COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1652 **Cir. Ct. No. 2006CV9565**

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

PHRONIE TOLIVER,

PLAINTIFF-APPELLANT,

MILWAUKEE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PLAINTIFF,

V.

POTAWATOMI BINGO & CASINO AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES J. KAHN, JR., Judge. *Affirmed.*

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

¶1 CURLEY, P.J. Phronie Toliver appeals from the judgment dismissing her complaint against Potawatomi Bingo & Casino and St. Paul Fire and Marine Insurance Company (collectively referred to as Potawatomi unless otherwise specified). Judgment was entered after Potawatomi successfully moved for a directed verdict at the close of Toliver's case. On appeal, Toliver argues that the trial court erred in three respects: (1) in granting Potawatomi's motion for a directed verdict dismissing her safe-place claim on the basis that she failed to establish evidence of notice; (2) in deciding that expert evidence was required for her to prove her safe-place claim; and (3) in dismissing her negligence claim on grounds that she failed to present evidence of Potawatomi's failure to exercise due care. Because Toliver failed to present evidence that Potawatomi had notice of an allegedly unsafe condition and failed to present evidence to support her negligence claim, we affirm.[1]

I. BACKGROUND.

¶2 This appeal arises from injuries Toliver sustained when she fell at Potawatomi on October 7, 2003. Three years later, Toliver filed suit against Potawatomi and its insurer, alleging negligence and a violation of Wisconsin's safe-place law. *See* WIS. STAT. ch. 101 (2003-04).[2] The case proceeded to a jury

[1] In light of this resolution, we do not address Toliver's claim that the trial court erred when it required expert testimony on the safe-place claim. *See infra* ¶21.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

trial with Toliver calling two witnesses, Eddie Mae Trueblood, Toliver's friend who was with her at Potawatomi on the day of the incident, and herself.[3]

¶3 Toliver's trial testimony revealed that during an intermission while playing breakfast bingo, Toliver, a frequent bingo player at Potawatomi, decided to get refreshments. She testified that she walked along an aisle between tables where patrons were sitting, obtained snacks from a concession stand, and as she re-entered the same aisle she had previously walked down (albeit on a different side of the aisle), she slipped and fell on a plastic bag. Toliver did not see a plastic bag on the floor in the aisle on her way to the concession stand. Photographs admitted at trial show empty translucent plastic bags hanging down on both sides of each table in the bingo hall. The empty bags were secured to the tables with tape and appear to have been touching, or close to touching, the floor. The bags were placed on the tables so that bingo patrons could throw away used bingo sheets and other trash.[4] Toliver was aware that the bags were used for this purpose and had thrown her trash in one of the bags located near where she was sitting on the day she fell.

¶4 As Toliver walked back to her seat, she testified that she was looking straight ahead and did not see a plastic bag on the floor. She claimed that she stepped on the bag and that it caused her to slip.[5] It was Toliver's testimony that a

[3] Trueblood did not see Toliver fall, nor did she go to the area of the bingo hall where Toliver fell.

[4] Toliver testified that in previous years, Potawatomi had placed garbage cans in the aisles and later switched to using plastic bags taped to the tables.

[5] Some of Toliver's medical records reveal that after the incident, she told medical personnel that she fell after tripping over a chair.

nurse who happened to be in the bingo hall came to her aid and removed the bag from Toliver's foot while she was on the floor. Toliver acknowledged that she did not know how long the bag had been on the floor prior to her fall.

