COURT OF APPEALS
DECISION
DATED AND FILED

July 03, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2325 **Cir. Ct. No. 2005CV4371**

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

KATHLEEN J. THOMAS,

PLAINTIFF-APPELLANT,

V.

ZURICH AMERICAN INSURANCE COMPANY AND MENARD, INCORPORATED,

DEFENDANTS-RESPONDENTS,

HUMANA WISCONSIN HEALTH ORGANIZATION INSURANCE CORPORATION AND UNITED HEALTHCARE INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Kathleen J. Thomas appeals from an order granting Menard, Incorporated (Menards) and Zurich American Insurance Company summary judgment and dismissing with prejudice Thomas's personal injury complaint against all defendants, as well as all cross-claims among and between the parties. Based upon our independent review of the record, we conclude that summary judgment was properly granted and affirm.

BACKGROUND

Undisputed facts

¶2 This case arises from an incident which occurred at Menards on the afternoon of Sunday, July 7, 2002. The following facts are undisputed. Thomas, accompanied by her husband Ron and their son Matt, had purchased some landscaping rock. After paying for, and receiving a receipt for, the rock inside the Menards store, she then proceeded to the outside self-service yard next to the building to get the actual rock. The outside, self-service yard at Menards is surrounded by fencing and is entered through a guard gate. The Thomases drove their van into Menards' outside self-service yard to pick up the rock they had purchased. As Ron and Matt were loading some bags of rock into the van, Thomas, while leaning over a pallet on the ground, was struck by another pallet falling from above. The pallet fell onto Thomas's head and right shoulder. No one other than Thomas witnessed the accident, who herself did not see from where the pallet had fallen. Ron and Matt came to Thomas's aid, lifting the pallet off of her head and right shoulder. The accident occurred approximately fifteen minutes after the Thomas family arrived at the store, and the Thomases left Menards approximately five minutes after the accident. Neither Thomas, Ron nor Matt

reported the accident to any Menards' employee that day. Thomas suffered from a headache that day as a result of being hit by the falling pallet.

¶3 The following day, Thomas continued to suffer from a headache plus some additional pain in her arm and shoulder. She went to work as usual, but due to severe pain and headache, reported to her company's nurse. Thomas contacted Menards at approximately 10:00 a.m. that day to report the incident.

¶4 Neither Thomas, Ron nor Matt have any recollection of the condition of the area surrounding the incident scene. Thomas has no idea were the pallet came from or what position it was in before it fell. Neither Thomas, Ron nor Matt have any information that Menards knew of the condition that allowed the pallet to fall prior to it falling or any information that anyone had made complaints to Menards before this incident about conditions similar to those which occurred here. As to the circumstances which caused the pallet to fall, Thomas does not know how the circumstances were created, who created them, or how long they existed before the pallet fell. Thomas also does not know who may know this information.

¶5 As a result of the incident, Thomas has incurred medical expenses, undergone extensive treatment for her injuries, missed time from work and continues to suffer pain.

Procedural Background

¶6 In June 2005, Thomas filed and served a complaint against Menards, Zurich (Menards' insurer), Humana Wisconsin Health Organization Insurance Corporation (as one of Thomas's health insurers-subrogated party) and United Healthcare Insurance Company (another of Thomas's health insurers-subrogated

party), for personal injuries she allegedly received as a result of the July 7, 2002 incident. All defendants answered, and Humana and United Healthcare filed cross-claims against Menards and Zurich for a full recovery of all medical benefits each paid as a result of Thomas's injury which is the subject of this lawsuit. At a telephonic scheduling conference held on January 19, 2006, the date for completion of discovery was set for October 20, 2006, which was also the last day for filing of dispositive motions.

¶7 The depositions of Thomas, Ron and Matt were taken by Menards and Zurich on May 18, 2006. Menards and Zurich filed their motion for summary judgment for dismissal of Thomas's complaint on June 20, 2006. The motion was supported by a brief and the affidavit of one of Menards' and Zurich's counsel, to which were attached the three depositions. Thomas filed her response brief opposing the motion for summary judgment on July 14, 2006, outside the fifteen-day briefing schedule as set by Milwaukee County Cir. Ct. R. 364. Thomas filed no supporting affidavits. Menards and Zurich filed a reply brief.

