COURT OF APPEALS DECISION DATED AND RELEASED

January 30, 1996

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

NOTICE

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

No. 95-0789

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

BARBARA KLOOSTRA,

Plaintiff-Appellant,

EMPLOYERS HEALTH INSURANCE,

Involuntary-Plaintiff,

v.

TRAVELERS INSURANCE COMPANY,
FRISCH, SHAY AND TAYLOR,
ABC, INC, DEF, GHI, INC, and
IVARS VELDRE,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed*.

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

WEDEMEYER, P.J. Barbara Kloostra appeals from a judgment dismissing her cause of action against Travelers Insurance Company, Frisch, Shay and Taylor, ABC, INC, DEF, GHI, INC, and Ivars Veldre (Travelers) for violation of the safe-place statute and common law negligence arising from a slip and fall accident.

Kloostra claims that the trial court erred as a matter of law in granting summary judgment because she provided sufficient circumstantial evidence from which it can be reasonably inferred that Travelers had constructive notice of the unsafe ice condition which precipitated her fall. Because the evidence Kloostra submitted was insufficient to create a reasonable inference of constructive notice, we affirm.

I. BACKGROUND

The facts relating to Kloostra's slip and fall are not in dispute. On February 22, 1991, Kloostra traveled from Wausau, Wisconsin, to the Travelers building located at 6815 West Capitol Drive, Milwaukee, Wisconsin, for an appointment at an employment counseling center located in the building. The weather on February 22 was relatively warm for February. It was Kloostra's first visit to the building. As she proceeded down a stairway towards the entrance of the building, she slipped on a thin patch of ice and fell backwards. As a result of the fall, she tore a rotator cuff, an injury which required surgery resulting in medical bills and wage loss. Kloostra admitted that prior to slipping, she did not observe any snow or ice in the area. In response to Kloostra's claim, Travelers moved for summary judgment. The trial court granted the motion on the basis that Kloostra failed to show sufficient evidence demonstrating that Travelers had actual or constructive notice of the icy condition in the entrance of the doorway. Kloostra now appeals.

II. DISCUSSION

The standards for the granting of a summary judgment are well known and we decline to repeat them here. Section 802.08, STATS., ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476 (1980). We note only that our review of the grant is *de novo*. ***Green Springs Farms v. Kersten***, 136 Wis.2d 304,

315, 401 N.W.2d 816, 820 (1987). Summary judgment should not be granted if reasonable but differing inferences can be drawn from the undisputed facts. ***Jones v. Sears Roebuck & Co.***, 80 Wis.2d 321, 325, 259 N.W.2d 70, 71 (1977).

In a safe-place negligence action, the owner of a place of employment is not an "insurer" of frequenters of the premises. ***Kaufman v. State Street Ltd. Partnership***, 187 Wis.2d 54, 59, 522 N.W.2d 249, 251 (Ct. App. 1994). In order to be liable for a failure to correct a defect, the owner must have actual or constructive knowledge of the defect. ***Id.*** In the absence of actual notice, constructive notice will be found if a defect existed long enough for a vigilant owner to discover and correct it. ***Id.*** at 59-60, 522 N.W.2d at 251-52.

Kloostra contends she has come forward with sufficient circumstantial evidence, i.e., meteorological data from which it can be inferred that an unsafe condition must have existed for over two days, thereby establishing a material issue of fact. We deem the desired inference unreasonable and conclude that the essential element of constructive notice is missing.

In her effort to demonstrate the presence of constructive notice on the part of the building owner, Kloostra submitted copies of official weather records for the National Weather Service office located at General Mitchell Field in Milwaukee, Wisconsin, for the entire month of February 1991. As relevant to February 22, the date of the Kloostra accident, the records demonstrate that the high temperature was 42, the low was 22 and the average was 32. The records show that there was no precipitation on February 22. The day before the incident, February 21, these same records show that the high temperature was 54, the low was 33 and the average was 44. Again, the records show that there was not any precipitation on February 21. Two days before the incident, February 20, the records show that the high temperature was 45, the low was 27 and the average was 36, again without any precipitation. Three days before the incident, February 19, the records show that the high temperature was 37, the low was 29, and the average was 33. In addition, there was a "trace" of precipitation.

Kloostra argues that this trace of precipitation on February 19 recorded at the weather service office creates a question of fact as to whether

constructive notice existed. In other words, Kloostra claims that a jury could reasonably infer from this trace of precipitation on February 19 that the ice patch she slipped on was present from February 19 until her fall on February 22. She argues that this shows four days of constructive notice to the building owners. We cannot agree.

