COURT OF APPEALS
DECISION
DATED AND RELEASED

July 3, 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.

Nos. 95-1187
95-1955

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

ERIN O'BRIEN,

Plaintiff-Appellant,

v.

BADGER BOWL, INC.,
AND ZURICH-AMERICAN INSURANCE COMPANY,

Defendants-Respondents,

PHYSICIANS PLUS INSURANCE CORPORATION,

Defendant.

Nos. 95-1187
95-1955

ERIN O'BRIEN,

Plaintiff,

v.

BADGER BOWL, INC.
AND ZURICH-AMERICAN INSURANCE COMPANY,

Defendants-Respondents,

PHYSICIANS PLUS INSURANCE CORPORATION,

Defendant-Appellant.

APPEAL from an order of the circuit court for Dane County: MICHAEL B. TORPHY, JR., Judge. *Affirmed*.

Before Gartzke, P.J., Sundby and Vergeront, JJ.

GARTZKE, P.J. Erin O'Brien appeals from an order at the close of her case in chief dismissing her action against Badger Bowl, Inc. and its insurer, Zurich-American Insurance Company, and Physicians Plus Insurance Corporation.[1] On New Year's Eve, 1991-92, O'Brien fell on an icy patch near an entrance to the Badger Bowl. She claims Badger Bowl violated the safe-place statute and was negligent at common law. The trial court dismissed the action on grounds that O'Brien failed to present any evidence from which the jury could find that Badger Bowl had actual or constructive notice of the ice on which she fell.

The issues are whether: (1) the evidence supports O'Brien's claim that Badger Bowl had such notice; (2) the evidence supports O'Brien's claim of

[1] Physicians Plus paid certain of Erin O'Brien's medical expenses and separately appealed from the same judgment. We consolidated the appeals.

Badger Bowl's negligence; and (3) the trial court properly excluded expert testimony regarding an alleged building design defect and the safety of the premises. We conclude the evidence does not support the claimed notice or negligence. We affirm without reaching the evidentiary issue.

A trial court may grant a motion challenging the sufficiency of the evidence if "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." Section 805.14(1), STATS. When reviewing the trial court's ruling, an appellate court applies the same statutory standard, ***Weiss v. United Fire & Casualty Co.***, 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995), but with deference to the trial court's better ability to weigh the evidence.

> Because a circuit 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." ***James v. Heintz***, 165 Wis.2d 572, 577, 478 N.W.2d 31 (Ct. App. 1991). An appellate court should not overturn a circuit court's decision to dismiss for insufficient evidence unless the record reveals that the circuit court was "clearly wrong." ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis.2d 94, 110, 362 N.W.2d 118 (1985).

Weiss, 197 Wis.2d at 388-89, 541 N.W.2d at 761.

The "clearly wrong" standard does not expand the deference an appellate court accords to the trial court's ruling.

> [T]he "clearly wrong" standard and the "no credible evidence" standard must be read together. When a circuit court overturns a verdict supported by "any credible evidence," then the circuit court "is clearly wrong" in doing so. When there is *any* credible evidence to support a jury's verdict, "even though it be

> contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand."

Weiss, 197 Wis.2d at 389-90, 541 N.W.2d at 761-62 (footnote omitted; citations omitted).

1. BACKGROUND

O'Brien, and her brother and his wife, testified that they saw no ice when they walked from their car in the Badger Bowl parking lot to the east entrance of the bowling alley. They first saw ice after O'Brien fell. She testified that hard solid ice covered the area where she fell. Her brother described the area as having a "large build up of ice, a big oval piece," and his wife indicated with her hands that the patch was about two feet around. O'Brien testified that the ice patch was larger than two feet. None of the three saw salt or sand on the ground.

The general manager of Badger Bowl testified that ice coming from the drain pipes on the building was a normal occurrence. The area near the east door would have more ice than any other part of the parking lot. A drain near the east door is supposed to pull water off the parking lot but in winter it freezes and forms ice.[2] Due to the lack of afternoon sun, the east side of the building retains ice longer. Badger Bowl maintains the entire parking lot.

O'Brien testified that when she called Badger Bowl on January 7, 1992, she spoke with the general manager. After she told him about her fall, he said he knew where she had fallen, that they had trouble there before, and the drain which was supposed to pull water away from the building freezes over in the winter, creating ice in the area.

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[2] A photograph shows a drain grill on the pavement several feet away from and in front of the door and at least several feet from the point where the witness said O'Brien fell.