¶8 At the time of the filing of the motion for summary judgment, through the date of the order dismissing this action, the only depositions which were taken in this case were of Thomas, Ron and Matt. Thomas also served no written discovery requests upon Menards or Zurich at any time prior to the granting of the motion for summary judgment.

¶9 The trial court held a hearing on Menards' and Zurich's motion for summary judgment on August 7, 2006. After the arguments of the parties, the trial court granted the motion for summary judgment. An order memorializing the summary judgment decision was filed on August 21, 2006, and a notice of entry of final judgment/order was filed on August 29, 2006. Thomas appealed.

DISCUSSION

Standard of Review

¶10 Summary judgment is appropriate when there is no material factual dispute and the moving party is entitled to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). In an appeal from the grant of summary judgment, we review the record *de novo*, applying the same standard and following the same methodology required of the trial court under WIS. STAT. § 802.08 (2005-06).[1] *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Our summary judgment methodology is well-known. We first must determine whether a claim for relief is set forth in the pleadings. ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶12, 277 Wis. 2d 21, 690 N.W.2d 1. After we have determined that a claim has been stated, we next examine the moving party's affidavits and other proof to determine "whether a prima facie case for summary judgment has been established." ***Id.*** A *prima facie* case is one in which the "moving [party] must show a defense which would defeat the [non-moving, opposing party]." ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

¶11 If the moving party established a *prima facie* case, we must then determine whether the opposing party has demonstrated "that there are disputed material facts, or undisputed material facts from which reasonable alternative inferences could be drawn," which entitle the party opposing summary judgment to a trial. ***Baumeister***, 277 Wis. 2d 21, ¶12. The simple existence of a factual

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

dispute between the parties shall not defeat a proper summary judgment motion. ***Id.***, ¶11.

¶12 In reviewing a motion for summary judgment, we recognize that, in certain circumstances, "a party moving for summary judgment can only demonstrate that there are no facts of record that support an element on which the opposing party has the burden of proof, but cannot submit specific evidentiary material proving the negative." ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291, 507 N.W.2d 136 (Ct. App. 1993). We have also specifically noted that "once sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial 'to make a showing sufficient to establish the existence of an element essential to that party's case.'" ***Id.*** at 291-92 (citation omitted). WISCONSIN STAT. § 802.08(3) provides us guidance as well, stating, in pertinent part:

> When a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

Issue of Negligence under Wisconsin Safe Place Statute, WIS. STAT. § 101.11[2]

¶13 Under WIS. STAT. § 101.11, 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." Sec. 101.11(1). No owner of a place of employment or a public building shall "fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of … frequenters" of the owner's place of employment or public building. Sec. 101.11(2). In other words, the Safe Place Statute "requires a place of employment to be kept 'as safe as the nature of the premises reasonably permits.'"

[2] WISCONSIN STAT. § 101.11, entitled "Employer's duty to furnish safe employment and place," states, in pertinent part:

> **(1)** Every employer … shall furnish a place of employment which shall be safe … 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 … 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.
>
> **(2)** (a) No employer … shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of … frequenters; and no employer or owner, or other person shall hereafter construct or occupy or maintain any place of employment, or public building, that is not safe….

Megal v. Green Bay Area Visitor & Convention Bureau, Inc., 2003 WI App 230, ¶7, 267 Wis. 2d 800, 672 N.W.2d 105 (citing ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis. 2d 51, 54, 150 N.W.2d 361 (1967)), *rev'd in part on other grounds*, 2004 WI 98, 274 Wis. 2d 162, 682 N.W.2d 857. "Owners and operators are not liable for an unsafe condition unless they have either actual or constructive notice of the condition." ***Id.***, ¶7. In determining whether constructive notice exists:

> "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 (Ct. App. 1994) (citation omitted). "What constitutes 'a sufficient length of time' depends on the nature of the business, the nature of the defect, and the public policy involved." ***Megal***, 267 Wis. 2d 800, ¶7 (citation omitted). Accordingly, under this general rule, constructive notice cannot be found if it cannot be proven how long an unsafe condition had existed. ***Id.***

¶14 There is an exception to this general rule for determining constructive notice, the ***Strack*** exception, which applies only when there is:

> [A] reasonable probability that an unsafe condition will occur because of the nature of the business and the manner in which it is conducted … [such that] the existence of such an unsafe condition may be charged to the operator and such constructive notice does not depend upon proof of an extended period of time … which [an] owner might have received knowledge of the condition in fact.

