COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2664 **Cir. Ct. No. 2004CV5293**

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

DESIREE POLLARD-BADJI,

PLAINTIFF-APPELLANT,

ROYAL INDEMNITY COMPANY AND MANAGED HEALTH SERVICES INSURANCE CORPORATION,

INVOLUNTARY-PLAINTIFFS,

V.

FEDERAL INSURANCE COMPANY AND BGK PROPERTIES, INC.,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V.

MAXIMUS, INC. AND XYZ INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge. *Affirmed.*

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

¶1 FINE, J. Desiree Pollard-Badji appeals the trial court's grant of summary judgment dismissing her Safe-Place-Statute claim, *see* WIS. STAT. § 101.11, and common-law-negligence claim against BGK Properties, Inc., and its insurer, Federal Insurance Company.[1] Pollard-Badji contends that the trial court erred because she asserts that there are genuine issues of material fact that preclude summary judgment. We disagree and affirm.

I.

¶2 Pollard-Badji was employed by Maximus, Inc. Maximus leased office space in a building owned by BGK Properties and managed by Inland Companies, Inc. Pollard-Badji sued BGK Properties and Federal Insurance, claiming that she was injured on March 21, 2002, when she walked into a co-worker's office at Maximus and a metal vent within a ceiling tile fell on her head. Pollard-Badji alleged both common-law negligence and a violation of the Safe Place Statute.

[1] BGK Properties, Inc., and Federal Insurance Company filed a third-party complaint against Maximus, Inc., and its insurer, Federal Insurance Company (originally designated "XYZ Insurance Company"), for contribution and/or indemnification. Maximus and Federal Insurance sought summary judgment on the ground that Maximus was not responsible for Pollard-Badji's injuries under its lease with BGK Properties. The trial court concluded that its ruling on BGK Properties's and Federal Insurance's motion for summary judgment rendered Maximus's and Federal Insurance's motion for summary judgment moot. Pollard-Badji does not appeal that aspect of the trial court's ruling.

¶3 According to Pollard-Badji's deposition testimony, she started working for Maximus in February of 2002. Pollard-Badji testified that, on March 21, 2002, she walked into the office of Diane Harris, one of her co-workers, and something "fell from the ceiling and hit me on the top of my head." When asked if she ever saw remodeling work done on the ceiling in the building, Pollard-Badji answered, "[t]hroughout the time [she was employed by Maximus], there was [*sic*] people working," but she could not remember any specific work on the ceiling. Pollard-Badji admitted that she had not reported to a supervisor or maintenance personnel any problems with the ceiling and did not know of anyone who did.

¶4 One of Pollard-Badji's co-workers, Mario Zuniga, testified that before Pollard-Badji was injured on March 21 the same type of vent fell from the ceiling in the office of another Maximus employee, Cassandra Johnson. According to Zuniga, the vent just missed Johnson and landed on the floor. Zuniga testified that Johnson submitted an incident report to Maximus's facilities department and someone from Inland's maintenance department fixed the vent.

¶5 Harris testified at her deposition that a ceiling tile and the "hood part of the exhaust" system fell and hit Pollard-Badji in the head. Harris claimed that she had worked in that office for "several months" and that during that time that part of the ceiling did not appear to be loose or likely to fall. Harris also testified that Johnson's office was "kitty-corner" from hers and that the offices were separated by approximately one and one-half to two feet, but that she was not aware that a vent had previously fallen in Johnson's office.

¶6 BGK Properties and Federal Insurance sought summary judgment, asserting, among other things, that BGK Properties was not liable for Pollard-Badji's injuries under the Safe Place Statute because it did not have either actual

or constructive notice of a defective condition associated with the ceiling. *See* ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶23, 245 Wis. 2d 560, 571–572, 630 N.W.2d 517, 522–523 (generally, owner of a building must have actual or constructive notice of alleged defect to be liable under Safe Place Statute). BGK Properties and Federal Insurance also argued that Pollard-Badji could not sustain her common-law-negligence claim.