¶5 At the close of Toliver's case, Potawatomi moved for a directed verdict based on the lack of credible evidence to support Toliver's claims. In granting the motion, the trial court set forth its reasoning:

> You know, it is possible that with all those bags and plastic bags being slippery, as they are, that an environment like this could create an unreasonable risk of injury. However, there has been no evidence of it presented in this case. Whether it would be probably some sort of expert or, perhaps, testimony from someone at Potawatomi called adversely. In order to prevail in this lawsuit, in order to actually have sufficient evidence to go to the jury even, there has to be some testimony about the strength of the tape or the method of application or the likelihood of slippage.
>
> Here the facts establish that Ms. Toliver walked right down the aisle in a relatively rapid way. Rather, I don't know if the tape was sped up or not, but in any event, it looked like people were moving rapidly on the tape, walked right to the concession area, the little cart or whatever it was, got something and quickly returned.[6] Other people, at least one other person, the woman in white, walked in the same area. Of course, Ms. Toliver testified that had she seen a bag there on the floor, she would have stopped to pick it up to move the obstruction, but it was in the rapid manner that the video is shown here. It was a minute or two at the most, but perhaps in real life, it was as much as five minutes from the time that Ms. Toliver first walked past the area and did not stop to pick up anything because there was no noticeable obstruction, and the other woman walked past, and then Ms. Toliver returned. Certainly, that was not sufficient time for Potawatomi to have any notice of any dangerous condition or hazardous condition. Then as far as whether or not it's

[6] The trial court is referring to a security tape depicting the incident that was entered into evidence.

> hazardous in general to operate a facility in that manner, perhaps it is, but the jury needs more than just the mere fact that the bags were there and that they were taped up to the sides of the table to establish this. The evidence just isn't here, and it's not the point in time of a motion for summary judgment. This is the trial. The plaintiff has put in her best shot and has failed to establish the elements of any cause of action.

(Footnote added.)

¶6 After additional argument by Toliver's attorney, the trial court went on to state:

> You know, you refer to tape as being inadequate, but there are a lot of different kinds of tape that 3-M has made a lot of executives and shareholders wealthy over all of the development of a variety of sticking methods, sticking surfaces. Some tape is very difficult to remove. Other tape is very easy to remove. There has been no presentation in this trial of the nature of the tape at all, not only expert witness, but no lay witness, no tape even itself. The plaintiff has the duty to present the case.[7]

(Footnote added.)

[7] In its pretrial report submitted six months before trial, Potawatomi put Toliver on notice that the defendants intended to move for a directed verdict at the close of her case. The trial court brought this up when ruling on Potawatomi's directed verdict motion, stating:

> [Potawatomi's attorney] was quite blunt in his pretrial report, I mean, it's right there, and that was several months ago, I believe, saying here is how the case is going to go. We are going to win it at the time of directed verdict at the end of the plaintiff's case. So it's not like this is any surprise to the plaintiff, Ms. Toliver, or her lawyer, who could have then, if you thought there was something missing, scrambled to ask me to allow time to amend your witness list or whatever would have had to have been done.

Toliver's attorney responded that he did not think anything was missing given the circumstances of the case.

¶7 At a follow-up hearing held a few days after the trial, the trial court expounded upon the reasoning behind its decision. First, it noted that use of the plastic bags was not a new development at Potawatomi, and despite this, "the plaintiff provided nothing to indicate that either Ms. Toliver or the other witness or anyone at Potawatomi ever observed that there was any problem or notice to Potawatomi of a problem." Second, the court referenced the width of the aisles, stating: "I did ask whether there was testimony as to the measurement of the width of the aisles, and there was none, no measurement. But from observation of the videotape, it is evident that the aisles were relatively spacious." The court noted that from the videotape of the incident, it appeared that it was easy to walk between the people playing bingo in the various aisles that Toliver walked in and that the facility seemed to be uncrowded. Finally, the trial court explained that the plastic bags at issue would have been observable to Toliver.

¶8 Toliver now appeals from the trial court's judgment dismissing her complaint.

II. ANALYSIS.

A. Standard of review.

¶9 A motion challenging the sufficiency of the evidence may not be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." WIS. STAT. § 805.14(1). "This standard applies both to a motion to dismiss at the close of a plaintiff's case and to a motion for a directed verdict or dismissal at the close of all the evidence when the motion challenges the

sufficiency of the evidence." ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995); *see* § 805.14(3), (4).

