COURT OF APPEALS
DECISION
DATED AND FILED

April 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 98-2831

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

WENDI LOUAH,

PLAINTIFF-APPELLANT,

EMC INSURANCE COMPANIES AND EMPLOYERS MUTUAL CASUALTY COMPANY,

INVOLUNTARY-PLAINTIFFS,

V.

ST. MARY'S HOSPITAL D/B/A SSM HEALTH CARE, AND OHIO HOSPITAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

DYKMAN, P.J. Wendi Louah appeals from an order dismissing her claim against St. Mary's Hospital and its insurer for allegedly violating Wisconsin's safe-place statute, § 101.11, STATS., when it failed to prevent the bathroom door in her hospital room from coming loose from its upper hinge and hitting her in the back, causing various injuries. She contends that summary judgment was inappropriate because there were genuine issues of material fact as to whether St. Mary's had notice that the door was defective prior to the incident. We disagree and affirm.

BACKGROUND

Wendi Louah was a patient at St. Mary's Hospital following back surgery. She was assigned to room 1409 in the One North West unit of the hospital, which had recently been remodeled. On December 5, 1995, Louah attempted to use the bathroom in her room. As she entered the bathroom and began to close the door behind her, the top part of the door came loose from its pivot or hinge and struck Louah in the back.

Later that same day, St. Mary's maintenance mechanics, Ted Weise and Tom Bollig, removed the bathroom door from Louah's room. The door was then reinstalled the next day by Tom McDermott, a carpenter, and Gary Rothenbuehler, the director of plant services at St. Mary's. The door was reinstalled without any repair to it or its frame. From that time on, until its removal several months later, the door functioned without further incident.

Louah's attorney, Lee Atterbury, sent St. Mary's a retainer letter, which included a request for a copy of the hospital's incident report for December 5. St. Mary's insurer, Ohio Hospital Insurance Company, responded to

Atterbury's letter, stating that it would provide him with a copy of the incident report only after formal discovery had been initiated.

A month after the accident, Rothenbuehler, who was unaware that Louah had sustained any injuries as a result of the December 5 incident, requested an estimate for replacing several bathroom doors, including the door in room 1409. Those doors were subsequently replaced, and the door taken from room 1409 was discarded a few months later.

Louah filed a complaint alleging common law negligence and violation of Wisconsin's safe-place statute. St. Mary's moved for summary judgment, claiming that the door was not defective, the hospital had no notice of any alleged defect, and that there was no evidence that the door was improperly maintained. The trial court granted St. Mary's motion. Louah appeals.

STANDARD OF REVIEW

There is a standard methodology that a trial court is to apply when faced with a motion for summary judgment. *See* ***Voss v. City of Middleton***, 162 Wis.2d 737, 747, 470 N.W.2d 625, 628 (1991). First, the court examines the pleadings to determine whether a claim for relief has been stated and a material issue of fact exists. *See* ***id.*** at 747, 470 N.W.2d at 628-29. If the court concludes that a claim for relief has been stated, then it must examine the moving party's affidavits or other proof to determine if they establish a prima facie case for summary judgment. *See* ***id.*** at 747-48, 470 N.W.2d at 629. To make a prima facie case for summary judgment, the moving party must show a defense that would defeat the non-moving party's claim. *See* ***id.*** at 748, 470 N.W.2d at 629.

If a prima facie case is established, the court reviews the opposing party's affidavits to determine if there are any genuine issues of material fact that would require a trial. *See* ***id.*** To show a genuine issue of material fact, "the party in opposition to the motion may not rest upon mere allegations or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial." ***Board of Regents v. Mussallem***, 94 Wis.2d 657, 673, 289 N.W.2d 801, 809 (1980). Under § 802.08(2), STATS., summary judgment is appropriate when the trial court is satisfied that the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, demonstrate that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. We review summary judgment de novo, applying the same methodology as the trial court. *See* ***Voss***, 162 Wis.2d at 747, 470 N.W.2d at 628.

DISCUSSION

1. *Safe-Place Statute*

We start by reviewing Louah's complaint to determine whether she has set out a claim for relief. *See* ***Voss***, 162 Wis.2d at 747, 470 N.W.2d at 628-29. When testing the sufficiency of the complaint, we take all facts pleaded and all inferences that can reasonably be derived from those facts as true. *See* ***id.*** at 748, 470 N.W.2d at 629. Louah contends that St. Mary's negligently violated the safe-place statute, which is set out under § 101.11(1), STATS.[1]

[1] Section 101.11(1), STATS., reads as follows:

> (1) Every employer shall furnish employment which shall be safe for the employes therein and shall furnish a place of employment which shall be safe for employes therein and for

(continued)

Under § 101.11(1), STATS., an owner and operator of a place of employment or a public building has the duty to make the premises as safe as the nature of the business will permit. *See* ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis.2d 51, 54, 150 N.W.2d 361, 362 (1967). An owner is not required to guarantee the safety of any frequenter of the business, but must construct, repair or maintain the premises in a safe manner. *See* § 101.11(1). The three elements necessary to find liability under the statute are: (1) the existence of a hazardous condition; (2) that such condition caused the injury; and (3) that the building owner knew or should have known of the condition. *See* ***Fitzgerald v. Badger State Mut. Cas. Co.***, 67 Wis.2d 321, 326, 227 N.W.2d 444, 446 (1975). Louah has stated in her complaint that the defective bathroom door constituted a hazardous condition, that the door fell and caused her injuries, and that the hospital would have known that the door was defective had it conducted an adequate inspection. We are satisfied that she has set forth a claim for relief.

