SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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# No Notice? No Problem For Property Owners

By Drew Broaddus

While it is well known that premises liability suits often run head-first into the open and obvious defense, the issue of notice is sometimes overlooked by attorneys who defend such claims. "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.* Because it is relatively rare to have evidence of active negligence or actual notice, many premises liability cases rest upon some type of constructive notice theory. The difficulty of establishing constructive notice was recently illustrated in *Allen v CDM Enterprises, Inc.*, unpublished opinion per curiam of the Court of Appeals, rel'd 1/17/13 (Docket No. 309904), a case which was defended on appeal by Secrest Wardle.

In *Allen*, two plaintiffs were injured when they fell while exiting defendant's bar. They were walking one behind the other on a wooden ramp outside one of the exit doors when part of the ramp collapsed underfoot. The ramp was not equipped with handrails. In their depositions, plaintiffs admitted that there were no visible signs of defects; in fact, the ramp "looked safe" and "perfect." They had also observed other patrons entering and exiting via the same ramp.

## SECREST WARDLE NOTES:

A premises owner owes an invitee "a duty to use reasonable care to protect invitees from unreasonable risks of harm posed by dangerous conditions on the owner's land." *Hoffner, supra*.

This duty is breached when a premises owner "knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix the defect, guard against the defect, or warn the invitee of the defect." *Id.* at 460.

A defendant's duty to protect invitees (such as the plaintiffs in *Allen*) from dangerous conditions on the land does not arise unless the defendant has actual or constructive notice of the condition. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609 (1995).

When a plaintiff alleges a latent defect, such as the "weathering" alleged in *Allen*, constructive notice is particularly difficult to establish. See *Lee v Bethel First Pentecostal Church of Am, Inc*, 304 AD2d 798, 800 (NY App Div 2d Dep't 2003): "[c]onstructive notice will not be imputed where the defect is latent, i.e., where, as here, the defect is of such a nature that it would not be discoverable even upon a reasonable inspection…. The failure to make a diligent inspection constitutes negligence only if such an inspection would have disclosed the defect…."

Plaintiffs returned to the bar after their fall to take pictures of the area where they fell. They argued that the pictures showed "weathered" wood such that defendant had constructive notice of a potential hazard. The bar owner testified that he regularly inspected the premises when looking for empty beer containers around the property. He testified that the only time there had ever been an issue with the ramp was approximately two years earlier, when it was damaged by a snowplow and repaired shortly thereafter.

Plaintiffs sued the bar under a premises liability theory. Defendant moved for summary disposition, arguing that plaintiffs could not establish a triable issue of fact as to notice. The trial court granted the motion, finding that "[t]here's no evidence to support the theory that there was a defect in the wooden ramp for a sufficient amount of time to place the Defendant on notice, actual or constructive." Plaintiffs appealed.

On appeal, plaintiffs argued that an issue of material fact existed regarding whether defendant breached its duty to inspect the premises, and whether the ramp was unreasonably dangerous because it was too steep and had no handrails. The Court of Appeals rejected these arguments. The panel acknowledged that a premises owner is required to make the premises safe, which includes a duty to inspect the premises to discover hazards per *Price v Kroger Co of Michigan*, 284 Mich App 496, 500 (2009). However, in this case, the panel simply saw "no evidence that defendant had actual or constructive knowledge of the 'defect' in the ramp." The panel therefore affirmed the trial court's findings that "because (1) other patrons used the wooden ramp throughout the night, (2) there were no known complaints about the ramp's condition prior to the accident, and (3) Allen testified the ramp looked perfect before she walked on it, there [was] no evidence to show there was a defect in the ramp for a sufficient amount of time such that defendant had actual or constructive notice of the defect." Although plaintiffs presented photographs taken several hours after the accident, which allegedly showed the wood to be "weathered," the appearance of the ramp prior to plaintiffs' fall was the critical inquiry, according to the Court of Appeals.

Plaintiffs also argued on appeal that the ramp contained design flaws because it was too steep and had no handrails. However, plaintiffs did not argue this in either their response to defendant's motion for summary disposition, or at the summary disposition hearing. The panel therefore noted that this issue had not been properly preserved for appellate review. However, the panel went on to note that even if this argument had been preserved, it would have failed under the Open and Obvious Doctrine. If a danger or defect is open and obvious, the premises owner has no duty to protect or warn invitees because the very nature of such dangers and defects "apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner v Lanctoe*, 492 Mich 450, 461 (2012). "The test to determine if a danger is open and obvious is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475 (1993). Here, plaintiffs admitted in their brief that the alleged design flaws in the ramp, namely its steepness and lack of handrails, were "plain to see." Thus, according to the appellate panel, plaintiffs had conceded that these alleged defects would have been open and obvious.

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