¶7 Pollard-Badji contended that there were issues of fact as to whether BGK Properties had notice of the defective ceiling, pointing to the incident in Johnson's office. She also pointed to a post-March 21 letter from what we assume from the Record is an employee of Maximus to Inland's property manager telling her about the two vent incidents:

> We have now had two very serious incidents regarding falling ceiling vents. One occurred in January 2002 and another occurred Thursday, March 21. The vent that fell in January just missed falling on an employee. This was reported immediately to you and I understand it was repaired that same day. The vent that fell last week did strike one of our employees in the head. She received medical treatment on the premises and later received further treatment from her physician.
>
> I am very concerned that there may be other ceiling vents in the building that have not been properly installed. Obviously, this could represent considerable risk to our employees and customers. I am demanding that all ceiling vents be inspected immediately and that action be taken to properly install any that have not been installed properly according to code.

¶8 As for Pollard-Badji's common-law-negligence claim, she asserted that she was entitled to a *res ipsa loquitur* inference because ceiling-tile vents do not ordinarily fall unless *someone* is negligent. *See* ***McGuire v. Stein's Gift & Garden Ctr., Inc.***, 178 Wis. 2d 379, 390, 504 N.W.2d 385, 389 (Ct. App. 1993) (plaintiff entitled to *res ipsa loquitur* instruction if evidence establishes: (1) the

event causing plaintiff's injuries ordinarily does not occur in the absence of negligence, and (2) the agency or instrumentality causing the harm was within the exclusive control or right to control of the defendant).

¶9 As we have seen, the trial court granted BGK Properties's and Federal Insurance's motion for summary judgment. It dismissed Pollard-Badji's Safe-Place-Statute claim because, it concluded, Pollard-Badji did not show why the ceiling tile fell:

> The fact that the ceiling tile fell, because it happened, doesn't mean that BGK is responsible for it. There's no evidence as to what the problem is. Like adhesive in one case was defective and they could say that was a problem with respect to [an] unsafe condition. And it properly fell under the safe place statute. In this case I don't know what happened and there's no evidence as to why this -- the ceiling tile fell. Without any testimony, without any evidence as to what the problem was, I don't know how this Court can allow the safe place claim to survive summary judgment.

The trial could also dismissed Pollard-Badji's common-law-negligence claim, because, it concluded, she had not satisfied the exclusive-control requirement of the *res ipsa loquitur* doctrine:

> With respect to the negligence claim[,] I understand that the sole basis for maintaining that that claim can proceed is the argument by Plaintiff that the res ipsa loquitur instruction would apply. In my reading of that instruction, it requires that there be exclusive control by one party. And I don't think we have this here.

See ***McGuire***, 178 Wis. 2d at 390, 504 N.W.2d at 389.

II.

¶10 We review *de novo* a trial court's grant of summary judgment. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816,

820–821 (1987). Summary judgment must be granted when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. WIS. STAT. RULE 802.08.

A. *Safe Place Statute.*

¶11 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).[2] An owner of a place of employment or a public building is liable for: (1) structural defects, and (2) unsafe conditions associated with the structure of the building.[3] *See* ***Barry***, 2001 WI 101, ¶¶20–21, 245 Wis. 2d at 569–570, 630 N.W.2d at 521–522 (place of employment); ***Rizzuto v. Cincinnati Ins. Co.***, 2003 WI App 59, ¶11, 261 Wis. 2d 581, 590, 659 N.W.2d 476, 481–482 (public building). Here, the parties agree that the allegedly defective ceiling-tile vent was

[2] 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.

[3] An employer, but not the owner of a public building, may also be liable for a third type of unsafe-property condition: unsafe conditions not associated with the structure of the building. *See* ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶21 n.4, 245 Wis. 2d 560, 570 n.4, 630 N.W.2d 517, 522 n.4. This condition is not at issue on this appeal.

an unsafe condition associated with the structure of the building. To be liable for an injury caused by an unsafe condition associated with the structure of the building, an owner of a place of employment or a public building must have actual or constructive knowledge of that condition. ***Barry***, 2001 WI 101, ¶23, 245 Wis. 2d at 571–572, 630 N.W.2d at 522–523.

¶12 Pollard-Badji contends that a reasonable jury could infer that BGK Properties or its agent, Inland, had notice of a defect in the ceiling because of the Johnson incident, which occurred approximately two months before Pollard-Badji was hurt. We disagree.

¶13 Pollard-Badji did not present any evidence that BGK Properties or Inland had actual notice. *See* ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 290, 507 N.W.2d 136, 139 (Ct. App. 1993) (party resisting summary judgment has burden to set forth specific facts to establish elements on which they have burden of proof at trial). According to the deposition testimony, neither BGK Properties nor Inland knew that the particular tile or piece of exhaust system that fell on Pollard-Badji was defective. Thus, Pollard-Badji must show that BGK Properties or Inland 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.'" ***Kaufman v. State St. Ltd. P'ship***, 187 Wis. 2d 54, 59, 522 N.W.2d 249, 251–252 (Ct. App. 1994) (quoted source omitted).