In addition, Louah contends that because the hospital failed to use ordinary care in preventing her injuries, it also is liable for common-law negligence. However, the supreme court has held that the safe-place statute does not create a cause of action; it merely sets out a standard of care. *See* ***Krause v. VFW Post No. 6498***, 9 Wis.2d 547, 552, 101 N.W.2d 645, 648 (1960). A violation of the safe-place statute causing an injury constitutes negligence. *See* ***id.***

> frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building as to render the same safe.

Therefore, because the safe-place statute establishes the appropriate standard of care for employers and building owners, allegations sufficient to meet that standard also meet the requirements of common law negligence.

After concluding that Louah's complaint sets forth a claim for relief, we must examine St. Mary's affidavits and other proof to determine whether it has articulated a defense that would defeat Louah's claims. St. Mary's does not dispute that the bathroom door in room 1409 became loose, fell on Louah and injured her; rather, it disputes Louah's contention that the hospital had notice of the defect prior to the incident.

The owner of a place of employment is only liable under the statue if he or she had actual or constructive notice of the defect causing the injury, prior to the injury occurring. *See* ***Strack***, 35 Wis.2d at 54, 150 N.W.2d at 362. Louah does not contend that St. Mary's had actual notice of the defective bathroom door, but rather that its notice was constructive. In ***May v. Skelly Oil Co.***, 83 Wis.2d 30, 36, 264 N.W.2d 574, 577 (1978), the supreme court held that "constructive notice is chargeable only where the hazard existed for a sufficient length of time to allow the vigilant owner or employer the opportunity to discover and remedy the situation." 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 576-578 & n.6.

St. Mary's motion for summary judgment asserts that it had no notice of the alleged defect. To support its motion, St. Mary's provided affidavits of several of its employees. These affidavits show that for approximately thirty-seven years before the accident, there were no reported incidents concerning any hinge or pivot coming loose. The door at issue was installed in 1987, and it

functioned without incident prior to December 5, 1995. It continued to function without incident after it was reinstalled on December 6, 1995, until it was removed several months later. In addition, Bernard Lynch, a St. Mary's maintenance mechanic, conducted an inspection of the bathroom door in June 1995, and found that it was in satisfactory working condition. After reviewing these affidavits, we are satisfied that because St. Mary's had no actual or constructive notice of the alleged defect, it has established a prima facie case for summary judgment on the safe-place statute claim.

We conclude that St. Mary's also has established a prima face case for summary judgment on the common-law negligence claim. In ***Balas v. St. Sebastian's Congregation***, 66 Wis.2d 421, 426-27, 225 N.W.2d 428, 431 (1975), the supreme court held that common law negligence cannot be found where a violation of the safe-place statute cannot be established. It held as follows:

> At common law, the highest duty owed by an owner of land toward someone on the premises was that of ordinary care, owed to an invitee. This duty could be satisfied by alternative means. The landowner might either have his premises in a reasonably safe condition or give the invitee adequate and timely warning of latent and concealed perils which are known to the invitor but not to the invitee. Another way of stating this same proposition is that there is no duty to inspect and warn unless it is shown that the premises were not in a reasonably safe condition. The statutory safe-place duty to construct and maintain a public building as safe as its nature will reasonably permit is not a lesser standard than that imposed by the common law. *A fortiori* no violation of a common-law duty is shown if violation of the safe-place statute cannot be established.

Id. (footnotes omitted). This conclusion is consistent with the court's decisions in ***Merkley v. Schramm***, 31 Wis.2d 134, 142, 142 N.W.2d 173, 177 (1966) (if defendant did not breach safe-place statute, then defendant could not have been

guilty of ordinary negligence), and ***Lealiou v. Quatsoe***, 15 Wis.2d 128, 136, 112 N.W.2d 193, 197 (1961):

> If the defendant is found to have breached his duty under the safe-place statute, recovery is had for the breach of the higher degree of care, and if it is found the defendant has not breached the higher degree of care, he cannot be held to have breached the standard of care under common law.

To oppose St. Mary's motion for summary judgment, Louah offers the two-page affidavit of James Massey, an expert in hospital and health care administration. Mr. Massey notes that for two years annual inspections were not performed on the door, despite plaintiff's usual standard of annual inspections. He maintains that this type of door requires consistent inspections with appropriate required maintenance. He further notes that this type of door, when properly installed, maintained and inspected, cannot come out of its pivots without warning. Louah points to Massey's opinion as sufficient to create a genuine issue of material fact as to whether St. Mary's maintained the door in a reasonable fashion, and that if the hospital knowingly failed to maintain the door in a reasonable fashion, it should be inferred that the hospital had constructive notice of the hazard.

