COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1666

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

LAUREL BANOVEZ, WILLIAM SCHOPP AND PAUL GAGLIARDI, AS GUARDIAN AD LITEM OF STEPHANIE SCHOPP, A MINOR,

PLAINTIFFS-APPELLANTS,

GENERAL AMERICAN LIFE INSURANCE COMPANY, WISCONSIN PHYSICIANS SERVICE INS. CORP. AND BLUE SHIELD UNITED OF WISCONSIN,

SUBROGATED-PLAINTIFFS,

V.

WAL-MART ASSOCIATES, INC. AND NATIONAL UNION FIRE INS. CO. OF PITTSBURGH,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Kenosha County: S. MICHAEL WILK, Judge. *Reversed and cause remanded.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Laurel Banovez, William Schopp and Paul Gagliardi, as guardian ad litem for Stephanie Schopp, have appealed from a judgment dismissing their complaint against Wal-Mart Associates, Inc. and National Union Fire Insurance Co. of Pittsburgh. In their complaint, the appellants sought damages for injuries suffered by Stephanie when she slipped and fell while shopping with her father, William, at a Wal-Mart store. Stephanie alleged that she slipped on liquid which had spilled from a plastic bottle of shampoo that had fallen from a shelf in the pet supply aisle and broken. The appellants claimed that Wal-Mart was liable for Stephanie's injuries based on negligence and WIS. STAT. §101.11 (1999-2000),[1] the safe-place statute.

¶2 The trial court granted summary judgment dismissing the complaint after determining that the appellants were unable to prove that Wal-Mart had either actual or constructive notice of the spilled dog shampoo on which Stephanie slipped. We reverse the trial court's judgment and remand the matter for further proceedings on the ground that all relevant discovery was not yet complete when summary judgment was granted.

¶3 This action was commenced by the appellants in June 1999. At the time the complaint was filed, the appellants also served a set of interrogatories and a request for the production of documents on counsel for Wal-Mart. No response was made to the interrogatories or the request for production of documents until February 21, 2000, approximately one month after present counsel for Wal-Mart was retained in the case. In response to Interrogatory #5, which asked Wal-Mart

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

to identify and attach copies of any reports, photographs and statements regarding the accident, counsel for Wal-Mart stated that, subject to an objection based on work product and privilege, "with regard to reports, photographs and statements, none are known to exist at this time." In response to a request that Wal-Mart identify "witnesses of the accident," counsel further stated that there were no known witnesses to the fall, but that an employee named Mark Kidd was believed to be the first employee on the scene.

¶4 Wal-Mart disclosed the names of its defense witnesses in mid-March 2000. The appellants then arranged to depose those witnesses, including a Wal-Mart employee named Rob Winkel. Winkel's deposition was taken on April 13, 2000, twelve days before the hearing on Wal-Mart's motion for summary judgment. In his deposition, Winkel testified that he photographed the scene of Stephanie's accident and filled out an incident report regarding the accident. Winkel further testified that he put the photographs and one copy of the incident report in the incident file at the store, and mailed one copy of the incident report to Claims Management, Inc. In addition, Winkel testified that an employee named Charlene worked in the pet department, that she was with Winkel and Kidd at the scene of the accident shortly after it occurred, and that a statement was taken from her regarding the scene of the accident.

¶5 Because Winkel's deposition testimony was inconsistent with Wal-Mart's earlier response to interrogatories indicating that no reports, photographs or statements regarding the accident were known to exist, the appellants filed a motion to compel discovery and to enlarge the time for discovery, after first attempting to obtain the additional materials by writing to Wal-Mart's counsel. The motion to compel was filed in the office of the clerk of the circuit court on April 24, 2000, one day before the summary judgment hearing.

At the hearing, the trial court refused to consider the motion, indicating that the only matter scheduled to be heard was the motion for summary judgment. The trial court then proceeded to grant summary judgment, concluding that there was no evidence presented as to the exact length of time the spilled shampoo was on the floor. It also relied on a statement in William's deposition testimony, indicating that he believed the shampoo fell just before he and Stephanie entered the pet aisle.

¶6 The trial court concluded that no reasonable jury could find that Wal-Mart had sufficient notice of the spilled shampoo to render it liable. On a motion for reconsideration in which the appellants renewed their motion to compel discovery, the trial court stated that while it had some concerns about the candor of Wal-Mart, it did not believe that any new evidence would provide a basis for finding Wal-Mart liable. It therefore refused to reconsider the order granting summary judgment and denied the motion to compel discovery.

