

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 12, 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

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No. 95-1757

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

DIANE JESSUP,

Plaintiff-Appellant,

**BLUE CROSS AND BLUE SHIELD
OF WISCONSIN and
KANSAS CITY FIRE & MARINE
INSURANCE COMPANY,**

Plaintiffs,

v.

**BANC ONE BUILDING MANAGEMENT CORPORATION,
and CONTINENTAL INSURANCE COMPANY,**

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Reversed and cause remanded with directions.*

Before Fine and Schudson, JJ., and Michael T. Sullivan, Reserve Judge.

PER CURIAM. Diane Jessup appeals from a judgment granting Banc One Building Management Corporation's motion for a judgment notwithstanding the verdict and dismissing her negligence and safe place suit. Jessup slipped and fell on the wet floor of the Banc One Plaza Building in downtown Milwaukee. She sued Banc One and went to trial. The jury returned a verdict in her favor, but the trial court granted Banc One's motion for judgment notwithstanding the verdict and dismissed the suit on the merits. We agree with Jessup that there was credible evidence to support the jury verdict and therefore the trial court was clearly wrong when it overturned that verdict. Accordingly, we reverse the judgment and remand the matter with directions for the trial court to reinstate the jury verdict.

I. BACKGROUND.

Jessup's action arose from a slip-and-fall injury which occurred in the Banc One Plaza in April 1991. She sued Banc One, alleging causes of action in both negligence and a safe place statute violation. *See generally* CHAPTER 101, STATS. The following facts were presented at trial. Jessup had just ridden the elevator down from her place of employment when she exited on the first floor and fell within eight feet of the elevator. Jessup testified that she did not notice a "wet floor" sign until after she fell. She also testified that the floor was not merely wet, but was more like a puddle of water.

A surveillance video camera at the Banc One Plaza captured the incident on tape. The tape was admitted into evidence at trial. The tape shows the "wet floor" sign to the left of Jessup at the time she fell. Testimony at the trial also established that Wesley Bruce, an employee of the American Building Maintenance Company, mopped the area prior to Jessup's fall. The surveillance tape also captured three people in the area of the accident about twenty minutes prior to Jessup's fall. From the tape, it could be inferred that one of the people slipped momentarily. A security guard, Kenneth Krueger, witnessed Jessup's fall as it happened. He was employed by American Building at the time of the accident. He testified that before Jessup fell, he observed the floor to be wet and/or slippery.

At the close of the evidence, the jury determined that Banc One was negligent in the maintenance of the floor area and awarded damages in the amount of \$40,890.01. Following the verdict, Banc One moved for a judgment notwithstanding the verdict on the ground that Jessup failed to establish a *prima facie* case against Banc One for safe place violations.¹ Banc One argued that a non-party to the suit, American Building, was providing maintenance and janitorial services to Banc One pursuant to a service contract, and that the evidence produced at trial by Jessup had “at most suggested a possible negligence case against American” Building. Banc One also argued:

There has been no evidence (1) that Banc One personnel were negligent in maintaining a safe place, (2) that Banc One was responsible for the creation of a dangerous condition, (3) that Banc One had constructive notice of any dangerous condition, or (4) that Banc One had a non-delegable duty to make sure that its independent contractor, American [Building], carried out its duty with reasonable care.

Finally, Banc One maintained that Jessup had failed to “establish a *prima facie* case against Banc One for safe place violations as negligence of an independent contractor cannot be imputed to the principal.” Further, because “Banc One had no actual or constructive notice of any unsafe condition created by the independent contractor,” it could not be liable “under safe-place law.”

In support of its decision, the trial court noted that American Building and Banc One had entered into a contract to provide Banc One with maintenance and janitorial services; that the evidence and its reasonable inferences proved that American Building was an independent contractor of Banc One; that American Building employees were not controlled by Banc One nor was their method, manner, time or compensation controlled by Banc One; and that American Building provided equipment for its employees and was solely responsible for their activities.

¹ Banc One also moved both at the close of Jessup's evidence and at the conclusion of the evidentiary portion of the trial for dismissal of the suit; the trial court took the motions under advisement.

In addition, the trial court concluded that the act of mopping a floor is not an extrahazardous activity against which a principal would be duty-bound to protect. Finally, the trial court concluded that the evidentiary record was devoid of evidence that Banc One had notice of the hazardous condition. Based on these conclusions, the trial court entered the judgment notwithstanding the verdict for Banc One and dismissed the complaint. Jessup appeals from that judgment.

II. ANALYSIS.

On appeal, Jessup concedes that American Building was an independent contractor. Jessup contends, however, that Banc One's duty of care under the safe place statute is not delegable and that there was credible evidence to support the jury verdict finding that Banc One had notice of the dangerous condition. She therefore argues that the trial court erred when it upset the jury verdict. Banc One's counsel stated at oral argument that Banc One's position was "relatively simple" – "there was no credible evidence to support either the negligence cause of action or the safe place action." We disagree with Banc One.

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 v. United Fire & Casualty Co., 197 Wis.2d 365, 389-90, 541 N.W.2d 753, 761-62 (1995) (ellipses in original) (citations omitted). Hence, we must reverse a trial court when it commits error "in overturning a jury verdict which is supported by any credible evidence." *Id.* at 389 n.9, 541 N.W.2d at 762 n.9.

