COURT OF APPEALS
DECISION
DATED AND FILED

September 2, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2726

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

BEVERLY HALVERSON, AND DOUGLAS HALVERSON,

PLAINTIFFS-APPELLANTS,

V.

PDQ FOOD STORES, INC.,
MARYLAND CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS,

WISCONSIN PHYSICIANS SERVICE,

SUBROGATED PARTY.

APPEAL from a judgment of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Eich, Vergeront and Deininger, JJ.

DEININGER, J. Beverly and Douglas Halverson appeal a judgment dismissing their complaint against PDQ Stores, Inc., and its liability insurer.[1] The Halversons had sought compensation for injuries Beverly allegedly sustained when she slipped on a wet floor and fell in a PDQ convenience store in Madison. PDQ moved for summary judgment, claiming that the Halversons had no evidence that PDQ or its agents had actual or constructive notice of an unsafe condition on its premises, and further that Beverly's claim for emotional injury lacked any basis in law or fact. The trial court granted PDQ's motion and dismissed the suit.

The Halversons claim the trial court erred in granting PDQ's summary judgment motion on the notice issue. Beverly testified at her deposition that she had spoken to the PDQ store manager after her fall. The manager told her that he had spoken to the clerk on duty at the time of Beverly's fall, and the clerk had informed him that two children had gotten into an "ice fight" in the store "and they got very busy, and they didn't have time to take care of the problem." The Halversons also assert that the allegations in their complaint, and Beverly's deposition testimony regarding the existence and disappearance of a videotape, are sufficient to support a claim for emotional injury and punitive damages.

We agree with the Halversons' first claim of error but not their second. Accordingly, we affirm the dismissal of their claim for emotional injuries and punitive damages, but we reverse the judgment insofar as it dismissed the

[1] PDQ Stores, Inc., and its insurer will be referred to collectively as PDQ except when necessary to separately identify these parties. The Halversons' complaint also names Wisconsin Physicians Service Insurance Corporation (WPS) as a subrogated party. WPS appeared and answered, but apparently did not respond to PDQ's motion for summary judgment. WPS has not participated in this appeal.

claims for compensatory damages based on PDQ's alleged negligence and violation of the safe-place statute. As to these causes of action, we remand for further proceedings.

BACKGROUND

We review a trial court's grant of summary judgment using the same methodology as the trial court. *See* ***M&I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***id***. at 496-97, 536 N.W.2d at 182; *see also* § 802.08(2), STATS. We also observe that we must view the evidence in the light most favorable to the nonmoving party, in this case, the Halversons. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477 (1980).

PDQ does not argue that the Halversons failed in their complaint to plead sufficient claims for compensatory damages grounded in negligence and a violation of the safe-place statute. Rather, PDQ asserts that its submissions in support of its motion for summary judgment show that the Halversons lack any direct evidence of how water got on the floor of the convenience store or how long it remained there prior to Beverly's fall. And, according to PDQ, the Halversons failed to submit evidentiary materials sufficient to negate its showing or to place any material facts in dispute.

In support of its summary judgment motion, PDQ submitted an affidavit incorporating excerpts from Beverly's deposition. The excerpts show that Beverly acknowledged having no personal knowledge as to how the floor became wet or how long it had been so. The Halversons did not submit affidavits

or any other evidentiary materials in opposition to PDQ's motion. During argument on PDQ's motion, however, the trial court permitted the Halversons to submit Beverly's entire deposition in opposition to the motion. Accordingly, we deem the entire deposition to be a part of the record on summary judgment.

In the deposition, Beverly was asked and she answered as follows:

> Q How did you come to learn how the water got there, if you know?
>
> A He [the PDQ store manager] told me he had spoken to Michelle, which was the girl that was on the register, and two little children were in there and had gotten into an ice fight in the store. And they got busy, and they didn't have time to take care of the problem.

