COURT OF APPEALS
DECISION
DATED AND RELEASED

May 29, 1997

NOTICE

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.

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

No. 96-2790

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

ROBERT J. MAZIARKA AND MARGE MAZIARKA,

PLAINTIFFS-APPELLANTS,

V.

NANCY DOLCE, INDIVIDUALLY AND D/B/A PIP PRINTING AND SENTRY INSURANCE, A MUTUAL COMPANY,

DEFENDANTS-RESPONDENTS,

TRAVELERS INSURANCE COMPANY AND BLUE CROSS-BLUE SHIELD OF IOWA,

DEFENDANT.

APPEAL from a judgment of the circuit court for Portage County: FREDERIC FLEISHAUER, Judge. *Affirmed.*

Before Eich, C.J., Roggensack and Deininger, JJ.

DEININGER, J. Robert Maziarka appeals a judgment dismissing Robert's safe-place statute claim against Nancy Dolce.[1] Maziarka was injured after he slipped and fell on a brick pathway at a strip mall owned by Dolce. Maziarka claims the trial court improperly excluded evidence of a safer pathway design and customary practices regarding pathways on commercial premises. We conclude that the trial court's decision to exclude evidence of an alternative pathway design was within its discretion. We further conclude that because Maziarka did not make a sufficient offer of proof regarding customary practices, this claim of error is waived. Accordingly, we affirm the judgment.

BACKGROUND

On January 8, 1993, Robert Maziarka slipped and fell on the premises of a Stevens Point strip mall owned by Nancy Dolce. At the time of the accident, Maziarka worked for one of the mall tenants. Around midday, Maziarka was walking along a brick pathway on his way to a commercial mailbox for his employer when he slipped and fell. The brick pathway led from a sidewalk directly in front of the mall, down a small slope, and intersected with an unpaved roadway. At the intersection of the brick pathway and the unpaved road was an area of poor drainage where ice accumulated at times during the winter. It was at this intersection that Maziarka fell. Maziarka's destination, the commercial mailbox, was located on the road a short distance from the intersection of the pathway and the road.

[1] Maziarka also made a common law negligence claim in the trial court. The jury found no negligence and Maziarka does not appeal the judgment dismissing that claim.

At trial, the trial court sustained an objection to the relevance of a portion of the testimony of Lanny Berke, a safety engineer. Maziarka made an offer of proof in which Berke testified that, in his opinion, the route to the mailbox could have been made safer by constructing a concrete platform under the mailbox and an adjoining concrete pathway leading from the platform, across the small slope, and ending at the middle of the brick pathway. Berke testified that the object of the concrete pathway would be to bypass the area of poor drainage at the intersection of the brick pathway and the unpaved road. Additional facts will be discussed below.

ANALYSIS

Maziarka argues that evidence of the concrete pathway is relevant to show that Dolce had not complied with the safe-place statute, § 101.11, STATS., which states:

> (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 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.

The safe-place statute imposes a duty more stringent than ordinary care, but it does not render an employer an insurer, ***Topp v. Continental Ins. Co.***, 83 Wis.2d 780, 788, 266 N.W.2d 397, 402 (1978). The question to be answered in a safe-place

claim is whether the employer has rendered the premises as safe as their nature reasonably permits. ***Bobrowski v. Henne***, 270 Wis. 173, 177, 70 N.W.2d 666, 669 (1955); ***McGuire v. Stein's Gift & Garden Ctr., Inc.***, 178 Wis.2d 379, 398, 504 N.W.2d 385, 393 (Ct. App. 1993).

We review a trial court's evidentiary ruling to determine whether the court exercised discretion in accordance with accepted legal standards and the facts of record. ***Bittner v. American Honda Motor Co.***, 194 Wis.2d 122, 146-47, 533 N.W.2d 476, 486 (1995). We will sustain a discretionary determination of the trial court if the record shows "that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law." ***Burkes v. Hales***, 165 Wis.2d 585, 590, 478 N.W.2d 37, 39 (Ct. App. 1991). The trial court need not exhaustively state the reasons for its decision; we will affirm the decision if the trial court's determination indicates to the reviewing court that the trial court undertook a reasonable inquiry and examination of the facts and the record shows there is a reasonable basis for the court's determination. ***Id***. at 590-91, 478 N.W.2d at 39. We generally look for reasons to sustain a trial court's discretionary decision. ***Id***.

Under § 904.01, STATS., the test of relevancy is whether the evidence sought to be introduced has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Even relevant evidence may be excluded, however, if its probative value is substantially outweighed by the risk of confusion of the issues, misleading the jury, undue delay, waste of time, needless presentation of cumulative evidence or other considerations. Section 904.03,

STATS.; s*ee* ***Nowatske v. Osterloh***, 201 Wis.2d 497, 503, 549 N.W.2d 256, 258 (Ct. App. 1996).

