COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1185

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

SUSAN HEENAN AND MICHAEL HEENAN,

PLAINTIFFS-APPELLANTS,

V.

FIREMAN'S FUND INSURANCE COMPANY, PBC PRODUCTIONS INCORPORATED, BRADLEY CENTER CORPORATION AND ST. PAUL FIRE & MARINE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

ABC INSURANCE COMPANY AND NETWORK HEALTH PLAN OF WISCONSIN, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Susan and Michael Heenan appeal from a judgment taxing costs against them and dismissing their compensatory damage claims for injuries which Susan sustained when she was hit in the face with a hockey puck while attending an Admirals hockey game at the Bradley Center in Milwaukee. The Heenans contend the trial court erred in concluding that "the baseball rule" of ***Powless v. Milwaukee County***, 6 Wis. 2d 78, 94 N.W.2d 187 (1959), automatically establishes contributory negligence sufficient to bar recovery for spectators of sporting events, and further assert that there were material facts in dispute which should have precluded summary judgment against them. Because we conclude that the Heenans failed to submit materials sufficient to establish a prima facie case for a violation of the safe place statute or negligence, we affirm the judgment of the trial court without reaching the question of contributory negligence.

BACKGROUND

¶2 When Susan Heenan arrived at the Bradley Center with her husband, her son, and her son's friend to watch her first hockey game, the Milwaukee Admirals and the opposing team were warming up on the ice. Within seconds after Heenan had taken her seat in the seventh row, a slap shot ricocheted off the goalie's stick and the puck flew over the protective barrier surrounding the rink, striking her in the face and injuring her eye and nose.

¶3 According to the affidavits submitted on summary judgment, the area where the Heenans' seats were located is well known within the hockey industry to be particularly dangerous, and fans are known to go to that area to try to retrieve pucks as souvenirs. The warm-up period is also known to be particularly dangerous because there are dozens of pucks on the ice rather than just

one. The Admirals print warnings on their tickets and game programs advising fans to keep their eyes on the puck at all times for their safety, display similar puck warnings on the Jumbotron hanging in the arena during warm-ups, and broadcast the warnings over their public address system prior to each game. However, Heenan had not observed any of these warnings prior to being struck, and, not having previously attended a hockey game or watched one on television, was unaware that pucks frequently clear the protective barrier and enter the stands.

¶4 It was undisputed that the sideboards and Plexiglas barrier surrounding the Bradley Center ice rink were designed according to, and complied with, National Hockey League (NHL) and International Hockey League (IHL) rules. The barrier design was intended both to facilitate play and to maximize the viewing enjoyment of the fans, and NHL and IHL hockey games could not be played in a nonconforming arena. A recreation expert hired by Heenan averred that it is standard procedure to place a catch net above the protective barrier to prevent pucks from flying into the seating area during hockey practice sessions. There was no such netting in place during the warm up period when Heenan was injured.

STANDARD OF REVIEW

¶5 It is well established that this court applies the same summary judgment methodology as that employed by the circuit court. *See* WIS. STAT. § 802.08 (1997-98);[1] ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). We first examine the complaint to determine whether it states a

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

claim, and then review the answer to determine whether it joins issue. *See* ***id.*** If we conclude that the pleadings are sufficient to join an issue of law or fact, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. *See* ***id.*** If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. *See* ***id.*** Affidavits which set forth opinions without providing an adequate factual basis for those opinions are insufficient to create a genuine issue of material fact. *See* ***Moulas v. PBC Prods., Inc.***, 213 Wis. 2d 406, 417, 570 N.W.2d 739 (Ct. App. 1997).

ANALYSIS

¶6 The complaint alleged that the Admirals and/or the Bradley Center had violated their duties to maintain a safe premises under WIS. STAT. § 101.11[2] and were negligent for allowing hockey pucks to leave the ice rink without providing adequate protection for spectators. Answering the complaint, the Admirals, the Bradley Center and their insurers denied that a safe place violation or negligence had occurred, and asserted several affirmative defenses to liability, including contributory negligence. We conclude that the pleadings were sufficient

[2] WISCONSIN STAT. § 101.11(1) provides:

> 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.

to state a claim and join issue, and proceed to consider whether the Heenans produced materials sufficient to establish a prima facie case for judgment in their favor.

¶7 Under WIS. STAT. § 101.11, an owner of a place of employment or a public building has a duty to construct, repair or maintain the premises, and to provide such safety devises or safeguards, as reasonably required to render the premises safe. *See* ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis. 2d 306, 312, 334 N.W.2d 883 (1983). The safe-place statute does not create an independent cause of action, but rather codifies the existence of a common law duty from a premises owner to a frequenter and sets forth a standard of care to be used in determining negligence. *See* ***Krause v. VFW Post No. 6498***, 9 Wis. 2d 547, 552, 101 N.W.2d 645 (1960). In order to establish liability under the statute, a plaintiff must show: (1) that a hazardous condition existed on the premises; (2) that such condition caused an injury to the plaintiff; and (3) that the building owner or operator 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 (1975). The reasonableness of employing particular safety measures must be measured according to the nature of the premises. *See* ***Powless***, 6 Wis. 2d at 83.

