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 W. Broaddus **December 11, 2015**

SECREST WARDLE NOTES

As a published decision, *Lowrey* – by requiring property owners to affirmatively disprove notice, rather than simply pointing to a plaintiff's inability to prove it – will significantly cut back the number of cases where dispositive motions based on the lack of notice are viable.

Quinto has been interpreted by 1 Longhofer, Michigan Court Rules Practice (5th ed), § 2116.10, p 39 to mean that if "the moving party is asserting the absence of evidentiary support for an allegation … on which the opponent has the burden of proof, the moving party is not required to 'prove a negative.' In such circumstances, it is sufficient for the moving party to assert the absence of evidence for the proposition, and the opposing party must provide evidentiary support for the allegation in order to avoid" dismissal. *Lowrey* rejects that interpretation by requiring that property owners "prove a negative" regarding the lack of notice.

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"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.

In *Lowrey v LMPS & LMPJ, Inc*, __ Mich App __ (Docket No. 323049), a bar owner obtained summary disposition on multiple grounds, including lack of notice, in a suit brought by a bar patron who slipped and fell on a wet stairway. But the Court of Appeals reversed in a published decision authored by Judge Michael

J. Kelly, which Judges Amy Ronayne Krause and Jane E. Markey also signed. In summary, the panel held: "In its motion, [the bar] failed to present evidence that, if left unrebutted, would establish that it did not have actual or constructive notice of the condition; as such, Lowrey had no obligation to come forward with evidence establishing a question of fact as to that element, and the trial court should have denied the motion." *Id.* at __; slip op at 1. While the December 10, 2015, Court of Appeals opinion also rejected the bar owner's other arguments for summary disposition (that the plaintiff failed to adduce evidence of causation, that there was no evidence of a dangerous condition on the steps, and that any such condition would have been open and obvious), the panel concentrated its fire on the notice defense.

Rejecting the bar's argument that there was no fact question as to actual notice, the panel held:

> In the present case, [the bar] relied on evidence from three sources to establish that it did not have actual notice. It cited deposition testimony from the manager on duty on the night at issue, Jenna Evans. She testified that no one made her aware that anyone had fallen on the steps. [The bar] noted too that its owner, Tony Kasab, did not learn of Lowrey's fall until much later. Finally, [the bar] relied on testimony tending to establish that Lowrey and her friends did not hear anyone complaining to [the bar's] employees about the condition of the stairs. None of this testimony was sufficient to allow a reasonable jury to find that [the bar] did not actually know that the steps were wet and slippery.
>
> Although knowledge that someone had fallen down the stairs at issue would be evidence that Evans or Kasab knew that the stairs might have been wet and slippery, it does not follow from that testimony that no customer or employee reported that the steps were wet and slippery, nor, for that matter, that the employees themselves did not know about the condition of the stairs. Knowledge that a hazard has not yet caused a fall is distinct from knowledge that the hazard exists in the first place. Likewise, the fact that Lowrey and her companions did not hear anyone complain to one of [the bar's] employees does not establish that no one brought the wet and slippery condition of the stairs to the attention of its employees. It is highly unlikely that Lowrey and her companions were privy to every conversation between every customer and [the bar's] employees during the time at issue. Because the evidence proffered in support of [the bar's] motion … did not permit an inference that it lacked actual notice of the wet and slippery conditions, [the bar] failed to properly support its motion on that issue….

And in rejecting the bar's argument that there was no fact question as to constructive notice, the panel found:

> …[The bar] argued that the undisputed evidence showed that Lowrey could not prove how the liquid at issue got on the stairs or how long it was there. [The bar] also noted that its manager, Evans, testified that either "a waitress or one of the staff will see it [a spill] and report it, or [that she] will see it on the security cameras." It then concluded that this evidence demonstrated that [the bar] would not be able to prove that [the bar] had constructive notice of the wet stairs....
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> We do not agree that [the bar] supported its motion for summary disposition with evidence that, if left unrebutted, would establish that it did not have constructive notice of the wet and

> slippery condition of the stairs. Because [the bar] had the initial burden to produce evidence in support of its motion, its belief that Lowrey would be unable to meet her burden at trial was irrelevant and did not establish grounds for dismissing Lowrey's claim…. Moreover, it did not proffer any evidence that would permit a reasonable finder of fact to find that it did not have constructive notice.
>
> Although [the bar] briefly cited Evans' testimony about how spills are normally discovered and handled, it did not present any evidence that that particular method for inspecting the premises was reasonable under the circumstances of that night. It did not cite any evidence concerning the weather conditions (there was testimony that it was snowing heavily and that snow was being tracked into the bar and onto the stairs), how busy the bar was at the time (there was testimony that there was normally a couple hundred or more patrons), and did not even cite evidence that the bar's employees actually used the stairs at issue.
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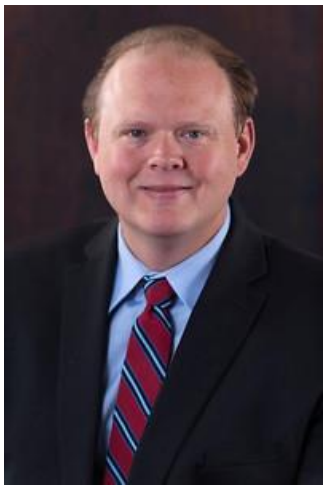
> …By failing to discuss the evidence concerning the nature of the condition at issue – steps that were wet with snow tracked in from outside and which may have formed over the course of an hour or more – [the bar] failed to establish that the wet condition was such that it might have occurred in such a short interval that a reasonable inspection regime would not have revealed it. Without discussing the evidence, its claim that the wet condition might have arisen mere seconds before Lowrey's fall is nothing more than conjecture….

It is questionable whether *Lowrey*'s application of MCL 2.116(C)(10) is in accord with *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996), which says that the moving party's initial burden may be satisfied in one of two ways: "First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. *Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.* If the nonmoving party cannot muster sufficient evidence to make out its claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law." (Emphasis added.) It would seem that here, the bar proceeded under the second path identified by *Quinto.*



We welcome your questions -

Please contact Drew W. Broaddus at

dbroaddus@secrestwardle.com

or (616) 272-7966

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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

Editor
Linda Willemsen

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