashtrays to, she assumed, air out a sewer smell in the building. She also claimed that after her accident the door was propped open with a doorstop. She admitted that the stairwell was well lit, and that there were no structural defects in connection with her fall. She did not and does not work for Weingrod.

¶4 Weingrod, the owner and manager of the Phoenix Building, submitted an affidavit in support of his motion for summary judgment. He averred that, on the day of the accident, neither he nor anyone on the building's maintenance staff had propped open the inside doors with the floor mat. He claimed that he did not know who had propped the doors open or how long they had been propped open before Oxman fell. Weingrod testified at his deposition that he had never seen the interior doors to the building propped open with ashtrays or bricks. He further testified that smokers sometimes propped the outside doors open with objects like bricks or ashtrays when they went outside to smoke. Weingrod acknowledged that there was a problem with a sewer smell "primarily in the spring," but claimed, however, that when this happened, someone would call the Sewerage Commission, the Sewerage Commission would fix a problem with the sewer lines, and the odor would be eliminated.

¶5 Rick Fiedorczyk, a maintenance employee, testified at his deposition that he had never used the floor mat to hold the doors open, and that he did not know that the doors were propped open on the day of the accident. He claimed that the sewer smell came from outside of the building, and that when the Sewerage Commission inspected the Phoenix Building's facilities, they did not find any problems.

¶6 Weingrod and One Beacon Insurance Company sought summary judgment, asserting that Weingrod was not liable under the Safe Place Statute for

Oxman's injuries because he did not have either actual or constructive notice that the floor mat was used to prop the doors open.[2] *See* ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis. 2d 51, 54, 150 N.W.2d 361, 362 (1967) (generally owner of building must have actual or constructive notice of alleged defect to be liable under Safe Place Statute). Oxman claimed that genuine issues of material fact existed as to whether Weingrod: (1) had actual or constructive notice that the floor mat was bunched up in the doors, and (2) was negligent *per se* for violating WIS. ADMIN. CODE § COMM 52.21 (Mar. 2000) (location and maintenance of exits).[3] In support, Oxman submitted an affidavit from John Wenning, a registered professional engineer who opined, to a reasonable degree of engineering certainty, that the "obstruction" caused by the bunched-up floor mats violated both the Safe Place Statute and § COMM 52.21.

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[2] When the parties submitted their summary-judgment briefs, a common-law-negligence claim generally failed if the Safe-Place-Statute claim failed. *See* ***Megal v. Green Bay Area Visitor & Convention Bureau, Inc.***, 2004 WI 98, ¶23, 274 Wis. 2d 162, 179–180, 682 N.W.2d 857, 865. After the motion for summary judgment in this case was granted, the supreme court held that the dismissal of a Safe-Place-Statute claim does not automatically preclude a common-law-negligence claim. ***Id.***, 2004 WI 98, ¶23, 274 Wis. 2d at 180, 682 N.W.2d at 865–866. The parties recognize this principle on appeal, and we individually address Oxman's common-law-negligence and Safe-Place-Statute claims.

[3] WIS. ADMIN. CODE § COMM 52.21 (Mar. 2000) provides:

> **Location and maintenance of exits.** Every exit mentioned in ss. Comm 51.15 to 51.20, inclusive, shall lead to a street, alley or open court connected with a street. All such exits and all passageways leading to and from the same, shall be kept in good repair and unobstructed at all times.

WISCONSIN ADMIN. CODE § COMM 51.15(1) (Mar. 2000) applies to standard exit doors: "Every door which serves as a required exit door or exit access door from an area, room, public passageway, stairway or building shall be a standard exit door, unless exempted by the occupancy requirements of this code."

¶7 As we have seen, the trial court granted the defendants' motion for summary judgment. It dismissed Oxman's claims because, it concluded, Oxman did not establish that there were facts that needed to be tried concerning whether Weingrod had actual or constructive notice of the bunched up floor mats:

> You've got rugs between an interior door that even if there is some notice of odor, I don't get the connection between the two. That doesn't translate into either negligence or a safe place violation. There's got to be something more that says there's actual, constructive notice of this defect, because the defect being the rugs in the door. There's nothing in this record so far from your client other than she speculates and concludes in her own mind as to whether they shouldn't have done this somehow.