The trial court noted this testimony in its written decision granting PDQ's motion, but the court discounted it because it did not directly establish the length of time the water had been on the floor prior to Beverly's fall, and because it was hearsay.

The second issue presented by PDQ's summary judgment motion involved the Halversons' claim for punitive damages, which was based on the "emotional injury" Beverly allegedly sustained on account of PDQ and its insurer's treatment of her after she began pursuing her claim. With respect to this claim, the complaint alleges:

> 22. Maryland Casualty Insurance, by its agent … increased plaintiff's emotional damage by tactics that stressed, traumatized and injured the plaintiff emotionally as she was recovering from her physical injuries, aggravating the physical pain plaintiff experienced.
>
> 23. Defendant's callous and intentional disregard for the suffering and rights of the plaintiff were a substantial factor in producing plaintiff's stress, humiliation, anxiety, embarrassment, depression and emotional injury which correspondingly increased her physical pain and suffering, delayed plaintiff's full recovery and caused the plaintiff to incur additional and unnecessary expenses.

Prior to moving for summary judgment, PDQ had served Halversons with a request that they admit that there was no basis in law or fact for the claims set forth in paragraphs 22 and 23 of the complaint, or for punitive damages. In the alternative, the Halversons were asked to respond to an interrogatory, which inquired as to the facts and law on which they were relying to support these allegations. The Halversons responded, belatedly, by denying the requests for admissions, and by explaining that this claim was based on Beverly having been told by the store manager that a store video camera would have recorded the incident, and the later statement by an insurance claims person that the videotape may have been destroyed. The response also indicated that if PDQ or its insurer did not produce the videotape, "there may be a basis in fact for the damages plaintiff suffered when this information was conveyed to her," but that if the tape was produced, the allegations would be dismissed.

When questioned at her deposition regarding the emotional injury allegations and the claim for punitive damages, Beverly acknowledged that she had sought no treatment on account of any statements made to her, and she admitted that the claim denial had not increased her physical pain. Despite repeated attempts by PDQ's counsel to obtain specific information regarding what the insurer's employee had done to upset her, Beverly's testimony was to the effect that she resented the company's change of attitude regarding taking care of her claim and its failure to acknowledge that a videotape of the incident existed. In response to counsel's question whether the insurer's employee had intentionally tried to upset her, she replied, "[o]f course not."

ANALYSIS

We agree with PDQ and the trial court that a failure to submit evidentiary materials in opposition to a motion for summary judgment is generally a fatal omission, provided the moving party has made a prima facie showing of entitlement to the relief sought. *See* ***Board of Regents v. Mussallem***, 94 Wis.2d 657, 673-74, 289 N.W.2d 801, 809 (1980). Here, however, the trial court accepted the full transcript of Beverly's deposition into the summary judgment record, to which PDQ did not object, and we must conduct our de novo review based on the materials before the trial court on summary judgment. *Cf.* ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis.2d 568, 573, 431 N.W.2d 721, 724 (Ct. App. 1988). In conducting our review:

> The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

Grams v. Boss, 97 Wis.2d at 339, 294 N.W.2d at 477. Moreover, "summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy." ***Id***. at 338, 294 N.W.2d at 477.

We also have no quarrel with PDQ's assertions that, in order to prevail on their negligence and safe-place claims, the Halversons must show that PDQ had actual or constructive notice of the unsafe condition that caused Beverly to fall and injure herself, and that the latter requires a showing that "'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.'" *See* ***Kaufman v. State St. Ltd. Partnership***, 187 Wis.2d 54, 59, 522 N.W.2d 249, 251-52 (Ct. App. 1994) (citation omitted). We conclude, however, that Beverly's deposition testimony regarding the PDQ store manager's admission to her that a store employee had witnessed an ice fight on the premises but "got busy" and "didn't have time to take care of the problem," is sufficient to withstand PDQ's motion for summary judgment on the safe-place claim. One could easily infer from the manager's statement that PDQ had actual notice of the wet floor, which ensued from the ice fight. By the same token, even absent actual notice that the floor was wet and hazardous, the statement implies that the condition was present long enough for corrective action to be taken, but that employees on duty chose to attend to other matters instead, presumably waiting on customers.