Strack, 35 Wis. 2d at 57-58. Under such conditions, "a much shorter period of time, and possibly no appreciable period of time under some circumstances, need

exist to constitute constructive notice." ***Id.*** at 55. The ***Strack*** exception merely shortens or eliminates the time element of the notice requirement in circumstances where the very nature of the business action (*e.g.*, the stacking of Italian prunes at a grocery store such that they were prone to roll onto the floor, *see* ***id.*** at 56) put the business owner or operator on notice that there existed a potentially unsafe situation needing monitoring.

¶15 Thomas first argues that the trial court erred in granting summary judgment on the issue of negligence under Wisconsin's Safe Place Statute, WIS. STAT. § 101.11, because whether Menards was negligent is for the fact-finder. Thomas argues that:

> It is a question of fact for the jury to decide as to whether Mendards [sic] fulfilled its duty to inspect and maintain the area where [Thomas] was injured, and as to whether Menards had constructive notice under the Strack exception that there was a dangerous condition on the premises.

Thomas further argues that "if the nature of a business is such that it is reasonably probable that an unsafe condition will occur, constructive notice should be found, regardless of evidence or *lack thereof* as to the length of time the condition existed," citing ***Strack*** and ***Megal***.

¶16 In response, Menards and Zurich argue that they have "established a *prima facie* case … [and] because there are no facts in dispute and there is no evidence to establish actual or constructive notice of the alleged unsafe condition or that Menard's [sic] was otherwise negligent," they are entitled to judgment as a matter of law. (Uppercasing omitted.)

¶17 Thomas does not assert that Menards had actual notice of an unsafe condition in its self-service yard. Accordingly, in order for Menards to be found

negligent under WIS. STAT. § 101.11, Thomas must prove that Menards had constructive notice. *See* ***Megal***, 267 Wis. 2d 800, ¶7.

¶18 Contrary to Thomas's assertion that under ***Strack*** and ***Megal*** constructive notice can be found "regardless of evidence or the lack thereof," the decisions in ***Strack*** and ***Megal*** do not hold that a lack of evidence can support a finding of constructive notice. *See* ***Strack***, 35 Wis. 2d at 55-56; ***Megal***, 267 Wis. 2d 800, ¶¶13-15. Rather, the court in ***Strack*** specifically noted: "We think the finding of the jury [of constructive notice by the supermarket] *has adequate support in the evidence* [accident report submitted by store to insurer and store employees' testimony regarding store's floor sweeping policies]." ***Id.***, 35 Wis. 2d at 55-56 (emphasis added). In ***Megal***, we addressed a case in which no disputed facts were presented, analyzing whether, in such circumstances, a determination of whether notice existed presented a question of law or a question of fact. ***Id.***, 267 Wis. 2d 800, ¶¶13-15. In determining that in such circumstances notice was a question of law, we specifically held:

> Ordinarily, notice is a question of fact left to the jury to answer. This is because the facts are generally disputed….
>
> Here, however, there is no dispute about the happening of events. The only question is what legal significance to attach to those events. That is a question of law.
>
> Our conclusion [that this is so] is bolstered by the reported cases … [including] an opinion authored by Chief Justice Hallows – who also authored ***Strack*** – [in which] the supreme court upheld a directed verdict, concluding as a matter of law that ***Strack*** did not apply to a burned out light in a parking lot.

Megal, 267 Wis. 2d 800, ¶¶13-15.

¶19 The present case, like ***Megal***, presents "no dispute about the happening of events." ***Id.***, ¶14. Menards and Zurich moved for summary judgment based upon the undisputed facts and lack of evidence in the record that Menards acted negligently or was not diligent in its maintenance of the self-service yard. Thomas, in response to Menards and Zurich's *prima facie* case, presented no evidence as to whether or how Menards was negligent, including who had control over the pallet prior to it falling on Thomas. In fact, when specifically asked by the trial court at oral argument what facts Thomas disputed, trial counsel answered "Res ipsa, the things speaks for itself…. This is under [Menards'] exclusive control."