A former Badger Bowl maintenance worker and part-time manager testified that in December 1991 the east door tended to have a lot of ice, that ice coming out of the downspout near the east door was a normal occurrence, that it always froze over in winter and that it froze over in December 1991.[3] That happened even when the rest of the building was clear of ice. Water dripping from the downspout would cause an ice build up outside the east door. However, he did not recall the condition at the east door on the 1991-92 New Year's Eve, and he did not know whether an unusual accumulation of ice existed at that time. A construction consultant testified that a significant water runoff problem existed in the area immediately outside the east door.

From December 25 to December 31, 1991, one inch of snow was on the ground. On December 30, 1991, a trace of snow and water fell. On January 1, 1992, one inch of snow was on the ground and a trace of snow and water fell. The temperature on December 31, 1991, ranged from a high of thirty-four and a low of thirty degrees and averaged thirty-two degrees. The temperature on January 1, 1992, ranged from a high of thirty-one degrees to a low of twenty-nine degrees.[4]

2. SAFE-PLACE STATUTE CLAIM

The safe-place statute, § 101.11(1), STATS., requires every employer to "furnish a place of employment which shall be safe for employes therein and for frequenters thereof ...." Because the statute does not make the employer an insurer of frequenters, to be held liable for failure to correct a defect making a place of employment unsafe, the employer must have actual or constructive knowledge of it. ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis.2d 51, 54, 150 N.W.2d 361, 362 (1967). Similarly, unless it had actual or constructive notice of the defect or dangerous condition where the plaintiff fell, a property owner

[3] The same photograph we described shows two downspouts terminating on the east wall at points higher than the east door at least several feet south of the door. The point where O'Brien fell is at least several feet from the wall and between the spouts and the entrance.

[4] The meteorological information was provided through testimony on the basis of exhibits not made a part of the record on appeal.

cannot be held liable for common law negligence. ***Kaufman v. State St. Ltd. Partnership***, 187 Wis.2d 54, 58-59, 522 N.W.2d 249, 251 (Ct. App. 1994).

The record contains no evidence that Badger Bowl had actual notice of the ice on which O'Brien fell. The sole remaining question is whether any credible evidence exists on the basis of which a jury could find that Badger Bowl had constructive notice of the ice.

Constructive notice is a fiction used to attribute knowledge of a fact to a person "as if he had actual notice or knowledge although in fact he did not." ***Strack***, 35 Wis.2d at 54-55, 150 N.W.2d at 363.

> "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." ***May v. Skelley Oil Co.***, 83 Wis.2d 30, 36, 264 N.W.2d 574, 577 (1978). Ordinarily, constructive notice cannot be found when there is no evidence as to the length of time the condition existed. *See* ***id***. at 35-38 & n.6, 264 N.W.2d at 576-78 & n.6.

Kaufman, 187 Wis.2d at 59, 522 N.W.2d at 251-52. The record contains no evidence on the length of time the ice O'Brien fell on existed.

An exception to the general rule, described in ***May***, 83 Wis.2d at 36, 264 N.W.2d at 577, allows a finding of constructive notice even if a defect existed for a much shorter length of time than would otherwise be required or even for no appreciable 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 it. ***Strack***, 35 Wis.2d at 57-58, 150 N.W.2d at 364.

In ***Strack***, the plaintiff fell in a supermarket on a "little Italian prune." ***Id***. at 53, 150 N.W.2d at 362. The ***Strack*** court ruled that when a store displays its fruit in such a way that customers may handle and drop or knock it

to the floor, the storekeeper must take reasonable measures to discover and remove the debris from the floor. The storekeeper who fails to take those measures has constructive notice of the condition if it causes a customer to slip and fall. In ***Steinhorst v. H.C. Prange Co.***, 48 Wis.2d 679, 180 N.W.2d 525 (1970), the plaintiff slipped on shaving cream while walking in the aisle for a self-service men's cosmetic counter in a department store. The ***Steinhorst*** court said that the "unsafe condition here was substantially caused by the method used to display merchandise for sale." ***Id***. at 684, 180 N.W.2d at 527. The court held "the evidence was sufficient to put Prange on notice that its method of operation could reasonably create an unsafe condition to the public and Prange must be charged with constructive notice." ***Id***. at 684, 180 N.W.2d at 528.

In ***Kaufman***, the plaintiff slipped and fell on a banana while walking through a store's parking lot. The store had no actual notice of the banana. No evidence was offered how long the banana had been on the parking lot. Because ***Strack*** and ***Steinhorst*** involved slip and fall injuries on aisles inside stores, we held that the exception did not apply to the general rule described in ***May***, 83 Wis.2d at 36, 264 N.W.2d at 577. ***Kaufman***, 187 Wis.2d at 65, 522 N.W.2d at 254. We concluded the plaintiff could not recover for a safe-place violation or for common law negligence. ***Kaufman***, 187 Wis.2d at 65, 522 N.W.2d at 254.

O'Brien contends that ***Kaufman*** does not apply to her case because it takes water an appreciable period of time to freeze while a banana can quickly appear in a parking lot and be gone just as quickly. The distinction is immaterial. For constructive notice to arise, the property owner must have sufficient time to discover and remedy the defect or an exception to that requirement must apply because of the nature of the property owner's business or the way he conducts it could create an unsafe condition. ***Kaufman***, 187 Wis.2d at 62-63, 522 N.W.2d at 253; ***Steinhorst***, 48 Wis.2d at 684, 180 N.W.2d at 527. None of those circumstances exist here.

O'Brien proposes to distinguish ***Kaufman*** on grounds that here Badger Bowl had the exclusive use of the parking lot and is responsible for its maintenance. She does not explain the significance of those factors. The issue here is whether Badger Bowl had constructive notice of the ice, and Badger Bowl's exclusive use and responsibility for the lot's maintenance does not eliminate or resolve that issue.

O'Brien proposes to add a "recurring nature" exception to the general rule for constructive notice which requires evidence that a condition existed for a sufficient time for the employer or property owner to discover and remedy it. ***May***, 83 Wis.2d 36, 264 N.W.2d at 577. She contends that the recurring nature of an unsafe condition results in constructive notice of it, citing ***Steinhorst***, ***Strack***, and ***Callan v. Peters Constr. Co.***, 94 Wis.2d 225, 288 N.W.2d 146 (Ct. App. 1979). It was, however, the nature of the defendants' businesses and the way they conducted their businesses that gave rise to the exception in ***Steinhorst*** and ***Strack***. O'Brien has not shown that the nature of Badger Bowl's business or the way Badger Bowl conducted its business could create the ice on which she fell.

Callan does not support the proposition that the recurring nature of an unsafe condition is enough to establish constructive notice. In ***Callan***, plaintiff fell on construction debris near the sidewalk entrance to a store. She sued the property owners, the lessee and the subcontractor responsible for the debris. The owner had actual knowledge of the continuous presence of debris. We concluded that because the owner had actual notice, whether it had constructive notice was irrelevant. 94 Wis.2d at 235, 288 N.W.2d at 151. We concluded actual notice existed because the debris recurred over a long period of time, and was apparent every day.

Nor do we accept the proposition that if ice has recurred, that should be enough to establish that an employer or property owner had constructive notice of the ice which caused a plaintiff's fall. Ice recurs at almost every outdoor location throughout Wisconsin in the winter. It can recur with or without defective drains or downspouts. That ice has recurred is not enough to hold that a Wisconsin employer or property owner had sufficient time to discover and remedy an unsafe condition caused by ice.

3. ACTUAL NEGLIGENCE

O'Brien asserts that a defect in Badger Bowl's drainage system caused the ice on which she fell, the defect is evidence of actual negligence, and she need not prove actual or constructive notice. She relies upon ***Merriman v. Cash-Way Inc.***, 35 Wis.2d 112, 117, 150 N.W.2d 472, 475 (1967). The plaintiff in the slip and fall described in ***Merriman*** failed to show how long the ice

condition on which she had fallen had existed before her fall. The ***Merriman*** court therefore held that the defendant store did not have constructive notice of the defect. The court continued,

> Plaintiff also seeks to establish liability showing that the downspout was defectively constructed and water emerging from the downspout ran under the protective fence and onto the parking lot, forming the patch of ice in question. If such a hypothesis could be established, there would be no need to prove actual or constructive notice since this would be actual negligence by the defendant which led to the hazardous condition.

Id.

The ***Merriman*** court rejected the plaintiff's contention partly because she produced no evidence

> to show that the patch of ice resulted from water which emerged from the downspout. There was no proof of melting of snow or ice in previous days. Plaintiff is attempting to infer both that the water emerged from the downspout and that the formation of ice was caused by negligent construction of the downspout. Such conclusions could only be speculations.

Id. That is precisely O'Brien's case. She produced no evidence to show that the ice on which she fell resulted from water coming from the downspout or that snow or ice had melted on previous days.

O'Brien emphasizes that Badger Bowl employees acknowledged that ice was a normal occurrence near the east entrance because of the way the water drained. As in ***Merriman***, however, here the record contains no evidence to show that the ice on which O'Brien fell resulted from the drainage problem. Although ice was a normal occurrence near the east entrance because of the way

the water drained, O'Brien made no showing that that created the ice on which she fell.