II.

¶8 We review a trial court's decision to grant summary judgment *de novo*, applying the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). Summary judgment is warranted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. RULE 802.08(2).

¶9 Oxman claims that the trial court erred when it granted summary judgment because material issues of fact are in dispute. For the reasons that follow, we disagree. *See* ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291–292, 507 N.W.2d 136, 140 (Ct. App. 1993) (burden of demonstrating sufficient evidence to go to trial on party who has burden of proof on issue at trial).

A. *Common-Law Negligence.*

¶10 A plaintiff alleging common-law negligence must prove: (1) a defendant's duty of care; (2) a breach of that duty; (3) a causal connection between the defendant's breach and the plaintiff's injury; and (4) an actual loss or damage as a result of the injury. ***Smaxwell v. Bayard***, 2004 WI 101, ¶32, 274 Wis. 2d 278, 298, 682 N.W.2d 923, 933.

> In [Wisconsin] all persons have a duty of reasonable care to refrain from those acts that unreasonably threaten the safety of others. This duty arises "when it can be said that it was foreseeable that his act or omission to act may cause harm to someone."

Antwaun A. v. Heritage Mut. Ins. Co., 228 Wis. 2d 44, 55, 596 N.W.2d 456, 461 (1999) (citations and quoted source omitted); *see also* ***Johnson v. Blackburn***, 227 Wis. 2d 249, 257, 595 N.W.2d 676, 680 (1999) ("As a general matter, a landlord owes a tenant, as well as guests of a tenant, the duty to exercise ordinary care.").

¶11 Oxman claims that material issues of fact remain as to whether Weingrod breached his common-law duty to exercise reasonable care, and whether Weingrod's alleged breach caused her injuries. She asserts that there is no evidence that the doorways were periodically inspected, and that the building's management was aware that "makeshift devices," such as bricks and ashtrays were used to hold the doors open. She points out that the building bought doorstops a few days after she was injured, and that the failure to use doorstops to keep the

doors open was an act or omission that could foreseeably cause harm.[4] We disagree.

¶12 Oxman has not shown that Weingrod failed to use the degree of care usually exercised under similar circumstances by an owner or manager of a multi-story office building; she has not provided any evidence, expert or otherwise, that it is standard for multi-story office buildings to use doorstops, or that it is standard for multi-story office buildings to periodically inspect the doorways. As we have seen, her only proffered expert, Wenning, opined that the bunched-up floor mats violated the Safe Place Statute and WIS. ADMIN. CODE § COMM 52.21 (Mar. 2000). He did not, however, testify about the standard of care applicable to the owner or manager of a multi-story office building. Accordingly, there is no basis upon which a jury could analyze whether or not Weingrod allegedly violated his duty to use reasonable care, *see* ***Megal v. Green Bay Area Visitor & Convention Bureau, Inc.***, 2004 WI 98, ¶20, 274 Wis. 2d 162, 177, 682 N.W.2d 857, 864 ("What is reasonable to expect for the management of such a facility in regard to preventing the kind of accident that occurred here is not within the common knowledge of mankind or of this court.") (Brown County Veterans Memorial Arena), and Oxman has not produced evidence sufficient to show that there are genuine issues of material fact on her common-law negligence claim, *see* ***Transportation Ins. Co.***, 179 Wis. 2d at 291–292, 507 N.W.2d at 140.

[4] We express no opinion regarding whether the post-accident purchase of doorstops would be admissible at trial. *See* WIS. STAT. RULE 904.07 (subsequent remedial measures generally not admissible).