¶20 Thomas also presented no evidence or testimony in response to Menards and Zurich's motion for summary judgment that Menards was negligent in the manner in which it utilized or maintained its outside self-service yard, provided no testimony by Menards' employees, or any written policies or procedures of Menards relating to the maintenance of the self-service yard, including how often the area is inspected, who is responsible for moving pallets (*e.g.* Menards' employees only, customers or even outside vendors), or whether similar accidents had occurred previously at this Menards store. As to control over the conditions leading to the pallet falling, both Thomas and her son testified at deposition that they knew that customers have access to the outside self-service yard where the pallet was located and that this access included the possibility that another customer could have created the condition that caused the pallet to fall on Thomas.

¶21 Notably, Thomas, at no time during the pendency of this lawsuit, propounded any written interrogatories nor took any depositions of Menards' officials or employees. Thomas did not do so even after she had been served with

Menards and Zurich's motion for summary judgment seeking dismissal of her action in its entirety. There is not even a copy of an incident report in the record. As we stated above, when sufficient time has elapsed for discovery to occur, and the party moving for a summary judgment has established a *prima facie* case for dismissal, the party opposing summary judgment, if that party has the burden of proof on the element, must provide evidence to substantiate its claim, and may not rest on legal conclusions. *See* ***Transportation Ins. Co.***, 179 Wis. 2d at 291-92. If the opposing party does not so provide, the moving party is entitled to summary judgment. *See* WIS. STAT. § 802.08(3); ***Transportation Ins. Co.***, 179 Wis. 2d at 291-92. Thomas has failed to provide either any "disputed material facts, or undisputed material facts from which reasonable alternative inferences could be drawn," to show that she is entitled to a trial. *See* ***Baumeister***, 277 Wis. 2d 21, ¶12. Accordingly, based upon the record in this case, we conclude summary judgment is proper.

¶22 Menards and Zurich advance a further argument that "[p]ublic policy considerations prevent the blanket application of the ***Strack*** exception," reasoning that "there would be no just or reasonable stopping point for its application in any case where a person claims to have been injured at a retail store by a product or anything relating to the display of products or the business' operations" such that every self-service business would be required to change to full service in order to protect itself from imputed notice. Because we have concluded that summary judgment is proper in this case on other grounds, we do not address this argument. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) ("As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged.").

Res ipsa loquitur and WIS. STAT. § 101.11.

¶23 *Res ipsa loquitur* is a rule of circumstantial evidence that allows a fact-finder to infer a defendant's negligence based merely upon the occurrence of the event. ***Milwaukee Metro. Sewerage Dist. v. City of Milwaukee***, 2003 WI App 209, ¶27, 267 Wis. 2d 688, 671 N.W.2d 346. Ordinarily, the doctrine of *res ipsa loquitur* is invoked during trial when determining which instructions the trial court should give to the jury. ***Id.*** The application of the *res ipsa loquitur* doctrine is permitted "only when the occurrence clearly 'speaks for itself.'" ***Kelly v. Hartford Cas. Ins. Co.***, 86 Wis. 2d 129, 134, 271 N.W.2d 676 (1978) (citation omitted). Specifically,

> [t]he doctrine applies where there is insufficient proof available to explain an injury-causing event, yet the physical causes of the accident are of the kind which ordinarily do not exist in the absence of negligence. Thus, where evidence of the defendant's negligence is lacking or virtually nonexistent, the jury is allowed to "fill in the blanks" by drawing an inference of negligence from the happening of the event and the defendant's relationship to it.

McGuire v. Stein's Gift & Garden Ctr., Inc., 178 Wis. 2d 379, 389, 504 N.W.2d 385 (Ct. App. 1993) (citations omitted).

¶24 Before the doctrine of *res ipsa loquitur* is applicable, two conditions must be present: "(1) the event in question must be of a kind which does not ordinarily occur in the absence of negligence; and (2) the agency of instrumentality causing the harm must have been within the exclusive control of the defendant." WIS JI—CIVIL 1145, cmt.;[3] *see also* ***Milwaukee Metro. Sewerage***

[3] WISCONSIN JI—CIVIL 1145, entitled, "RES IPSA LOQUITUR," states:

(continued)

Dist., 267 Wis. 2d 688, ¶27; ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶34, 241 Wis. 2d 804, 623 N.W.2d 751. When both conditions are present, "they give rise to a permissible inference of negligence, which the jury is free to accept or reject." ***Lambrecht***, 241 Wis. 2d 804, ¶34.

