

# boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

## Supreme Court Vacates Court of Appeals' Opinion that Improperly Shifted a Plaintiff's Burden to the Premises Owner

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December 15, 2016

*Lowrey v LMPS & LMPJ, Inc.*, \_\_\_ Mich \_\_\_ (2016), arose after a patron at Woody's in Royal Oak, Michigan fell on wet stairs. The plaintiff, who was celebrating St. Patrick's Day with her friends, arrived at Woody's at approximately 12:30 a.m. and went to the second floor dance area. On multiple occasions, she and her friends traversed the building's stairs to move back and forth between the second floor and a smoking patio on the ground level. At about 1:45 a.m. the plaintiff and her friends went to leave the bar using the same stairs when, according to her testimony, she slipped on a wet step. She broke her tibia and fibula and eventually sued Woody's.

The trial court granted Woody's motion for summary disposition after the bar argued that the plaintiff had failed to create a genuine issue of material fact regarding whether the bar had actual or constructive knowledge of the wet stairs. The trial court also found that the wet stairs were open and obvious.

### SECRET WARDLE NOTES

Typically, the plaintiff in a premises case must prove that some dangerous condition existed and that the premises owner had actual or constructive notice of the condition. Initially, in its December 10, 2015 opinion regarding *Lowrey v LMPS & LMPJ, Inc.*, the Court of Appeals found that, instead of the plaintiff proving notice, the premises owner must *disprove* notice in bringing a dispositive motion.

The Supreme Court disagreed. The State's highest court found that the Court of Appeals had improperly shifted the burden from the plaintiff to the defendant. More specifically, all seven Supreme Court Justices agreed that a premises owner is not required to present evidence disproving an element of the 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.

The plaintiff appealed and the Court of Appeals reversed finding that Woody's, in moving for summary disposition, failed to present evidence that it lacked notice of the hazardous condition.<sup>1</sup> The Court of Appeals indicated that Woody's failed to present any evidence of what a reasonable inspection would have entailed under the circumstances and what a reasonable person would have discovered had that inspection occurred. Since it had not done so, Woody's could not invoke the open and obvious defense. Woody's appealed to the Supreme Court.

The Supreme Court overturned the Court of Appeals and upheld the trial court's dismissal of the plaintiff's claim. As part of a unanimous opinion, the *Lowrey* Court pointed out that a premises owner moving for summary disposition of a premises liability claim must show that the plaintiff's evidence is insufficient to establish some element of the claim; i.e., that the plaintiff cannot prove that the premises owner had actual or constructive notice the dangerous condition. The premises owner does not have the additional burden of producing evidence to *disprove* the plaintiff's claim.

Therefore, in this case, Woody's was not required to show that a reasonable inspection of the stairs would have failed to reveal the hazard because it was not required to prove that it lacked actual or constructive notice. It was the plaintiff's burden to create a question of fact regarding notice.

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<sup>1</sup> See *Boundaries*, December 11, 2015, "[Court of Appeals holds that, to prevail on summary disposition, property owners must prove that they lacked actual or constructive notice of a defective condition.](#)" by Drew Broaddus.

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