B. *Safe Place Statute.*

¶13 Under the Safe Place Statute, an owner of a place of employment or a public building has a duty to "construct, repair or maintain such place of employment or public building as to render the same safe." WIS. STAT. § 101.11(1).[5] An owner of a place of employment or a public building, however, is not an insurer of persons on the owner's property. *See* ***Megal***, 2004 WI 98, ¶9, 274 Wis. 2d at 170–171, 682 N.W.2d at 861.

> Just because a place could be made more safe, it does not necessarily follow that an employer or owner has breached the duty of care established by WIS. STAT. § 101.11(1). Rather, the duty set forth by the statute requires an employer or owner to make the place "as safe as the nature of the premises reasonably permits." The "nature of the business" and the "manner in which [business] is conducted" are factors to be considered is assessing whether the premises are safe, within the meaning of § 101.11(1).

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[5] WISCONSIN STAT. § 101.11(1) provides:

> Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. 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.

Section 101.11(1) applies to three categories: (1) employers; (2) owners of places of employment; and (3) owners of public buildings. ***Naaj v. Aetna Ins. Co.***, 218 Wis. 2d 121, 126, 579 N.W.2d 815, 817 (Ct. App. 1998). It is undisputed that Weingrod is the owner of a place of employment and a public building.

Id., 2004 WI 98, ¶10, 274 Wis. 2d at 171, 682 N.W.2d at 861 (citation and quoted sources omitted; brackets in ***Megal***). Accordingly, to be liable for an injury caused by an unsafe condition, an owner of a place of employment or a public building must have actual or constructive knowledge of it. *See* ***Strack***, 35 Wis. 2d at 54, 150 N.W.2d at 362.

¶14 Oxman concedes that Weingrod did not have actual notice that the floor mat was bunched up in the doors. Thus, the issue is whether Weingrod had constructive notice.

> "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 or employer the opportunity to discover and remedy the situation." Ordinarily, constructive notice cannot be found when there is no evidence as to the length of time the condition existed.

Kaufman v. State St. Ltd. P'ship, 187 Wis. 2d 54, 59, 522 N.W.2d 249, 251–252 (Ct. App. 1994) (quoted source and citation omitted). It is undisputed that there is no evidence showing how long the floor mat was bunched up in the doors before Oxman fell. Oxman argues, however, that although the length of time is unknown, a material issue of fact exists as to whether Weingrod had constructive notice under ***Strack***, which recognizes a narrow exception to the general rule. *See* ***Strack***, 35 Wis. 2d at 57–58, 150 N.W.2d at 364; ***Megal***, 2004 WI 98, ¶13, 274 Wis. 2d at 172–173, 682 N.W.2d at 862. We disagree.

¶15 In ***Strack***, the plaintiff sued a supermarket under the Safe Place Statute after she slipped on a prune and injured her back and leg. ***Id.***, 35 Wis. 2d at 53, 150 N.W.2d at 361–362. ***Strack*** held that a jury could find that the supermarket had constructive notice, despite no proof as to how long the prune

was on the floor, because of the "nature of the business and the manner in which it is conducted":

> we think supermarkets which display their produce and fruit in such a way that they may be handled by customers and dropped or knocked to the floor unintentionally is a way of doing business which requires the storekeeper to use reasonable measures to discover and remove such debris from the floor. . . . While the use of self-service produce displays is not negligence as a matter of law, [such displays] do create marketing problems of safety and place upon the store operator the need for greater vigilance if he is to meet the higher than common-law standard of care required by the safe-place statute.

Id., 35 Wis. 2d at 56–57, 58, 150 N.W.2d at 363, 364.

¶16 Oxman argues that the ***Strack*** exception applies in this case because, she alleges, the Phoenix Building's management had a practice of propping the doors open to alleviate a sewer smell in the building. To support this assertion, she points to her deposition testimony that she had previously seen the doors propped open with bricks and ashtrays. Oxman thus claims that the building's "method of operation" resulted in a "reasonable probability that an unsafe condition would result." Again, we disagree.