The trial court incorrectly disregarded Beverly's testimony regarding the manager's statement to her, concluding that it was hearsay, or even double hearsay because the manager referred to what he was told by a clerk. Certain out-of-court statements, even when offered for their truth, are *not* hearsay. These include admissions by a party opponent, if:

> The statement is offered against a party and is:
>
> ….
>
> 4. A statement by the party's agent or servant concerning a matter within the scope of the agent's or servant's agency or employment, made during the existence of the relationship….

Section 908.01(4)(b), STATS. Both the store clerk's statement to the manager, and the manager's statement to Beverly, are thus not hearsay because they are admissions by PDQ, consisting of statements by PDQ employees concerning matters within the scope of their employment. *See* ***Mercurdo v. County of***

Milwaukee, 82 Wis.2d 781, 791, 264 N.W.2d 258, 263 (1978) (holding that under § 908.01(4)(b)4, there is no requirement that the statement be authorized by the employer or principal).

Thus, we conclude that the trial court erred in dismissing the Halversons' negligence and safe-place claims on summary judgment. The same is not true, however, regarding the Halversons' claim for punitive damages based on their fourth cause of action, a claim for emotional injury alleged in paragraphs 22 and 23 of the complaint. PDQ asks us to sustain the dismissal of these allegations based on the Halversons' tardy response to its request for admissions. We need not rely on the failure of the Halversons to timely respond.

The response itself, together with Beverly's deposition testimony, both of which we have summarized above, show that the trial court correctly concluded that "no relevant evidence … has been presented to support these allegations." Beverly apparently became upset because PDQ's insurer balked at settling the Halversons' claims to her satisfaction, after she was led to believe by the PDQ store manager that her injuries would be taken care of. Beverly was unable, however, to point to any conduct on the part of PDQ or its insurer's agents that constituted "callous and intentional disregard for [her] suffering and rights," with the possible exception of the alleged disappearance of the store videotape. If the Halversons are able to establish through discovery or at trial that a videotape of the incident did in fact exist and was intentionally or negligently destroyed by PDQ or its insurer, the Halversons can move the court for the imposition of appropriate sanctions. *See, e.g.,* ***Garfoot v. Fireman's Fund Ins. Co.***, No. 98-1618/98-1662 (Wis. Ct. App. Jun. 10, 1999, ordered published Jul. 21, 1999).

Finally, we note that the trial court also concluded that the materials submitted on summary judgment provided no support for the Halversons' third cause of action, which alleged that PDQ neglected "to prevent and control the behavior of the parties who caused the floor to be wet…." The Halversons have not argued on appeal that this conclusion was error, and in our review of the record, we could not locate any evidence tending to show that PDQ employees could have prevented the floor from getting wet. While we must permit all reasonable inferences in favor of the nonmoving party, and have done so by inferring that the manager's statement could show actual notice of the wet floor hazard or constructive notice of it for a sufficient length of time, we cannot reasonably infer from the statement that store employees could have prevented the ice fight from occurring. Accordingly, we affirm the dismissal of both the fourth and the third causes of action in the Halversons' complaint.

CONCLUSION

For the reasons outlined above, we reverse the appealed judgment in part and remand for further proceedings on the Halversons' first two causes of action. Although we conclude, under the standard of review applicable to motions for summary judgment, that there is sufficient evidence in the record to withstand PDQ's motion on these claims, we concur with the trial court that the manager's statement to Beverly regarding what had occurred in the store prior to her fall is a slender reed upon which to rest the plaintiffs' case. On remand, it will be in the Halversons' interest to attempt to obtain, through appropriate discovery, direct evidence of the timing of the events which preceded Beverly's fall.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.