Mr. Massey's' affidavit does not persuade us that there is a genuine issue of material fact as to whether St. Mary's had constructive notice that the door was defective. Louah must establish facts to prove that the door was defective long enough for St. Mary's to have the opportunity to discover and remedy the situation. Louah has presented no evidence as to how long the alleged defect existed.

Louah, however, points out that there is an exception to the general rule described in ***May***, 83 Wis.2d at 36, 264 N.W.2d at 577, that 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 business. *See* ***Strack***, 35 Wis.2d at 57-58, 150 N.W.2d at 364.

In ***Strack***, the plaintiff sued under the safe-place statute after she fell in a supermarket on a "little Italian prune." *See* ***id.*** at 53, 150 N.W.2d at 362. The supreme 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. *See* ***id.*** at 55, 150 N.W.2d at 363. More generally, the ***Strack*** court held that:

> [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.

See ***id.***

In ***Kaufman v. State St. Ltd. Partnership***, 187 Wis.2d 54, 522 N.W.2d 249 (Ct. App. 1994), another case cited by Louah, 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, and no evidence was offered as to how long the

banana had been on the parking lot. In our decision, we declined to extend the ***Strack*** exception "beyond the doors of the premises absent any 'length of time' evidence." ***Id.*** at 64, 522 N.W.2d at 254.

In determining whether this exception applies, we must conduct a fact-specific inquiry focusing on the nature of the defect and the nature of the business. *See* ***id.*** at 63, 522 N.W.2d at 253. The defect in this case was an isolated incident over a period of at least thirty-seven years. St. Mary's is not involved in a business in which it should have foreseen a risk that a bathroom door would fall off its pivot or hinge. We therefore decline to extend the ***Strack*** exception to apply to the facts in this case.

Louah also argues that we should infer from Massey's affidavit that the hospital had constructive notice that the bathroom door was defective because of the hospital's failure to conduct routine inspections of the room in 1994 and part of 1995. We fail to see the basis for such an inference. The bathroom in room 1409 was not inspected in 1994 or in the beginning of 1995, because that area of the hospital was under construction and unoccupied. Furthermore, when the construction and remodeling project was finally completed in June 1995, Bernard Lynch stated in his affidavit that he checked each bathroom door in the unit, including room 1409, to make sure that they were in working order.

Louah appears to argue, based on Massey's affidavit, that Lynch's inspection was insufficient to check for defects in the door pivot or hinge, and therefore Lynch's inspection should not qualify as an inspection. We disagree. Louah has not provided any factual evidence to dispute that Lynch's June 1995 inspection was sufficient. She never deposed him as to the extent of his

inspection. Furthermore, in its answer to one of her interrogatory questions regarding the extent of these inspections, St. Mary's stated that:

> [T]he maintenance employee who performs an annual inspection of a bathroom door may check the hinges and/or pivots in a number of ways which include but are not limited to, attempts to rock the door by lifting it and pressing down on it[,] visually inspecting them or evaluating their tightness with a tool of some sort. The maintenance employee also opens and closes the door in both directions. The maintenance employee also checks to make sure the bathroom door latches properly.

In the response to the more specific question as to how the bathroom door in room 1409 was inspected after the remodeling was completed and before it was again used for patients, i.e., the June 1995 inspection, St. Mary's referred Louah to this explanation and added that Lynch performed the rocking procedure in his inspection.

If Louah wanted a more detailed explanation from Lynch regarding his inspection, she could have deposed him. She did not do so. As a result, there is no factual evidence to contradict Lynch's statement that the bathroom door in room 1409 was in working condition when he inspected the room in June 1995.

Overall, we conclude that Louah has presented no evidence as to how long the alleged defect existed. Without this evidence, we cannot conclude that there is a genuine issue of material fact as to whether St. Mary's had constructive notice of the defect.

2. *Disposal of Evidence*

Louah also contends that the destruction of the door raises questions of intent as to why the evidence was destroyed and what information it would have

provided regarding St. Mary's liability. While Louah recognizes that St. Mary's intent is not an element of either of her causes of action, she argues that negative inferences are sufficient to have the matter proceed to trial. We disagree.

Even if Louah's experts were able to inspect the door and determine that it was defective, Louah still must establish that St. Mary's had notice of the door's defective condition. The fact that one of St. Mary's employees destroyed the door six months after it fell on Louah is insufficient to create a genuine issue of material fact as to whether St. Mary's had constructive notice of a defect prior to December 6, 1995. Lynch inspected the door six months before the alleged incident and determined that it was in working order. Therefore, we conclude that St. Mary's "suspicious behavior" has no bearing on the material issue of notice. Accordingly, we affirm.[2]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[2] In its brief, St. Mary's contends that it would be contrary to public policy to hold it liable for Louah's injuries, and Louah responds to this in her reply. However, because we rule in favor of St. Mary's on matters unrelated to public policy, we do not address this argument.