The test for a safe-place claim is whether the employer has maintained the premises as safe as their nature reasonably permits. *See* ***McGuire v. Stein's Gift & Garden Ctr., Inc.***, 178 Wis.2d 379, 398, 504 N.W.2d 385, 393 (Ct. App. 1993). During the offer of proof, Berke testified that an alternate concrete pathway would have been easier to keep clear and, being built above the area of poor drainage, would have had less problems with build-up of snow or ice. Three witnesses, including Dolce, testified that Maziarka's route to the mailbox was the route typically used by mall tenants and their employees to retrieve their mail. Also, two witnesses testified that a path had been made in the snow by tenants going to the mailbox, in the same location that Berke testified a concrete pathway should have been placed, to avoid the icy spot at the bottom of the brick pathway. We conclude that evidence regarding an alternate concrete pathway could have had a tendency to show that Dolce had not made the premises as safe as their nature reasonably permitted. *See* § 904.01, STATS.; ***Gross v. Denow***, 61 Wis.2d 40, 47-48, 212 N.W.2d 2, 7 (1973) (jury entitled to find safe-place violation based on reasonable alternatives available to, but not used by, racetrack operator).

However, we also conclude that the trial court could also reasonably determine that the probative value of the evidence, even if relevant, was substantially outweighed by the risk of confusion of the issues, waste of time or needless presentation of cumulative evidence. First, the trial court could

reasonably conclude that the excluded testimony was of only marginal relevance.[2] The gravamen of Maziarka's claim is that he slipped and fell because of a hazardous condition at the intersection of the brick pathway and the road, not because of unsafe conditions on the path through the snow to the mailbox. In addition, Berke testified in detail before the jury regarding several other methods by which the premises could have been made safer, including: installing a better drainage system; constructing a concrete, rather than brick, pathway from the mall to the road; making the pathway to the street more level; installing a handrail; and moving the mailbox to another location.[3]

The only evidence of a safer alternative excluded by the trial court was Berke's testimony regarding construction of a separate concrete pathway to the mailbox. We are satisfied that, in light of the marginal relevance of the alternate concrete pathway, the trial court could reasonably conclude that Berke's testimony was substantially outweighed by the considerations under § 904.03, STATS. Accordingly, we affirm the trial court's exclusion of the evidence.

Next, Maziarka argues the trial court improperly excluded evidence of customary practices regarding the construction of routes to commercial mailboxes. Dolce contends that Maziarka's offer of proof was insufficient to preserve this issue. We agree.

---

[2] The trial court stated during its ruling that "[m]y problem is the causal relationship. I don't think you have any causal relationship about that path or tarmac and the accident you are referring to." A separate pathway to the mailbox would not have made the premises safer for an individual using the brick pathway with a destination other than the mailbox, or a tenant who chose to use the brick pathway regardless of an alternative pathway to reach the mailbox.

[3] The trial court originally excluded testimony regarding relocating the mailbox, but later reversed itself and the evidence was admitted.

An offer of proof must be made at trial before we will review a claim that the trial court improperly excluded evidence. ***McClelland v. State***, 84 Wis.2d 145, 153, 267 N.W.2d 843, 847 (1978). We will not conclude the trial court erred in excluding evidence unless the substance of the evidence was made known to the trial judge. *See* § 901.03(1)(b), STATS. A party claiming error must establish through the record that the issue was raised with sufficient prominence that the trial court had an opportunity to consider the issue below. *See* ***Budget Rent-A-Car Sys. v. The Shelby Ins. Group***, 197 Wis.2d 663, 673, 541 N.W.2d 178, 181-82 (Ct. App. 1995). An offer of proof "need not be stated with complete precision or in unnecessary detail, but it should state an evidentiary hypothesis underpinned by a sufficient statement of facts to warrant the conclusion or inference that the trier of fact is urged to adopt." ***State v. Haynes***, 118 Wis.2d 21, 28-29, 345 N.W.2d 892, 896 (Ct. App. 1984).

On appeal, Maziarka states that he had intended to prove that "normal custom and safe practice would have required the establishment of a concrete sidewalk, postal tarmac or pad." For his offer of proof, Maziarka refers us solely to Berke's recommendations addressing "what ... should be done with regard to the means of access to the commercial mailbox." Berke testified for the offer of proof that, in his opinion, the premises would have been made safer either by installing the concrete base under the mailbox with the connecting concrete pathway or relocating the mailbox to a more accessible spot. There is no indication in the offer of proof that Berke was to testify regarding customary practices for constructing routes to mailboxes on commercial premises. We conclude that the trial court had no opportunity to rule upon Maziarka's contention that the concrete pathway testimony was relevant as evidence of customary

practices. Accordingly, we conclude that this issue was not properly preserved in the trial court and we deem it waived. *See* ***id***. at 29, 345 N.W.2d at 896-97.

We thus conclude that the trial court did not err in excluding Berke's testimony regarding the construction of a concrete platform and pathway, and accordingly affirm the judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.