SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

Court of Appeals follows Supreme Court's *Lowrey* holding, finds that premises liability suit failed for lack of evidence of actual or constructive notice

By Drew Broaddus **February 15, 2017**

"Michigan law requires that a *prima facie* case of premises liability include sufficient evidence that the landowner either created the dangerous condition or had actual or constructive notice of the condition." *Sparks v Wal-Mart Stores, Inc*, 361 F Supp 2d 664, 668 (ED Mich 2005). A property owner is liable for an injury resulting from a dangerous condition on the premises if the condition was caused by the "active negligence" of the defendant or its employees, or if the defendant or its employees either knew or should have known of the condition. *Clark v Kmart Corp*, 465 Mich 416 (2001). Notice may be inferred from evidence that the dangerous condition existed for such a duration of time that a reasonably prudent owner would have discovered the hazard. *Id.* This is referred to as constructive notice.

The Michigan Supreme Court recently looked closely at the notice element of a premises liability claim in *Lowrey v LMPS & LMPJ, Inc*, ___ Mich ___; ___ NW2d ___ (2016) (Docket No. 153025). In *Lowrey*, the Supreme Court reinstated the trial court's summary disposition ruling in favor of the property owner, finding that the Court of Appeals (which had reinstated the case) "improperly required defendant to provide proof of reasonable inspection to show that it lacked constructive notice of the alleged harm…." *Id.*; slip op at 10-11. "Defendant is not required to go beyond showing the insufficiency of plaintiff's evidence. [There is no] additional requirement … to proffer evidence to negate one of the elements of plaintiff's claim." *Id.* at 7. The Supreme Court further noted that it "has never required a defendant to present evidence of a routine or

SECREST WARDLE NOTES

In *Lowrey*, all seven Supreme Court Justices agreed that a premises owner is not required to present evidence disproving an element of a plaintiff's claim; the burden to present evidence creating at least a question of fact regarding each element (such as notice) lies with the plaintiff.

Bacon illustrates that post-*Lowrey*, the lack of notice defense is going to be extremely difficult for plaintiffs to overcome in cases that involve transient defects such as accumulations of mud.

Bacon also illustrates the conundrum faced by slip and fall claimants: in order to avoid the open and obvious defense, they often describe the condition as invisible. However, if the condition is truly invisible, it is very difficult for a claimant to say that the property owner knew or should have known about it, as required to establish notice.

reasonable inspection under the instant circumstances to prove a premises owner's lack of constructive notice of a dangerous condition on its property." *Id.*; slip op at 8. "The Court of Appeals erred when it imposed this new condition on premises owners seeking summary disposition. …[D]efendant could establish its entitlement to summary disposition by demonstrating that plaintiff failed to present sufficient evidence of notice." *Id.*

One of the first appellate decisions to discuss the Supreme Court's December 13, 2016 *Lowrey* opinion is *Bacon v Sunshine Products of Mid-Michigan*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2017 (Docket No. 330332). In *Bacon* – a case in which the property owner was represented by Secrest Wardle on appeal – the panel affirmed the trial court's summary disposition ruling in favor of the Defendant.

The Plaintiff in *Bacon* visited Sunshine Products, a landscaping supply company, on a clear October morning. He entered Sunshine Products, spoke with an employee to make a purchase, and then attempted to return to his truck to wait for delivery. As the Plaintiff was leaving, he slipped on the store's wooden deck and was injured. The Plaintiff testified that after he slipped, he touched the deck and felt that it was "slippery and slimy" in the area he fell. He described the slippery substance as being "almost invisible" and said that he could not see it, only feel it. The substance did not leave a residue on his hand and seemed to be "part of the wood." The Plaintiff speculated that the substance was mold or mildew, and presented evidence that it was very humid on the day of the accident. A friend of the Plaintiff, who went to the business to retrieve the Plaintiff's truck after the fall, testified that she did not notice anything wrong with the deck, nor did she experience any slippery conditions when she went into the store. Another witness, Sunshine Products' manager, testified that she regularly inspected the deck. This witness also assisted the Plaintiff on the day he fell, and in the course of doing so did not find any slippery substance in the area.

In response to Sunshine Products' motion for summary disposition under MCR 2.116(C)(10), the Plaintiff claimed that Sunshine Products should have known of the slippery condition and that it was reasonably foreseeable that someone would slip on the wooden deck because it lacked a safety mat or handrail outside the door. The trial court nonetheless granted summary disposition, finding no evidence that the substance "was a condition caused by [Sunshine Products] or that it was there for a sufficient amount of time that [Sunshine Products] would be charged with knowing or should have known the substance was there and taken steps to … get rid of the alleged hazard." *Bacon*, unpub op at 2.

In a short opinion, the Court of Appeals agreed. In response to the Plaintiff's arguments on appeal that Sunshine Products had not carried its burden of proof under (C)(10), the majority noted that per *Lowrey* "a defendant need not provide evidence of routine or reasonable inspections. … It is a plaintiff's responsibility to show that a defendant had notice of a hazard." *Id.* at 2 n 1.

One judge concurred in result only, noting that she was "constrained to do so by our Supreme Court's decision in *Lowrey*."

PLEASE CLICK HERE TO SIGN UP FOR SECREST WARDLE NEWSLETTERS PERTINENT TO OTHER AREAS OF THE LAW

We welcome your questions -

Please contact Drew W. Broaddus at

dbroaddus@secrestwardle.com

or (616) 272-7966

Tweet Share

Secrest Wardle Email YouTube LinkedIn Twitter

SECREST WARDLE

Troy 248-851-9500
Lansing 517-886-1224
Grand Rapids 616-285-0143
www.secrestwardle.com

CONTRIBUTORS

Premises Liability Practice Group Chair
Mark F. Masters

Editors
Linda Willemsen
Sandie Vertel