SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

9.27.05

The Mere Existence of a Dangerous Condition Does Not Establish Notice

By Cleo N. Fekaris

In *Millhisler v Manzoni,* unpublished decision of the Michigan Court of Appeals, Plaintiff was running after her dog in a veterinary clinic when she slipped on a damp floor. Plaintiff sued the clinic and others based on premises liability.

Plaintiff came to the Defendants' clinic for a follow-up examination of her dog which had broken his leg. Once inside the clinic, Plaintiff's dog ran away from her and towards the waiting area. Plaintiff was fearful that her dog would re-injure himself because she had seen one of Defendants' employees, Schaffer, coming from the waiting area with a mop and bucket.

Plaintiff testified she was looking at the floor as she hurried after the dog and did not observe that it was wet, slippery or damp. As she neared the front desk, she slipped and fell. In fact, it was not until after she fell that she noticed that the floor was wet. Even then, she only noticed that the floor was wet by feeling the dampness with her hand.

Defendants' employee, Mayer, testified that although she did not see Plaintiff fall, she went to the waiting area immediately thereafter. Mayer did not see any standing water or debris on the floor. Schaffer, who had mopped the floor, testified that the area she had mopped was approximately four feet away from where Plaintiff fell. She further testified that if there were any puddles or standing water, she would have dried them immediately.

The trial court dismissed the case, and Plaintiff appealed. In upholding the dismissal, the Court of Appeals first addressed whether Defendants owed Plaintiff a duty. Generally, a possessor of land owes a duty to an invitee (*i.e.,* a business visitor) to exercise reasonable care to protect the invitee from unreasonable risk of harm caused by a dangerous condition on the land. Plaintiff argued that the floor must have been a dangerous condition since she fell. However, the Court held that this was insufficient to survive a motion for summary disposition. The Court opined that a dry floor, without more, is not a dangerous condition.

SECREST WARDLE NOTES:

Although *Millhisler* is an unpublished decision and not binding on lower courts, it presents another example of the application of the open and obvious doctrine to everyday occurrences. The Michigan Court of Appeals, once again, has shown that it is not going to reward people for failing to take care for their own safety, especially with respect to readily observable and avoidable conditions.

Millhisler also supports the position that a plaintiff cannot establish notice of a supposedly dangerous condition merely by establishing its existence. Instead, a plaintiff is required to come forth with evidence to establish that the defendant had actual or constructive notice of the condition.

CONTINUED...

The Court found that there was no evidence that the floor was wet.

Second, the Court addressed whether the condition was open and obvious. The test in deciding whether a condition is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented on casual inspection. The Court held that an average user would have discovered the danger and the risk presented by the floor in the waiting area, if any, upon casual inspection. This was especially true in *Millhisler,* since Plaintiff testified that she had seen someone returning from the waiting area carrying a bucket and mop, and since she was concerned that her dog would fall and re-injure its leg.

Third, the Court addressed whether Defendants had notice of the condition. The Court found that Defendants did not have constructive or actual notice of a hazardous condition in the waiting area. Plaintiff presented no evidence as to how long the dampness was present on the floor before Plaintiff fell or as to how the dampness came to exist on the floor.

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
1550 East Beltline, S.E., Ste. 305, Grand Rapids, MI 49506-4361
Tel: 616-285-0143 Fax: 616-285-0145

Champaign, IL
2919 Crossing Court, Ste. 11, Champaign, IL 61822-6183
Tel: 217-378-8002 Fax: 217-378-8003

www.secrestwardle.com

SECREST SW WARDLE

CONTRIBUTORS

Premises Liability Practice Group Chair
Mark F. Masters

Editor
Carina Nelson

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 **cnelson@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
Landowners' Alert – Defense strategies for property owners and managers
No-Fault Newsline – 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
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