¶7 When reviewing a grant of summary judgment, we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. *See* ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). Summary judgment is warranted when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See* ***Millen v. Thomas***, 201 Wis. 2d 675, 682, 550 N.W.2d 134 (Ct. App. 1996). Although the party seeking summary judgment must establish that there is no issue of material fact for trial, the ultimate burden of demonstrating that there is sufficient evidence to go to trial is on the party who has the burden of proof on that issue at trial. *See* ***Kaufman v. State St. Ltd. P'ship***, 187 Wis. 2d 54, 58, 522 N.W.2d 249 (Ct. App. 1994). If a moving party can demonstrate that there are no facts of record which support an element on which the opposing party

has the burden of proof at trial, and sufficient time for discovery has passed, the party who bears the burden of proof at trial must make a showing sufficient to establish the elements of its case. *See* ***Transp. Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (Ct. App. 1993).

¶8 Although the operator of a retail store is not an insurer of the premises, the safe-place statute mandates that the store be kept as safe for frequenters as the nature of the premises will reasonably permit. *See* ***Steinhorst v. H. C. Prange Co.***, 48 Wis. 2d 679, 682, 180 N.W.2d 525 (1970). To be liable for an injury caused by a defect in the premises, the owner must have actual or constructive notice of the defect. *See* ***Strack v. Great Atl. & Pac. Tea Co.***, 35 Wis. 2d 51, 54, 150 N.W.2d 361 (1967). Generally, constructive notice is chargeable to a defendant only when a hazard has existed for a sufficient length of time to allow a vigilant owner the opportunity to discover and remedy the situation. *See* ***Kaufman***, 187 Wis. 2d at 59. The length of time which is sufficient to constitute constructive notice varies with the nature of the business and the nature of the defect. *See* ***May v. Skelley Oil Co.***, 83 Wis. 2d 30, 37, 264 N.W.2d 574 (1978).

¶9 Constructive notice generally cannot be found when there is no evidence as to the length of time that a defect or hazard existed. *See* ***Kaufman***, 187 Wis. 2d at 59. However, when an unsafe condition, although temporary or transitory, arises out of the owner's manner of doing business or may reasonably be expected to occur from the owner's method of operation, a short period of time, and possibly no appreciable period of time, need exist to constitute constructive notice. *See* ***Steinhorst***, 48 Wis. 2d at 683-84; ***Strack***, 35 Wis. 2d at 55.

¶10 Wal-Mart contends that summary judgment was properly granted because the appellants could not prove that Wal-Mart had actual or constructive notice that liquid was spilled in the aisle where Stephanie slipped and fell. The appellants, in contrast, contend that this case falls within the rule adopted in ***Steinhorst*** and ***Strack***. They contend that factual disputes and conflicting inferences exist as to whether Wal-Mart's manner of doing business created a foreseeable hazard, permitting a jury to find constructive notice even if the hazard existed for little or no time before Stephanie fell. In analogizing their case to ***Steinhorst*** and ***Strack***, the appellants rely on the fact that Wal-Mart's method of merchandising is primarily self-service, and on deposition testimony regarding Wal-Mart's placement of merchandise, including bottles of shampoo, on six-foot high shelving that has no guards to prevent items from falling, in aisles which the appellants contend are too narrow.

¶11 We reject any argument that merely because Wal-Mart is a self-serve store, temporal considerations are not a factor in determining whether the safe-place statute was violated. Liability in both ***Strack*** and ***Steinhorst*** was premised not only on the self-serve nature of the product display where the injury occurred, but also on the nature of the product itself. In ***Strack***, an injury occurred when a plum fell from a self-service display table in a produce aisle. *See* ***Strack***, 35 Wis. 2d at 56. The plums had been piled on the table in such a way that they could be handled by customers and would sometimes be dropped or knocked to the floor. *See* ***id.*** Similarly, in ***Steinhorst***, an injury occurred when a customer slipped on shaving foam which came from an aerosol can on a self-serve men's cosmetic counter. *See* ***Steinhorst***, 48 Wis. 2d at 681. The counter displayed various brands of shaving foams, and a companion counter displayed colognes and after-shave lotions, including "tester bottles" which the department store

encouraged customers to sample. *See* ***id.*** The store was also aware that shaving foam from the display had been found on the counter in the past, and that boys had been playing around the counter approximately fifteen minutes before the accident occurred. *See* ***id.*** at 684.