¶17 Wisconsin courts have "refused to impute constructive notice where the area where the harm occurred is not an area where the owner was merchandizing articles for sale to the public in a way that made the harm that occurred reasonably foreseeable." ***Megal***, 2004 WI 98, ¶18, 274 Wis. 2d at 176, 682 N.W.2d at 863. Moreover, Oxman has not presented any evidence, expert or otherwise, to support her contention that Weingrod violated his duty of care under the Safe Place Statute, *i.e.*, that the doorway to the Phoenix Building was not "as safe as the nature of [a seven-story office building] reasonably permits." ***Id.***, 2004 WI 98, ¶10, 274 Wis. 2d at 171, 682 N.W.2d at 861. The only evidence Oxman

presents is Wenning's unsupported assertion that Weingrod violated the Safe Place Statute. That is not sufficient. *See* ***Moulas v. PBC Prods., Inc.***, 213 Wis. 2d 406, 417, 570 N.W.2d 739, 743 (Ct. App. 1997) ("Personal opinions . . . in the absence of a validating basis do not constitute evidentiary facts."). This is not a ***Strack***-type case, *see* ***Megal***, 2004 WI 98, ¶20, 274 Wis. 2d at 177, 682 N.W.2d at 864, and, accordingly, we analyze Oxman's claim under the general rule for constructive notice.

¶18 As we have seen, the general rule is that constructive notice is chargeable only where the hazard has existed for a sufficient length of time to give a vigilant owner or employer a chance to discover and remedy the situation. ***Kaufman***, 187 Wis. 2d at 59, 522 N.W.2d at 251–252. Oxman has not presented any evidence showing how long the floor mat was bunched up in the doors. Accordingly, Oxman has failed to produce evidence sufficient to support her contention that Weingrod violated the Safe Place Statute. *See* ***Transportation Ins. Co.***, 179 Wis. 2d at 291–292, 507 N.W.2d at 140.

C. *Negligence Per Se.*

¶19 "Negligence per se arises when the legislature defines a person's standard of care in specific instances." ***Taft v. Derricks***, 2000 WI App 103, ¶11, 235 Wis. 2d 22, 29, 613 N.W.2d 190, 194.

> When conduct is negligent per se, the legislature has substituted its judgment for that of the jury for purposes of determining the defendant's standard of care. Thus, the only issues are whether the statute has been violated, causation and damages.

Id., 2000 WI App 103, ¶11, 235 Wis. 2d at 30, 613 N.W.2d at 194 (citation omitted); *see also* ***D.L. v. Huebner***, 110 Wis. 2d 581, 640, 329 N.W.2d 890, 917 (1983) (negligence *per se*).

¶20 Oxman claims that Weingrod was negligent *per se* because, she claims, he violated WIS. ADMIN. CODE § COMM 52.21 (Mar. 2000), which, as we have seen, requires that standard exit doors be kept "unobstructed":

> **Location and maintenance of exits.** Every exit mentioned in ss. Comm 51.15 to 51.20, inclusive, shall lead to a street, alley or open court connected with a street. All such exits and all passageways leading to and from the same, shall be kept in good repair and unobstructed at all times.

Assuming, without deciding that a violation of § COMM 52.21 is negligence *per se*, *see* ***Taft***, 2000 WI App 103, ¶12, 235 Wis. 2d at 30, 613 N.W.2d at 194 (limitations on what constitutes negligence *per se*), Oxman has not produced any evidence that *Weingrod* breached § COMM 52.21's directive to keep standard exit doors "unobstructed," *see* ***Transportation Ins. Co.***, 179 Wis. 2d at 291–292, 507 N.W.2d at 140. Simply put, it is as likely as not that someone other than Weingrod used the floor mat to hold open the door. *See* ***Merco Distrib. Corp. v. Commercial Police Alarm Co.***, 84 Wis. 2d 455, 460, 267 N.W.2d 652, 655 (1978) (Without "credible evidence upon which the trier of fact can base a reasoned choice between the two possible inferences, any finding of causation would be in the realm of speculation and conjecture.").

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.