¶25 Thomas argues that the determination of whether the doctrine of *res ipsa loquitur* applies should be determined "at the *conclusion of the case*," and, therefore, the trial court erred in granting summary judgment because "[t]he Defendants, to receive summary judgment, 'must produce evidence that will destroy any reasonable inference of negligence or so completely contradict it that reasonable persons could no longer accept it,'" quoting ***Lambrecht***, 241 Wis. 2d 804, ¶78. (Emphasis in Thomas's brief-in-chief.) Thomas further argues that the trial court, when evaluating her WIS. STAT. § 101.11 claim, correctly ruled "that this type of accident does not ordinarily occur in the absence of negligence … [but

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> If you find (defendant) had (exclusive control of) (exclusive right to the control of) the (name the instrument or agency involved) involved in the accident and if you further find that the accident claimed is of a type or kind that ordinarily would not have occurred had (defendant) exercised ordinary care, then you may infer from the accident itself and the surrounding circumstances that there was negligence on the part of (defendant) unless (defendant) has offered you an explanation of the accident which is satisfactory to you.

The Comment to WIS JI—CIVIL 1145 also notes:

> The following conditions must be present before the doctrine of res ipsa loquitur is applicable: (1) the event in question must be of a kind which does not ordinarily occur in the absence of negligence; and (2) the agency of instrumentality causing the harm must have been within exclusive control of the defendant. When these two conditions are present, they give rise to a permissible inference of negligence, which the jury is free to accept or reject. Lambrecht v. Estate of Kaczmarczyk, 2001 WI 25, 241 Wis. 2d 804, 623 N.W.2d 751.

then] erred in concluding that there was no evidence to support a reasonable finding that Menards had exclusive control over the instrumentality causing Ms. Thomas's harm."

¶26 Menards and Zurich argue that the "applicability of the doctrine of *res ipsa loquitur* is a question of law … [involving] a rule of evidence," and that while "'[i]t may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant' … the party seeking to assert the doctrine of *res ipsa loquitur* must 'present sufficient evidence that eliminates other responsible causes,"' "including the conduct of the plaintiff and third persons," and Thomas cannot show, as a matter of law, that "Menard[s] had exclusive control over the pallet or the factors that apparently caused the accident." (Citing to ***Lambrecht***, 241 Wis. 2d 804, ¶27; ***Richards v. Mendivil***, 200 Wis. 2d 665, 676, 548 N.W.2d 85 (Ct. App. 1996); and Restatement (Second) of Torts § 328D (1965).)

¶27 As noted in the previous section, Thomas has provided no testimony or other evidence as to how the condition arose that resulted in the pallet falling on Thomas. Thomas has provided no evidence that Menards had exclusive control over the pallet and its placement in the self-service yard. Rather, both Thomas and her son acknowledged that the self-service yard was used by customers who on their own put purchased materials into their own vehicles, and both further testified that a customer could have caused the pallet to be in the position from which it fell on Thomas. Thomas has provided no testimony from Menards' employees or officials as to who may have put the pallet in a position from which it could fall on Thomas, or who in fact did so place the pallet. Without evidence that Menards had exclusive control over the pallet which fell on Thomas, the conditions for permitting a fact-finder to consider the doctrine of *res ipsa loquitur* are foreclosed. While Thomas's trial counsel attempted to argue at the summary

judgment hearing that he would seek that information before the close of discovery,[4] Thomas had already had over six months to discover this evidence and had propounded no written discovery nor taken any depositions during that time. Because Thomas has failed to present evidence to show that Menards had exclusive control of the subject pallet, thereby failing to meet the second condition necessary for her to be entitled to the fact-finder's consideration of the doctrine of *res ipsa loquitur* in connection with the incident that caused her injury, summary judgment is proper.

By the Court.— Order affirmed.

Not recommended for publication in the official reports.

[4] In response to the trial court's question, "What is the evidence as to what [Menards] did to inspect?" Thomas's trial counsel responded: "We haven't done any discovery with Menards store employees at this point. There is a discovery deadline in this case of October 20th, and I do intend to take depositions of employees."