¶10 When reviewing the trial court's determination on a motion for a directed verdict, we apply the same standard as the trial court; however, we defer to the trial court's assessment of the evidence:

> In ruling upon a motion made at the close of a plaintiff's case, a [trial] court may not grant the motion "unless it finds, as a matter of law, that no jury could disagree on the proper facts or the inferences to be drawn therefrom," and that there is no credible evidence to support a verdict for the plaintiff.
>
> Because a [trial] court is better positioned to decide the weight and relevancy of the testimony, an appellate court "must also give substantial deference to the trial court's better ability to assess the evidence." An appellate court should not overturn a [trial] court's decision to dismiss for insufficient evidence unless the record reveals that the [trial] court was "clearly wrong."

Weiss, 197 Wis. 2d at 388-89 (citations omitted). "This 'clearly wrong' standard and the 'any credible evidence' standard are not two different standards, but only flip sides of the same coin. A trial court is 'clearly wrong' when it grants a motion for a directed verdict despite the existence of credible evidence to the contrary." ***Haase v. Badger Mining Corp.***, 2003 WI App 192, ¶16, 266 Wis. 2d 970, 669 N.W.2d 737, *aff'd*, 2004 WI 97, 274 Wis. 2d 143, 682 N.W.2d 389.

B. The trial court properly granted Potawatomi's motion for a directed verdict on Toliver's safe-place claim.

¶11 As presented in her brief, the crux of Toliver's argument that the trial court erred in directing a verdict dismissing her safe-place claim reads:

> [Potawatomi] chose to use self service plastic bags to dispose of the patrons['] trash, which foreseeably, the plaintiff could become entangled in, causing her to fall and dislocate her shoulder. The court erred because it

> incorrectly concluded that the plaintiff failed to establish actual notice that there was a plastic bag on the floor for sufficient time for the defendant to reasonably respond. The court should have found that by the defendant's chosen method of operation of taping plastic bags to tables that it had constructive notice that the plaintiff could be entangled in a bag and fall.

¶12 To analyze her position, we begin with a brief overview of Wisconsin's safe-place law:

> According to WIS. STAT. § 101.11, every employer and owner of a public building is to provide a place that is safe for employees and for frequenters of that place, and "[e]very employer and every owner of a place of employment or a public building ... shall so construct, repair or maintain such place of employment or public building as to render the same safe." This duty has a higher standard of care than that imposed by common-law negligence. However, the safe-place statute addresses unsafe conditions, not negligent acts. In addition, the law does not require an employer or an owner of a public building to be insurers of frequenters of the premises.

Megal v. Green Bay Area Visitor & Convention Bureau, Inc., 2004 WI 98, ¶9, 274 Wis. 2d 162, 682 N.W.2d 857 (citations omitted).

¶13 Before liability will ensue under WIS. STAT. § 101.11(1), "the employer or owner must have notice that an unsafe condition exists. This notice can be actual notice or constructive notice." ***Megal***, 274 Wis. 2d 162, ¶11. Toliver's attorney conceded during trial that there was no evidence of actual notice.

¶14 Accordingly, we focus on constructive notice, which has been described as follows:

> [C]onstructive notice is neither notice nor knowledge but a shorthand expression, "the mere trademark of a fiction." In order to promote sound policy, we attribute constructive notice of a fact to a person and treat his legal rights and

> interests as if he had actual notice or knowledge although in fact he did not.

Strack v. Great Atl. & Pac. Tea Co., 35 Wis. 2d 51, 54-55, 150 N.W.2d 361 (1967). Where there is an alleged safe-place violation, "the general rule is that an employer or owner is deemed to have constructive notice of a defect or unsafe condition when that defect or condition has existed a long enough time for a reasonably vigilant owner to discover and repair it." ***Megal***, 274 Wis. 2d 162, ¶12. In most contexts, "constructive notice requires evidence as to the length of time that the condition existed." ***Id.***

¶15 Toliver, however, relies on a limited exception to the length of time requirement, which depends on the course of conduct or method of operation involved. The limited exception provides:

> [W]hen an unsafe condition, although temporary or transitory, arises out of the course of conduct of the owner or operator of a premises or may reasonably be expected from his method of operation, a much shorter period of time, and possibly no appreciable period of time under some circumstances, need exist to constitute constructive notice.

Strack, 35 Wis. 2d at 55; *see* ***Megal***, 274 Wis. 2d 162, ¶13; ***Steinhorst v. H. C. Prange Co.***, 48 Wis. 2d 679, 683-84, 180 N.W.2d 525 (1970).

¶16 Toliver argues that the circumstances of her case are akin to those in ***Strack*** and ***Steinhorst***. In both cases, the courts concluded that due to the manner of business being performed, temporal evidence was not necessary to establish constructive notice of an unsafe condition.

¶17 In ***Strack***, the plaintiff, a customer in an A & P store, slipped on a prune that was on the floor in a self-serve fruit counter area and suffered injuries. ***Id.***, 35 Wis. 2d at 53. She filed an action under the safe-place statute, and the

court was asked to determine whether A & P had sufficient notice of the presence of the prune on the floor such that it could be held negligent for failing to remove it. ***Id.*** at 54. In affirming the jury verdict for the plaintiff, finding that A & P had constructive notice of the condition of the aisle in its store, which rendered it not as safe as its nature would reasonably permit, the court explained:

> [W]e 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. The Italian prunes were piled on the table in the aisle. There was evidence that sometimes prunes were packaged in trays or "boats" which prevents the handling of the fruit by the customer and the knocking of individual pieces of fruit to the floor. While the use of self-service produce displays is not negligence as a matter of law, they 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. at 56-57.

¶18 Similarly, in ***Steinhorst***, the plaintiff slipped on shaving foam while walking in the aisle of a self-service men's cosmetic counter at a Prange's department store. ***Id.***, 48 Wis. 2d at 681. Rejecting Prange's argument that it did not have constructive notice, the supreme court explained: "The unsafe condition here was substantially caused by the method used to display merchandise for sale." ***Id.*** at 684.

¶19 In contrast to the circumstances in ***Strack*** and ***Steinhorst*** where temporary unsafe conditions were caused by the manner of displaying products, here, as Potawatomi points out, the circumstances involve "large[,] clearly visible garbage bags, taped to tables, in between chairs." Toliver's situation is

distinguishable from those contemplated in ***Strack*** and ***Steinhorst***, and we are not persuaded that the ***Strack*** exception extends to the facts of this case. "We 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***, 274 Wis. 2d 162, ¶18 (citing ***Kaufman v. State Street Ltd. P'ship***, 187 Wis. 2d 54, 65, 522 N.W.2d 249 (Ct. App. 1994) (concluding that the ***Strack*** exception was not available to a plaintiff who slipped on a banana peel in a store's parking lot)).

¶20 At trial, Toliver acknowledged that she did not know how long the bag that she alleged was on the floor was located there and any conclusion in this regard would be purely speculative. Without evidence that the bag she allegedly slipped on was on the floor for any appreciable time, Toliver could not establish that Potawatomi had constructive notice of the alleged unsafe condition. *See* ***May v. Skelley Oil Co.***, 83 Wis. 2d 30, 36, 264 N.W.2d 574 (1978) ("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."), *criticized on other grounds by* ***Reiter v. Dyken***, 95 Wis. 2d 461, 290 N.W.2d 510 (1980). As a result, we conclude that the trial court properly directed a verdict on Toliver's safe-place claim.