¶8 The Heenans contend that the Admirals and the Bradley Center created a hazardous condition in the hockey arena by: (1) failing to install a higher protection barrier around the rink; (2) failing to raise a safety net during the warm up period; (3) selling tickets for an area where pucks frequently enter the stands; (4) admitting spectators to the arena during the warm-up period; and (5) failing to adequately warn spectators about the danger of flying pucks or to advise them that pucks were more likely to fly into the stands in certain locations and during the warm up period. The affidavit by the Heenans' recreational hazards expert opined

that each of these acts or omissions played a part in causing the injury to Heenan. However, we conclude that there were insufficient facts in the expert's affidavit, or any of the other materials submitted, to establish that any of the measures identified by the Heenans were reasonably necessary for safety taking into account the nature of the hockey arena as "a place of public assembly for the enjoyment of sports." *See* ***id.***

¶9 First, as this court has previously observed, "Since the puck is round with a flat bottom and top, it is not always possible for a particular player to determine the direction the puck will take in flight, nor how high it will rise." *See* ***Moulas***, 213 Wis. 2d at 420 (internal citation omitted). The risk of pucks leaving the ice is thus inherent to the game of hockey, and the nature of an arena designed for hockey requires balancing this risk with other considerations.

¶10 The Heenans submitted nothing to contradict the asserted facts that the Plexiglas barrier surrounding the rink is designed to maximize the viewing enjoyment of the fans and that NHL and IHL games could not be played at the Bradley Center if the barrier did not conform to NHL and IHL rules. Since raising the height of the barrier would obscure the presentation of the very events which the arena is designed to host, such a safety precaution could not, as a matter of law, be reasonably necessary given the nature of the premises.

¶11 The recreation expert averred that it is common practice to raise safety nets during hockey practices when multiple pucks are in use on the ice. He did not, however, state whether it is common practice to raise such nets during the warm up periods directly preceding hockey games. Nor did the expert offer any information about how long it would take to raise the nets, how much such nets would cost, or how effective such nets would be in preventing injuries such as the

one which occurred here. There have therefore been insufficient facts presented from which to determine the reasonableness of the proposed measure.

¶12 The Heenans contend that the Admirals and the Bradley Center were negligent for selling tickets to an area where pucks frequently enter the stands and admitting fans to the arena during the warm up period. However, they presented nothing to suggest that such seats and such admissions are not the common practice in other hockey arenas. Again, it was uncontroverted that the arena was designed for the viewing enjoyment of the fans, and even the Heenans' affidavits noted that fans are known to go to the area just above the protective barrier during the warm ups expressly in order to try to retrieve pucks as souvenirs. Fans were free to choose whether to sit in areas closer to the rink where they would have a better view and a better chance of obtaining a souvenir, or farther from the rink out of the range of the flying pucks. *See* ***Powless***, 6 Wis. 2d at 82 (noting that baseball spectators may choose where they will sit when watching a game in which foul balls are commonly known to be hit).

¶13 Finally, there are several reasons why the facts submitted by the Heenans in support of their contention that the Admirals and the Bradley Center were negligent for failing to adequately warn spectators about the danger of flying pucks, or to advise them that pucks were more likely to fly into the stands in certain locations and during the warm up period, were insufficient to create a material factual dispute. First, Heenan admits that she did not read the warning printed on her ticket or view the warning broadcast on the Jumbotron. Therefore, the content of those warnings cannot have had any effect on her decision to sit where she did. Moreover, this court has already decided that the risks associated with flying hockey pucks should be known to the reasonable person attending a game. *See* ***Moulas***, 213 Wis. 2d at 420. In sum, we see nothing in the affidavits

presented by the Heenans which distinguishes them from the affidavits which were found insufficient in ***Moulas***.

¶14 Because the Heenans cannot establish a violation of the safe place statute, it follows that they cannot establish a claim for common law negligence arising from the condition of the premises. *See* ***Balas v. St. Sebastian's Congregation***, 66 Wis. 2d 421, 426-27, 225 N.W.2d 428 (1975). In light of our conclusion that the Heenans have failed to establish a prima facie case for liability, we need not consider whether Heenan's presence at the arena, her failure to read the puck warning on the ticket, and/or her failure to keep her eyes on the rink at all times, were sufficient to constitute contributory negligence as a matter of law.

By the Court.—Judgment affirmed.

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