

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Sour Grapes: Smashed, Brown Grapes Insufficient to Establish Constructive Notice

By Renee T. Townsend

Michigan storekeepers have a duty to provide reasonably safe aisles for customers and other guests of their stores. Under *Clark v Kmart Corp*, a storekeeper will be held liable for injury caused by an unsafe condition in three circumstances: (1) when the unsafe condition was caused by the storekeeper's active negligence, (2) when the storekeeper knew about the unsafe condition, or (3) the unsafe condition was of such a character or had existed a sufficient length of time that the storekeeper should have had knowledge of it. 465 Mich 416 (2001).

When a plaintiff asserts liability for injury against a storekeeper under the third prong of the *Clark* test, the plaintiff must come forth with sufficient evidence to give rise to an inference of constructive notice. However, that inference must be more than just speculation and conjecture.

In *Duncan v Meijer, Inc.*, Plaintiff was shopping in the produce department at Meijer when she allegedly slipped and fell on grapes that had fallen onto a floor mat. She did not see the grapes before her fall, and there was no evidence to establish that employees of Meijer actually knew that there were grapes on the floor. While there was evidence that some residue from the grapes was brown, it was not established how long the grapes had been on the floor.

Plaintiff argued that the brown residue on the floor was demonstrative of an unsafe condition that was present for a considerable time. The Court found that it was just as likely that the grapes were brown before they fell to the ground. This alternative explanation was equally

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Duncan reasserts the holding in *Clark* that a smashed or brown grape, by itself, is insufficient to prove constructive notice of a slippery condition. *Clark v Kmart Corp*, 249 Mich App 141 (2001). To establish that an unsafe condition was of such a character or had existed a sufficient length of time that a storekeeper should have had knowledge of it, a plaintiff must come forward with more than just evidence that calls for speculation. The evidence must allow a jury to infer that the grapes were on the floor for a sufficient length of time prior to the fall to constitute constructive notice.

When a plaintiff asserts liability against a storekeeper for injury caused by an unsafe condition under the third prong of the *Clark* test, there must be sufficient evidence to give rise to an inference of constructive notice. Constructive notice can be supported by reasonable inferences drawn from evidence, but those inferences must be more than speculation and conjecture.

The *Duncan* case also illustrates that knowledge by a defendant's employees of past instances of grapes on the floor does not establish that those employees knew or should have known that these grapes had fallen on the floor on this particular occasion.

Duncan reiterates the rule that sufficient evidence of the timing and origin of an allegedly unsafe condition is required to establish constructive notice and hold a storekeeper liable for injury.

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plausible, and would require a finder of fact to speculate as to the actual condition. Plaintiff then argued that constructive notice could be inferred by circumstantial evidence that the grapes were smashed before the fall. However, in *Clark v Kmart*, the Michigan Court of Appeals rejected the argument that a smashed grape is sufficient to prove constructive notice of a slippery condition.

The Court held that Plaintiff was unable to present evidence to support an assertion of liability under the third prong of the *Clark* test. Specifically, the Court stated that Plaintiff was unable to present evidence to allow a jury to infer that the grapes were on the floor for a sufficient length of time prior to the fall to constitute constructive notice. The only evidence presented would call for speculation.

The Court also rejected the argument that, because Meijer employees knew that grapes had fallen from the displays in the past, this established an inference of constructive notice. The Court held that knowledge of past instances of grapes on the floor would not establish that Meijer employees knew or should have known that these grapes had fallen on this particular occasion.

As such, the Court held that Plaintiff did not present evidence to show that the unsafe condition had existed for a considerable time, and summary disposition in favor of Defendant Meijer was held to be proper. The holding of the trial court was Affirmed.

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