COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP697 **Cir. Ct. No. 2009CV402**

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

GEORGE FREEMAN,

PLAINTIFF-APPELLANT,

V.

AIRGAS-NORTH CENTRAL, INC. AND THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

DEFENDANTS-RESPONDENTS,

MICHIGAN INSURANCE COMPANY,

NOMINAL-DEFENDANT.

APPEAL from a judgment of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. George Freeman appeals a summary judgment dismissing his safe place[1] and negligence claims. Freeman slipped on a wet floor at Airgas-North Central, Inc.'s facility in Marinette. He argues that summary judgment was erroneously granted because Airgas had constructive notice of the slippery floor condition, and its conduct constituted an affirmative act of negligence. We disagree and affirm.

¶2 Freeman was an employee of Office Planning Group, an independent contractor hired by Airgas to install office furniture. Freeman and Gunther Stolze carried materials into Airgas's facility from pallets placed by Airgas near its rear entrance.

¶3 On the day of the accident, it was snowing. Conditions were slushy, although Freeman acknowledged "not even enough stuff to plow." Freeman and Stolze had made six to eight trips into the building with material before Freeman slipped when he stepped off a floor mat onto a tile portion of the floor. During the sixty to ninety minutes Freeman was on the premises before he slipped, he did not have any problems with his footing, and did not notice any change in the condition of the floor.

¶4 Freeman commenced an action claiming Airgas violated the safe place statute and was negligent at common law. Airgas moved for summary judgment. After a hearing, the circuit court granted summary judgment. Freeman now appeals.

[1] *See* WISCONSIN STAT. § 101.11 (2007-08).

¶5 In order to be subject to the standard of care established by the safe place statute, "the employer or owner must have notice that an unsafe condition exists. This notice can be actual notice or constructive notice." ***Megal v. Green Bay Area Visitor & Conv. Bureau, Inc.***, 2004 WI 98, ¶11, 274 Wis. 2d 162, 682 N.W.2d 857. Freeman produced no evidence to show that Airgas had actual notice of the wet floor on which Freeman fell. The issue is whether any evidence exists on which a jury could find constructive notice.

¶6 In the context of the safe place statute, the general rule is that constructive notice arises if the property owner has sufficient time to discover and remedy the defect or unsafe condition. ***Id.***, ¶12. In most contexts, constructive notice requires evidence as to the length of time that the condition existed. ***Id.***

¶7 In the present case, there is no evidence as to how long the floor was wet and slippery before Freeman fell. In fact, Freeman testified at his deposition as follows:

> Q: During the six to eight trips, the hour to an hour and a half you were there, did you notice the condition of the floor change at all?
>
> A: I didn't really notice, no, you know.
>
> Q: Before you actually fell, did you have any problems with your footing?
>
> A: No.

¶8 Nevertheless, Freeman relies upon a limited exception to the general rule about length of time. The exception applies when it is reasonably probable that an unsafe condition will occur because of the nature of the property owner's business and the manner in which the owner conducts that business. The ***Megal*** court stated as follows:

> [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.

Megal, 274 Wis. 2d 162, ¶13 (citing ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis. 2d 51, 55, 150 N.W.2d 361 (1967), and ***Steinhorst v. H.C. Prange Co.***, 48 Wis. 2d 679, 683-84, 180 N.W.2d 525 (1970)).

¶9 In ***Strack***, a customer in an A & P store slipped on a prune on the floor near tables displaying fruit for sale. She filed a safe place action and the court was asked to determine whether A & P had sufficient notice of the presence of a prune on the floor. ***Strack***, 35 Wis. 2d at 53-54. The court explained that displaying fruit and produce in such a way that the fruit may be dropped on the floor is a way of doing business that requires the storekeeper to use reasonable measures to discover and remove debris from the floor. ***Id.*** at 56-57.

¶10 Similarly, in ***Steinhorst***, 48 Wis. 2d at 681-84, the plaintiff slipped on shaving foam while walking in the aisle of a self-service men's cosmetic counter. Our supreme court stated that the "unsafe condition here was substantially caused by the method used to display merchandise for sale." ***Id.*** at 684.

¶11 However, 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 harm reasonably foreseeable. *See, e.g.*, ***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). Indeed, ***Megal*** characterized the ***Strack*** and ***Steinhorst*** decisions as "a narrow class of cases" where temporary unsafe conditions were caused by the manner of displaying products in the area where the harm occurred. *See* ***Megal***, 274 Wis. 2d 162, ¶18.

¶12 The wet and slippery condition of the floor at Airgas had nothing to do with the nature of its business or the manner in which the business was conducted. The limited exception is therefore inapplicable in this case. Because Freeman has no evidence of the length of time the slippery condition existed, he cannot prove constructive notice. Without proof of constructive notice, Freeman cannot prevail on a safe place claim.

¶13 A negligence claim may proceed even when insufficient grounds exist to support a violation of the safe place statute. *See* ***id.***, ¶25. However, the parties agree that under Wisconsin law, "one who hires an independent contractor is not liable in tort for injuries sustained by an independent contractor's employee while he or she is performing the contracted work." *See* ***Danks v. Stock Bldg. Supply, Inc.***, 2007 WI App 8, ¶17, 298 Wis. 2d 348, 727 N.W.2d 846. There are two exceptions to this rule: if an independent contractor is engaged in abnormally dangerous work; or if the hiring entity commits an "affirmative act of negligence." *See* ***id.***, ¶23.

¶14 Freeman argues that Airgas's conduct constituted an affirmative act of negligence. He contends Airgas "was in control of the back entrance and made the conscious decision to allow just one mat in the area." Freeman also contends

Airgas placed the office supplies on pallets near the back door, "thereby forcing Freeman to traverse this area, including the slippery and wet tile floor."[2]

¶15 Airgas responds that an affirmative act of negligence requires "an act of commission – that is, something that one does – as opposed to an act of omission, which is something one fails to do." *See* ***Wagner v. Continental Cas. Co.***, 143 Wis. 2d 379, 389-90, 421 N.W.2d 835 (1988). Airgas notes this court has concluded that the negligent design of a project and the failure to incorporate safety precautions were passive inactions that did not constitute affirmative acts of negligence. *See* ***Estate of Thompson v. Jump River Elec. Coop.***, 225 Wis. 2d 588, 601-02, 593 N.W.2d 901 (Ct. App. 1999). Airgas also emphasizes our conclusion in ***Danks*** that the failure of a driver to notice and fix a truss that was improperly attached to a crane cable, and to warn others about the problem, was an omission and not an affirmative act of negligence. *See* ***Danks***, 298 Wis. 2d 348, ¶33-34.

¶16 Freeman did not file a reply brief and therefore has failed to even attempt to address this case law, or refute Airgas's arguments. Regardless, we conclude that Airgas's alleged conduct constituted "passive inaction or a failure to … protect the plaintiff from harm." *See* ***Wagner***, 143 Wis. 2d at 390. Airgas's potential negligence lay in its failure to discover and act regarding the alleged wet

[2] Freeman notes that following his fall, Airgas "determined that additional mats were necessary to ensure the safety of the employees and patrons of the building." Freeman claims this "conscious decision of the defendant to have just one mat at the entrance is an affirmative act of negligence …." Freeman also argues that "[g]iven the foreseeability of the slush and water being tracked in, coupled with the slippery tile surface, this decision by Airgas to use this dangerous entrance constituted 'active' negligence." However, Freeman's arguments are conclusory. Further, he lacks citation to legal authority regarding subsequent remedial measures or foreseeability. We therefore decline to further consider the arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

and slippery floor, and such passive inaction does not constitute affirmative acts of negligence.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).