¶21 Toliver further contends that the trial court erred when it required her to present expert evidence to prove her safe-place claim. However, because we concluded that the trial court properly directed a verdict based on the lack of evidence showing that Potawatomi had notice of an unsafe condition, we need not

address this additional claim of error.[8] *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point disposes of an appeal, we will not decide other issues raised).

C. The trial court properly granted Potawatomi's motion for a directed verdict on Toliver's negligence claim.

¶22 In addition to claiming that there was a safe-place violation, Toliver also claimed Potawatomi was negligent. Toliver contends that she "presented evidence that [Potawatomi] chose to replace garbage containers with plastic bags, which were allowed to improperly touch the floor. The jury could find these

[8] Moreover, we are not convinced that the trial court required expert testimony. Instead, the trial court's references to expert testimony seemingly were meant to emphasize the complete lack of *any* evidence to support Toliver's claim. As relayed above, the trial court made the following statements:

> Whether it would be probably some sort of expert or, perhaps, testimony from someone at Potawatomi called adversely. In order to prevail in this lawsuit, in order to actually have sufficient evidence to go to the jury even, there has to be some testimony about the strength of the tape or the method of application or the likelihood of slippage.
>
> ….
>
> … There has been no presentation in this trial of the nature of the tape at all, not only expert witness, but no lay witness, no tape even itself. The plaintiff has the duty to present the case.

In addition, at the follow-up hearing, the trial court reiterated:

> Although [Toliver's attorney's] analysis is that merely because plastic bags are slippery, large, touch the floor and are secured with tape, tape that could possibly come off, of course without any evidence at all lay or demonstrative or expert about the properties of the tape, I mean, like we didn't even have the tape.

Clearly, the trial court identified other sources of evidence, beyond expert testimony, that would have been useful for Toliver to present in proving her case.

actions by the defendant were negligent because it was foreseeable that the plaintiff would trip on a plastic bag[,] fall and be injured." (Record citation omitted.) We disagree.

¶23 A negligence claim can proceed even when insufficient grounds exist to support a violation of safe-place law, *see* ***Megal***, 274 Wis. 2d 162, ¶25. However, in this case, the trial court did not err in granting Potawatomi's motion for a directed verdict on Toliver's negligence claim. Here, Toliver did not present any evidence to substantiate her claim that Potawatomi's conduct on the date of her fall deviated from the applicable standard of care. The evidence submitted by Toliver at trial—namely, her testimony and that of a friend who was with her the day of the incident, photographs of empty plastic bags hanging from tables, and a security video of the incident—is wholly insufficient to substantiate her negligence claim. The mere fact that at some point in time Potawatomi switched from using garbage cans to plastic bags that were taped to tables and touched the floor in and of itself does not establish negligence. The extent of the testimony as to what Potawatomi may have done wrong on the day of the incident amounts to one self-serving statement made by Toliver during trial: "I think the housekeeping department was negligent because to me, they didn't come back and see if those bags were secure on the table, stuck on the table properly. That's all I think."

¶24 We agree with Potawatomi that "[t]he fact that an incident occurred, and plaintiff is of the opinion that Potawatomi is somehow negligent, is not evidence of negligence." *Cf.* ***Moulas v. PBC Prods. Inc.***, 213 Wis. 2d 406, 417, 570 N.W.2d 739 (Ct. App. 1997) ("Personal opinions of an affiant in the absence of a validating basis do not constitute evidentiary facts."), *aff'd*, 217 Wis. 2d 449, 576 N.W.2d 929 (1998). "The 'mere happening of an accident does not automatically establish that a place is not safe within the meaning of the safe place

statute or that someone was negligent under the common law.'" ***Id.*** (citation omitted).

¶25 Consequently, given our deferential review of the trial court's assessment of the evidence, we cannot say that the trial court was clearly wrong. Because the trial court properly granted Potawatomi's motion for a directed verdict on both Toliver's safe-place and negligence claims, we affirm the judgment dismissing her complaint.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.