4. CONCLUSION

Because we conclude her evidence fails to support O'Brien's claim that Badger Bowl had constructive notice of the ice on which she slipped and fell, and because O'Brien produced no evidence to show that the ice on which she fell resulted from water coming from the downspout, the record contains no evidence of negligence. We affirm the order dismissing her action. Our disposition makes it unnecessary for us to decide whether the trial court properly excluded expert testimony regarding a building design defect.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

Nos. 95-1187(D)
95-1955(D)

SUNDBY, J. (*dissenting*). "Slip-and-fall" cases are legion. In this case the plaintiff Erin O'Brien was injured when she fell on a patch of ice near an entrance to the defendant Badger Bowl, in its parking lot. We propose to affirm the judgment dismissing her action because she failed to present evidence from which the jury could find that Badger Bowl had actual or constructive notice of this dangerous condition.

The possessor of land has a special liability to invitees. The Restatement, Torts 2d, § 343 states:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

The trial court found that O'Brien failed to present evidence from which the jury could find that Badger Bowl knew or by the exercise of reasonable care should have discovered the icy condition in its parking lot upon which O'Brien fell. The trial court's error, which the majority confirms, was in failing to recognize that the icy condition which existed at the entrance to the Badger Bowl was not an unexpected, transient condition but one which Badger Bowl knew recurred whenever there was winter precipitation. The cases establish a "hybrid" test for snow and ice conditions. Montgomery Lee Effinger, "*A Piling of Inferences*" *Still Will Not Do For Constructive Notice*, 22 Westchester B.J. 47, *3(Winter, 1994):

> The analysis employed in cases based upon an alleged presence of snow and ice must necessarily combine rationale borrowed from both transient conditions and that employed in more static, permanent features. This logically follows since frozen precipitation or run off *can clearly constitute a long standing hazard* or one as immediate as an ongoing storm.

(Emphasis added).

Badger Bowl knew that the icy area on which O'Brien slipped was a long-standing hazard. The manager testified that the formation of ice at this entrance to the bowling alley was a normal occurrence because of the discharge of water from drainpipes. He further testified that this area would have more ice than any other part of the parking lot. A drain near the entrance was supposed to drain off the water from the parking lot but in the winter, the water freezed and formed ice. Due to the lack of afternoon sun, this area retained ice longer. A former Badger Bowl maintenance worker and part-time manager testified that in December 1991 (O'Brien was injured on New Year's Eve, 1991) the east door tended to have a lot of ice, that ice forming from the water coming out of the downspout near the east door was a normal occurrence, that it always froze over in winter and that it froze over in December, 1991.

Furr's, Inc. v. Logan, 93 S.W.2d 187 (Tex. Ct. App. 1995) is a "spotted cow" case. On the sidewalk outside its store, Furr's maintained a coin-operated machine selling purified water for drinking and cooking. The machine leaked water which froze, at least partially. A customer slipped and fell on the ice formed by the water and broke her ankle. A jury awarded her damages, finding that she was not negligent.

Furr's assistant manager testified that he had been aware of the leaking problem for some time and had called the owner of the machine several times to complain about the leaking. On the day plaintiff was injured, he noticed that when people purchased water, some water would run from the machine onto the sidewalk. He tried to turn the machine off but could not find the valve and left it as it was. Prior thereto, Furr's employees had salted part of the sidewalk because of this condition. The assistant manager acknowledged that Furr's was responsible for the parking lot and outside premises.

Furr's claimed that, as a matter of law, it did not owe a duty to the plaintiff. However, the court stated: "[A]n occupier's liability to an invitee depends on whether he acted reasonably in light of what he knew or should have known about the risks accompanying a premises condition, not on whether a specific set of facts or a specific breach of duty is established," citing ***Corbin v. Safeway Stores, Inc.***, 648 S.W.2d 292, 295 (Tex. 1983). The court concluded that the record was "rife" with evidence of Furr's knowledge of the dangerous condition and its efforts to eliminate those dangers. The court said: "Furr's had the responsibility of keeping the premises outside its store in a reasonably safe condition, and that included maintaining or disabling the water dispenser so that it would not leak water in freezing weather." 893 S.W.2d at 192.

Likewise, Badger Bowl knowing of the recurring dangerous condition, had a duty to its customers to remove the drain pipes or divert the flow of water from the drain pipes so that it did not collect and freeze in the parking lot. O'Brien was entitled to have the jury determine the respective negligence of Badger Bowl and herself, and her damages. For these reasons, I respectfully dissent.