¶14 Contrary to Pollard-Badji's contention, that a ceiling-tile vent fell in Johnson's office some two months before the March 21 incident does not give to either BGK Properties or Inland the requisite constructive notice of a defect in the vent that fell on Pollard-Badji because there is no evidence as to why *either* vent

fell. *See* ***Boutin v. Cardinal Theatre Co.***, 267 Wis. 199, 203–205, 64 N.W.2d 848, 850–851 (1954) (jury "not … permitted to guess" whether defendant had constructive notice); *cf.* ***Rizzuto***, 2003 WI App 59, ¶22, 261 Wis. 2d at 596, 659 N.W.2d at 483 (remodeling not enough to provide constructive notice of defective tile). Either of the vents could have fallen for many reasons, including: (1) a manufacturing defect; (2) improper installation; (3) BGK Properties's or Inland's failure to maintain and repair the building; or (4) improper handling by maintenance personnel or an employee. The evidence in the Record demonstrates the following:

- BGK Properties and Federal Insurance submitted a 1997 newspaper article indicating that BGK Properties was not the building's original owner. *See* ***State v. Heredia***, 172 Wis. 2d 479, 482 n.1, 493 N.W.2d 404, 406 n.1 (Ct. App. 1992) (unobjected-to hearsay is admissible).

- There is evidence in the Record that the fire department routinely inspected the building.

- A Maximus employee testified at his deposition that he took an unspecified tile in the Maximus office complex "out" when he was painting.

- Another employee testified "that throughout the years there have been several maintenance people coming around making repairs in here," and, as we have seen, Pollard-Badji testified that "[t]hroughout the time [she was employed by Maximus], there was [*sic*] people working."

Simply put, there is nothing in the summary-judgment Record supporting Pollard-Badji's contention that BGK Properties or Inland had constructive notice that there

was something wrong *with the vent system that fell on her* just because another vent in the office complex had fallen some two months earlier.

B. *Common Law Negligence.*

¶15 As we have seen, Pollard-Badji contends that she is entitled to a *res ipsa loquitur* inference in connection with her common-law-negligence claim. "*Res ipsa loquitur* is a rule of circumstantial evidence which permits, but does not require, a permissible inference of negligence to be drawn by the jury." ***McGuire***, 178 Wis. 2d at 389, 504 N.W.2d at 389. As noted, a plaintiff is entitled to a *res ipsa loquitur* instruction if the evidence establishes that: "(1) the event causing the plaintiff's injuries was of the kind which ordinarily does not occur in the absence of negligence, and (2) the agency or instrumentality causing the harm was within the exclusive control or right to control of the defendant." ***Id.***, 178 Wis. 2d at 390, 504 N.W.2d at 389.

¶16 Pollard-Badji has not presented any evidence that either BGK Properties or Inland had exclusive control over the vent assembly. "Exclusivity of control does not mean that the instrumentality be in the physical possession of the defendant at the time of the occurrence…. "'All that is necessary is that the defendant have *exclusive control of the factors which apparently have caused the accident.*'"" ***Gierach v. Snap-On Tools Corp.***, 79 Wis. 2d 47, 53, 255 N.W.2d 465, 467 (1977) (emphasis added, quoted sources omitted). As we have seen, Pollard-Badji has not shown why the vent may have fallen, and the negligence of almost anyone coming into contact with the vent assembly could have caused its failure on March 21—from the manufacturer, *see* ***Morden v. Continental AG***, 2000 WI 51, ¶¶55–58, 235 Wis. 2d 325, 359–361, 611 N.W.2d 659, 675–676 (jury can infer that manufacturer was negligent if product is defective) and installer, to

the persons working in the office complex, including the fire inspectors we mentioned earlier. Simply put, Pollard-Badji has not shown that either BGK Properties or Inland had exclusive control over the vent assembly that fell on her so as to permit her to take advantage of the *res ipsa loquitur* inference. *See* ***Richards v. Mendivil***, 200 Wis. 2d 665, 676, 548 N.W.2d 85, 90 (Ct. App. 1996) (to satisfy control requirement plaintiff must "present sufficient evidence that eliminates other responsible causes").

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.