¶12 Although Wal-Mart is primarily a self-serve store, displaying a bottle of dog shampoo on a self-serve shelf is not, standing alone, comparable to piling plums on a self-service table in a grocery store. It is also clearly different from displaying shaving foam in a self-serve area where customers are encouraged or known to sample products which are likely to spill or leak.

¶13 Absent a ***Strack*** or ***Steinhorst*** exception, evidence regarding the length of time a defect or hazard existed is required before constructive notice may be found. *See* ***Kaufman***, 187 Wis. 2d at 62-63. However, while we reject the appellants' claim that temporal considerations are not a factor here, we reverse the trial court's grant of summary judgment on the ground that discovery was improperly foreclosed.

¶14 A grant of summary judgment contemplates that adequate time and opportunity for discovery has passed. *See* ***Transp. Ins.***, 179 Wis. 2d at 291-92; ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 226-27, 522 N.W.2d 261 (Ct. App. 1994). In addition, pursuant to WIS. STAT. § 802.08(4), when one party moves for summary judgment, the trial court has discretion to deny the motion or order a continuance to permit discovery to be conducted. *See* ***Kinnick v. Schierl, Inc.***, 197 Wis. 2d 855, 865, 541 N.W.2d 803 (Ct. App. 1995). After additional discovery is conducted, the trial court may revisit the motion for summary judgment and determine whether material issues of fact exist for trial. *See* ***Park***

Bancorporation v. Sletteland, 182 Wis. 2d 131, 146, 513 N.W.2d 609 (Ct. App. 1994).

¶15 Counsel for Wal-Mart objected to considering the motion to compel discovery at the hearing on the motion for summary judgment on the ground that he did not receive adequate notice of its filing and lacked adequate time to respond. The trial court indicated that it did not yet have the motion in the file[2] and refused to consider it, stating that the only matter before it was Wal-Mart's motion for summary judgment. In denying the appellants' motion for reconsideration, the trial court again refused to compel discovery. Although it expressed concern with Wal-Mart's candor, it concluded that discovery would not result in evidence which would warrant a trial.

¶16 We conclude that the trial court acted prematurely in granting summary judgment without addressing the motion to compel and permitting additional discovery. We recognize that the time which passed in this case between the filing of the complaint and the decision granting summary judgment ordinarily would have been sufficient time to conduct discovery. We also recognize that the motion to compel discovery was not filed until one day before the summary judgment hearing. However, the motion to compel was necessitated by Wal-Mart's conduct. When Wal-Mart responded to interrogatories in February 2000, its counsel indicated that no photographs, reports or statements concerning the accident were known to exist. The appellants were entitled to rely on this response as indicating that no photographs, reports or statements existed. When

[2] Although the motion may not yet have been physically received in the trial court's chambers at the time of the summary judgment hearing, it was, in fact, file-stamped by the clerk of the circuit court one day before the hearing.

Winkel subsequently testified on April 13, 2000, that he had taken photographs and prepared an incident report, copies of which were filed at two locations, the appellants acted promptly in seeking to discover those materials. Similarly, they acted promptly in seeking the full name and statement of Charlene.

¶17 Although the trial court's belief that additional discovery will not assist the appellants may ultimately be proven correct, such a conclusion is premature at this juncture. The incident report and photographs could possibly contain information helpful to the appellants, and this would be reasonably likely to lead to the discovery of evidence relevant to the issues of negligence or constructive notice. Additional discovery is therefore warranted pursuant to WIS. STAT. § 804.01(2)(a). Because the depositions also indicated that Charlene was at the scene of the accident with Winkel and Kidd, additional discovery as to Charlene's identity and statement may also produce evidence relevant to the case and helpful to the appellants. However, regardless of whether additional discovery ultimately proves helpful, because the appellants were entitled to rely on Wal-Mart's representation that no photographs, accident reports or statements existed, and because they acted promptly after receiving contradictory deposition testimony, fairness requires that the trial court address their motion to compel discovery and grant an extended discovery period.[3] *See* ***id.***

By the Court.—Judgment reversed and cause remanded.

[3] At the hearing on the motion for reconsideration, Wal-Mart's counsel represented to the trial court that he "personally [had] gone to the store and looked through the file and found nothing, and I have had people in two separate organizations connected with Wal-Mart look for this documentation and can't find it." While Wal-Mart's ability to locate the material testified to by Winkel may affect future discovery proceedings, counsel's nonevidentiary statement that the material does not exist is not dispositive.

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