An inferred fact is a logical factual conclusion drawn from basic facts or historical evidence. It is the probability that certain consequences can and do follow from basic events or conditions as dictated by logic and human experience. A probability is that a phenomenon more likely occurred than not. The inference that Kloostra seeks is neither logical nor probable, and therefore not reasonable. First, the weather records she submitted are from the weather service station located at 5800 South Howell Avenue, approximately twenty miles away from the site of her slip. She did not submit any weather records documenting the specific conditions at the building where her accident occurred. Second, the weather service records demonstrate unseasonably warm days prior to February 22, with temperatures rising significantly above the freezing point. Hence, even if that trace of precipitation did cause an ice patch to form on February 19, the next several days of above freezing temperatures surely could not have sustained the ice.

In the absence of any evidence to show that the building owners were on notice for some period of time that an icy patch existed, Kloostra cannot maintain her action. As noted above, the only evidence she submitted on this issue, the meteorological report, is insufficient to satisfy her burden. Accordingly, the trial court was correct to grant summary judgment in favor of the building owner. We affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. (*concurring*). Although the majority's conclusion is correct, its reasoning is not quite right.

The majority properly calls for an analysis of the facts "dictated by logic and human experience." Majority slip op. at 5. The majority, however, having summarized the weather conditions of the days preceding Kloostra's fall, then concludes: "Hence, even if that trace of precipitation did cause an ice patch to form on February 19, the next several days of above freezing temperatures surely could not have sustained the ice." In my estimation, this conclusion certainly is not "dictated by logic and human experience."

Fluctuating February temperatures can produce daily/nightly thawing/freezing depending on numerous conditions including the amount and location of nearby snow and ice, and any slope or depression in the surface area of the fall. Thus, the conditions could very well have "sustained the ice." The difficulty for Kloostra, however, is that she offered nothing to remove the issue from the realm of pure speculation. Recently reviewing a comparable situation, we explained:

> Here, as Pick 'N Save points out, there was no evidence of how long the banana was in the parking lot, and any conclusion in that regard would be purely speculative. To repeat, the supreme court stated, "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." Thus, although ***Strack [v. Great Atl. & Pac. Tea Co.,*** 35 Wis.2d 51, 150 N.W.2d 361 (1967)] clearly may be read to delineate an exception to the general rule requiring "length of time" evidence for constructive notice, ***Strack*** clearly does *not* stand for the proposition that constructive notice *automatically* exists when the condition is present for no appreciable time, or when there is no evidence to remove the temporal estimate from the realm of pure speculation.

> ....
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> The Kaufmans have provided no authority to establish the basis on which we could extend the ***Strack*** exception beyond the doors of the premises absent any "length of time" evidence. The parking lot in this case was not within the exclusive control of the defendants, individually or collectively. Outside, exposed to the comings and goings of countless parkers and shoppers, the lot was subject to potentially dangerous conditions unrelated or only incidentally related to Walgreens' and Pick 'N Save's "method of operation," and to State Street's management of the lot.... Rain or snow could make footing dangerous.

Kaufman v. State Street Ltd. Partnership, 187 Wis.2d 54, 63-64, 522 N.W.2d 249, 253-254 (Ct. App. 1994) (citations omitted; emphasis in original). Here, similarly, Kloostra's submissions were insufficient "to remove the temporal estimate from the realm of pure speculation." *See* ***id.*** Accordingly, I concur.

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FINE, J. (*dissenting*). Barbara Kloostra slipped on some ice. That ice must have come from somewhere, not necessarily the "trace" precipitation recorded at the National Weather Service office for February 19, 1991. The climatic conditions recorded by the Weather Service at Mitchell International Airport for the days preceding February 22, 1991, raise, in my view, a genuine issue of fact as to whether the ice was on the stairs for a sufficiently long enough time to give constructive notice. That the data was collected from a site away from the place where Kloostra fell does not, in my view, alter this fact. Jurors are free to bring their life experiences with them into the jury room, ***State v. Heitkemper***, 196 Wis.2d 218, 225, 538 N.W.2d 561, 564 (Ct. App. 1995), and it is common knowledge that temperatures generally do not vary significantly from the airport to the sixty-eight hundred block of West Capitol Drive. I respectfully dissent.