The elements of a safe place action are: (1) the existence of a hazardous condition at a place of employment; (2) the condition must be a cause of injury; and (3) the owner or employer either knew or should have

known of the condition. *Topp v. Continental Ins.*, 83 Wis.2d 780, 787, 266 N.W.2d 397, 402 (1978). It is undisputed that Banc One was a place of employment within the meaning of § 101.01, STATS., and that Jessup was a person other than an employee and not a trespasser.

The crux of this case is whether Banc One had notice of the hazardous condition, that is, the wet floor. Absent a structural defect, Jessup was required to prove that Banc One had either actual or constructive notice of the wet floor condition. *Fitzgerald v. Badger State Mut. Cas. Co.*, 67 Wis.2d 321, 330, 227 N.W.2d 444, 448 (1975). Ordinarily, this is a fact issue for the jury. See *Krause v. V.F.W. Post No. 6498*, 9 Wis.2d 547, 554, 101 N.W.2d 645, 649 (1960). Here, there was evidence presented that an American Building janitor had mopped the area before Jessup's fall; that about twenty minutes previously another person slipped in the area; and that Jessup described the wetness as a "bunch of water." We conclude that this was credible evidence from which the jury could find that Banc One had constructive notice of the hazardous condition.

In *Steinhorst v. H.C. Prange Co.*, 48 Wis.2d 679, 684, 180 N.W.2d 525, 527-28 (1970), a customer slipped and fell on shaving foam on a department store floor. Evidence that boys had been playing around the self-serve shaving cream counter fifteen minutes before the accident and that previously foam had been found on the floor was sufficient to support a finding of constructive notice.²

Banc One also argues that it delegated its duty to keep its premises reasonably safe to American Building. To the contrary, Wisconsin

² Our supreme court stated:

We have pointed out that when an unsafe condition, although temporary or transitory, arises out of the manner of doing business by the occupant of the premises or may be reasonably expected to occur from his method of operation, a short period of time and possibly no appreciable period of time under some circumstances need exist to constitute constructive notice.

Steinhorst v. H.C. Prange Co., 48 Wis.2d 679, 683-84, 180 N.W.2d 525, 527 (1970).

jurisprudence has maintained a rule that an owner's duty to comply with Chapter 101, STATS., is nondelegable. *Dykstra v. McKee & Co.*, 100 Wis.2d 120, 130-32, 301 N.W.2d 201, 206-07 (1981). All that is necessary to impose the duty is a right to possession or control of the premises. See *Novak v. City of Delavan*, 31 Wis.2d 200, 207, 143 N.W.2d 6, 10 (1966). It is without dispute that the evidence showed that Banc One had control of the premises. It was duty-bound to comply with the safe place statute.

In addition, Banc One contends that by virtue of its maintenance contract with independent contractor American Building, it is insulated from liability for the negligence of American Building's employees. The fault with this argument is that the owner's *control or custody* need not be exclusive or for all purposes to invoke the strictures of the safe place statute. *Schwenn v. Loraine Hotel Co.*, 14 Wis.2d 601, 607, 111 N.W.2d 495, 498 (1961). Its exercise of control over the building was manifest from its power to discharge American Building, to delegate work to American Building, and to direct American Building to pull and submit Banc One's lobby videotape to its security person in event of an accident. Further, accident forms were prescribed by Banc One, which reviewed them before forwarding them to insurers. The evidence supports a conclusion that Banc One's control of the premises was sufficient to invoke its liability under Chapter 101, STATS.

Finally, Banc One argues that the jury was "utterly confused" and misunderstood the trial court's instructions. Banc One contends that the questions sent by the jury to the judge during deliberations confirm this confusion. The jury sent the following questions:

Is "Banc One" responsible for any negligence on the part of American Building Maintenance Corp.?

Is this suit filed against the owner of the building "Bank One" [sic] or the cleaning company who we presume now is Banc One Building Management Corporation?

How does Banc one Building Management tie in with the cleaning (ABM) company at the time of the accident.

(Letter case altered from original.)

The trial court gave the following respective responses:

No.

This suit is filed against the owner of the building Banc One Building Management Corporation.

Bank One [sic] Building Management contracted with ABM for cleaning services.

Both parties conceded at oral argument that the trial court's answers were correct.³ Given that the jury received accurate answers to their questions, we do not see how this evinces the jury's confusion as to the issues in this case. Thus, based on the record before us, we cannot conclude that the jury's verdict should be impeached because of its exposure to what Banc One terms "extraneous prejudicial information." *E.g., State v. Marhal*, 172 Wis.2d 491, 497 n.4, 493 N.W.2d 758, 761 n.4 (Ct. App. 1992) (discussing impeachment of jury verdict).

In short, we conclude that the trial court was "clearly wrong" in overturning the jury verdict because the record is replete with credible evidence to support the jury's finding that Banc One was "negligent in maintaining and keeping its premises safe for" Jessup. Accordingly, we must reverse the judgment and remand the matter with directions for the trial court to reinstate the jury verdict.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

³ Jessup stated that while she originally rejected the trial court's first answer, she later waived this issue.