

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Notice of a Condition Must be Proven by More than Speculation and Conjecture; Ordinance Violations Must be Pled or Are Waived

By John L. Weston

In *Mead v St Charles Pro Bowl*, an unpublished decision of the Michigan Court of Appeals, Plaintiff Edith Mead slipped on a patch of ice on Defendant bowling alley's sidewalk, and was injured. Plaintiff asserted that the alleged patch of ice was an unnatural accumulation caused by Defendant. Specifically, Plaintiff claimed that Defendant created a snow bank which melted and refroze in a depression in the sidewalk, which caused Plaintiff to fall.

On the night of the accident, Plaintiff attended moonlight bowling at Defendant's bowling alley. Plaintiff left the bowling alley after midnight and proceeded to the parking lot. Plaintiff's husband walked across the parking lot to retrieve the couple's vehicle while Plaintiff continued to the end of the sidewalk. Plaintiff alleged that the light bulb in a nearby lamp pole appeared to be broken. When Plaintiff reached the end of the sidewalk, she slipped on the patch of ice and injured herself. Both Plaintiff and her husband testified that the patch of ice was impossible to see because it was black ice and because of the poor lighting conditions. Plaintiff further argued that the patch of ice was an unnatural accumulation caused by Defendant. Specifically, Plaintiff claimed that Defendant created a snow bank that melted and refroze in a depression in the sidewalk.

The trial court dismissed the case and Plaintiff appealed. In upholding the dismissal, the Court of Appeals first addressed whether Defendant had notice of the alleged condition. The Court noted that a landowner owes a duty to an invitee to exercise reasonable care to protect the invitee from unreasonable risks of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 51 (2001). A possessor of land is subject to liability for physical harm caused to its invitees by a condition on the land if the possessor: (a) knows of, or by the exercise of reasonable care would discover, the condition

SECRET WARDLE NOTES:

Although *Mead* is an unpublished decision, and therefore lacks precedential value, it may be used for persuasive purposes in support of a dispositive motion. The *Mead* Court made it clear that a plaintiff must provide more than speculation and conjecture in support of allegations that a defendant had notice of an alleged unreasonably dangerous condition.

Mead also supports the position that, while a violation of an ordinance is evidence of negligence, a plaintiff must plead and argue that ordinance at the trial level, in order to preserve the issue for appeal. Landlords should therefore be aware of all ordinances applying to their property, and ensure that their property is in compliance.

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and should realize that the condition involves an unreasonable risk of harm to such invitees; (b) should expect that invitees will not discover or realize the danger, or will fail to protect themselves against it; and (c) fails to exercise reasonable care to protect invitees against the danger. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 597 (2000). Accordingly, on the issue of notice, a premises possessor is liable for injury resulting from an unsafe condition either caused by the active negligence of the possessor and its employees, or, if otherwise caused, was known to the possessor, or had existed a sufficient length of time that it should have had knowledge of it. *Clark v Kmart Corp*, 465 Mich 416, 419 (2001). While negligence may be established by circumstantial evidence, the circumstances must be such to “take the case out of the realm of conjecture and within the field of legitimate inferences from established facts” *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 9 (1979).

In *Mead*, Plaintiff asserted that the alleged patch of ice was an unnatural accumulation caused by Defendant. Specifically, Plaintiff claimed that Defendant created the snow bank, which melted and refroze in a depression in the sidewalk. The Court of Appeals ruled that Plaintiff’s argument relied on speculation and conjecture since Plaintiff had no actual evidence that it was Defendant that created the snow bank. Furthermore, even if Defendant had created the snow bank, Plaintiff failed to provide any evidence that Defendant’s actions created the ice patch. The Court held that, even if the ice was formed according to the mechanisms advanced by Plaintiff, there was no evidence Defendant knew the snow would melt, run into the depression and refreeze to create the patch of ice. Further, assuming the condition was an unnatural accumulation of ice, Plaintiff failed to set forth facts indicating Defendant had knowledge of the condition or should have discovered it.

Plaintiff alternately alleged that inadequate lighting at the accident site violated a local ordinance (which required that lighting be “sufficient to allow safety for users at any time”) and thereby created an issue of fact regarding notice of the ordinance by Defendant. The Court of Appeals again disagreed, indicating that Plaintiff had failed to preserve this issue for appeal by arguing below that violation of an ordinance either proved notice or vitiated the notice requirement. *See Fast Air, Inc v Knight*, 235 Mich App 541, 549 (1999). The Court noted that it reviewed unpreserved issues for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336 (2000). “It is well established that violation of an ordinance is evidence of negligence.” *Cassibo v Bodwin*, 149 Mich App 474,477 (1986). “However, violation of an ordinance must be pleaded and proved.” *Id.* Plaintiff failed to include an allegation that Defendant violated the city ordinance in her pleadings. Additionally, Plaintiff offered no proof that the lighting was not “sufficient to allow safety for users at any time.” Therefore, the Court of Appeals concluded that the trial court did not commit plain error when it ruled that plaintiffs failed to establish that a genuine issue of disputed fact existed, and affirmed the dismissal.

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