

# boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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## A Cautionary Tale: Lost Gas Pump Videotape Precludes Summary Disposition

By Mark Masters

In *Banks v. Exxon Mobil*, \_\_ Mich \_\_ (2007), the Supreme Court reversed the trial court's and Court of Appeals' summary dismissal of Defendants based on lack of notice since Defendants lost key evidence.

Plaintiff alleged that he was a business invitee at Defendants' gas station and was pumping gas when the gasoline nozzle suddenly broke and splashed gasoline in his face, causing serious injury to his eyes. Plaintiff's complaint alleged that Defendants were negligent for failing to maintain the gas pumps in a reasonably safe condition and failing to repair the gas pump he used, which Defendants should have known was unsafe for use by customers. Defendants moved for summary disposition, arguing that they were not actively negligent in damaging the pump, and did not have actual or constructive notice that the pump was damaged. The trial court agreed and granted summary disposition for Defendants based on lack of notice. The Court of Appeals affirmed the dismissal.

Plaintiff first argued that the trial court erred in concluding that there was no genuine issue of material fact with regard to whether Defendants had constructive notice of the defective gasoline pump. At his deposition, Plaintiff testified that he observed a nozzle lying on the ground when he drove into the gas station. He tried to replace that nozzle on the hanger, but it was broken, so he just set the hose down. Plaintiff then used another hose on pump 12, which he believed was not damaged. That hose did not initially leak. As Plaintiff was pumping gasoline, however, the nozzle detached from the handle and sprayed gasoline in his face. According to the station's records, a customer used pump 12 at 5:12:12 P.M. to pump \$25.68 worth of gas. Another customer subsequently pumped one cent worth of gasoline on pump 12 at 5:15:51 P.M. Plaintiff began using pump 12 at 5:20:28 P.M. The attendants on duty did not see how pump 12 was damaged, nor did they observe the nozzle on the ground before plaintiff used pump 12.

### SECRET WARDLE NOTES:

It has been said again and again: If you have evidence (pictures, accident reports, witness statements, video tapes, etc.), don't lose it! If you lose it, the loss will create a legal presumption that the lost evidence was bad for your defense. What may have been a great piece of evidence for you (such as a photo of an ice-free sidewalk taken immediately after an alleged slip and fall), can become the Plaintiff's strongest evidence if you lose it.

Copies are cheap. Therefore, make copies. Lots of copies. Develop protocols that originals of all investigative materials will be kept in a certain location for at least four years following an alleged accident. Complete sets of copies of those materials (including color copies of photographs) should be kept in at least one other designated location for the same period of time. If insurance is involved, make sure you provide a complete set of copies to your insurer as well.

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In this case, the trial court concluded that the evidence would allow a jury to infer that the hose that caused Plaintiff's injuries was damaged, at most, approximately eight minutes before plaintiff used the pump. The Court of Appeals agreed that this amount of time was insufficient to prove that Defendants should have discovered and rectified the hazard. Plaintiff argued that the trial court failed to consider that the preceding sale on the same was for only one cent, which should have given Defendants notice that the pump was damaged. It was apparent to the Court of Appeals that the trial court took this fact into account because it referred to it in its decision. The one-cent sale occurred less than five minutes before Plaintiff used the pump. The Court of Appeals agreed with the trial court, however, that a one-cent sale was not sufficient to provide notice that there was something immediately wrong with the pump that required immediate action to either turn off or promptly inspect the pump.

Plaintiff also argued that he was entitled to the benefit of an adverse inference based on Defendants' failure to produce a surveillance videotape of the incident. Here, the incident involving Plaintiff was captured on a surveillance videotape, but Defendants claimed that the videotape was lost and could not be produced. Plaintiff prevailed in his request for an instruction that a jury would be permitted to draw an inference that the videotape would be adverse to Defendants. Nonetheless, Court of Appeals held the availability of an adverse inference instruction did not preclude summary disposition on the issue of notice. At oral argument before the trial court, Plaintiff's counsel argued that the videotape would have shown that another driver hit the pump before plaintiff used it. The Court of Appeals held that, while such evidence would have been relevant to show that the fuel pump was damaged, and while Defendants' failure to produce the videotape could allow a jury to draw an adverse inference against Defendants with regard to the question whether the pump was damaged, it did not permit an inference that Defendants had actual or constructive knowledge of the defect.

The Michigan Supreme Court disagreed. In her concurring opinion, Justice Kelly held that while such an adverse inference could be disregarded by the jury, a judge deciding a motion for summary disposition did not have such a luxury. When deciding a motion for summary disposition, the trial judge must draw all reasonable inferences in favor of the non-moving party. Here, the adverse inference created by Defendants' loss of key evidence created a question of fact, which had to be resolved by the jury.

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We welcome your questions and comments.

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