

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

10.28.09

Court Decides Chocolate Frosted Shoe Not a Shoo-in Plaintiff Gets Just Desserts

By James Molloy

The mere existence of a dangerous condition on the land is not enough to create notice.

In premises liability claims, a landowner may be liable for an injury resulting from a dangerous condition on the land either caused by its own active negligence or if the condition was known or should have been known to the landowner. However, a plaintiff cannot establish notice of an allegedly dangerous condition merely by establishing its existence. Direct or circumstantial evidence of a landowner's actual or constructive notice of the dangerous condition is necessary to impose liability on a landowner. This holds true whether or not the landowner was actively negligent in creating the allegedly dangerous condition.

In *West v Auction Company of America*, case no. 287702, Mich App, 10/20/09, plaintiff went to a home to attend an auction being conducted by the defendant. She went into the kitchen where there were two chocolate cakes with chocolate frosting on a table. She then walked downstairs to the basement to view auction items. Plaintiff claimed she slipped on chocolate frosting on the stairs and fell. She knew that chocolate frosting caused her to fall because she saw it on her shoes. However, she did not know how long the frosting had been on the stairs or who created this allegedly dangerous condition.

SECRET WARDLE NOTES:

West is an unpublished decision and therefore, not binding on lower courts. However, unpublished opinions provide Appellate Court insight into the notice doctrine and have persuasive value. Plaintiffs must come forward with either direct or circumstantial evidence of a defendant's actual or constructive notice of an alleged hazardous condition. When plaintiffs simply allege the existence of a dangerous condition, then the factfinder is essentially forced to engage in a guessing game as to the who? what? when? and for how long? It appears from this decision that this is exactly what the *West* Court is seeking to avoid.

Plaintiff argued that proof of notice was unnecessary as defendant's active negligence created the condition. The Michigan Court of Appeals disagreed. The Court found that since there was no evidence that defendant, as opposed

CONTINUED...

to some third party, created the dangerous condition, defendant was entitled to summary disposition. Plaintiff also argued that her claim was one of ordinary negligence and, therefore, lack of notice is not a defense. She further asserted that she was not required to provide evidence of an unreasonable risk of harm because that evidence is only necessary in a premises liability setting. The Court again disagreed holding that the description of negligence as involving an unreasonable risk of harm is not limited to actions based on conditions on land. The description also applies to a defendant's conduct. In this case, all reasonable persons would agree that the serving of cake did not pose an unreasonable risk of harm.

CONTACT US

Farmington Hills

30903 Northwestern Highway, P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500 Fax: 248-851-2158

Mt. Clemens

94 Macomb Place, Mt. Clemens, MI 48043-5651
Tel: 586-465-7180 Fax: 586-465-0673

Lansing

6639 Centurion Drive, Ste. 130, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids

2025 East Beltline, S.E., Ste. 209, Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

SECRET
SW
WARDLE

Copyright 2009 Secrest, Wardle, Lynch, Hampton,
Truex and Morley, P.C.

This newsletter is published for the purpose of providing information and does not constitute legal advice and should not be considered as such. This newsletter or any portion of this newsletter is not to be distributed or copied without the express written consent of Secrest Wardle.

CONTRIBUTORS

Premises Liability Practice Group Chair

Mark F. Masters

Premises Liability Practice Group Co-Chair

Caroline Grech-Clapper

Editors

Bonny Craft/Julie Gorney

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for Boundaries, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at swsubscriptions@secrestwardle.com or 248-539-2850.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice

Blueprints – Mapping legal solutions for the construction industry

Community Watch – Breaking developments in governmental litigation

Contingencies – A guide for dealing with catastrophic property loss

Fair Use – Protecting ideas in a competitive world

In the Margin – Charting legal trends affecting businesses

Industry Line – Managing the hazards of environmental toxic tort litigation

Landowner's Alert – Defense strategies for property owners and managers

No-Fault Newslines – A road map for motor vehicle insurers and owners

On the Beat – Responding to litigation affecting law enforcement

On the Job – Tracking developments in employment law

Safeguards – Helping insurers protect their clients

Standards – A guide to avoiding risks for professionals

State of the Art – Exploring the changing face of product liability

Structures – A framework for defending architects and engineers

Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability