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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

No Notice Still Means No Problem for Property Owners, Even After Supreme Court's Recent Changes to Premises Liability Law

By Drew W. Broaddus **September 14, 2023**

Before the Michigan Supreme Court's July 28, 2023 decision in *Kandil-Elsayed v F & E Oil, Inc,* ___ Mich ___ (2023) (Docket No. 162907), slip and fall claims often stumbled face-first into the open and obvious doctrine. While Michigan's appellate courts have written extensively about that defense over the last 22 years – culminating with the *Kandil-Elsayed* opinion – defenses based on the property owner's lack of notice tend to receive less attention. 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 it. *Lowrey v LMPS & LMPJ, Inc,* 500 Mich 1 (2016). This was recently illustrated in *Smith v Empire Property Investments, Inc,* unpublished opinion per curiam of the Court of Appeals, issued August 10, 2023 (Docket No. 361468), where Secrest Wardle successfully represented the property owner in the trial court and on appeal.

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. *Lowrey*, 500 Mich at 11. 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 unusual 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 underscored in *Smith*.

Secrest Wardle Notes

In *Smith v Empire Property Investments, Inc,* unpublished opinion per curiam of the Court of Appeals, issued August 10, 2023 (Docket No. 361468), the panel unanimously found that an out-of-possession landlord had no actual or constructive notice of the allegedly deteriorated back porch of the Plaintiff's daughter's residence and therefore, the premises liability suit was properly dismissed under MCR 2.116(C)(10).

Smith illustrates that, while the Supreme Court's recent decision in *Kandil-Elsayed v F & E Oil, Inc,* ___ Mich ___ (2023) (Docket No. 162907) complicates the defense of many premises liability suits, notice defenses are unaffected by that decision, and continue to be potentially dispositive.

In *Smith*, unpub op at 1, the "[p]laintiff's daughter, Jessica Smith, moved into a house in Detroit as a tenant after a home inspection was completed on January 30, 2018." "Defendant purchased the home in March 2018, and in reliance on the January 2018 inspection, defendant did not have another home inspection completed before taking ownership." *Id.* "Jessica continued to live in the home after defendant's purchase, and on April 30, 2018, plaintiff was visiting the home when she took a phone call on the back porch." *Id.*, unpub op at 1-2. "It was dark outside, and plaintiff did not see a hole in the cement porch until she fell into it." *Id.*, unpub op at 2. Plaintiff seriously injured her ankle in the fall and filed this premises liability action. "[T]he trial court granted defendant's motion

for summary disposition, agreeing with [the property owner] that she did not have actual or constructive notice of the hole in the back porch." *Id.* Plaintiff appealed by right.

In affirming, the Court of Appeals summarized the evidence as follows: "Defendant had no reason to suspect that there was a defect with the porch." *Smith*, unpub op at 5. "According to the home inspection that occurred on January 30, 2018, the condition of the home's exterior foundation, porches, and surfaces passed inspection." *Id.* The property owner's agent "testified that neither she nor defendant saw the back of the property before defendant's purchase." *Id.* "Defendant purchased the property in March 2018, and in reliance on the January 2018 inspection, defendant did not have another home inspection completed before taking ownership." *Id.* "Additionally, the first time that Jessica noticed the hole was on April 30, 2018, when plaintiff fell into it, and Jessica never reported any structural issues with the house, including a hole in the back porch, while she lived there." *Id.* "Jessica testified that [the defendant's agent] went into the backyard once when there was snow on the ground, and another time in April 2018, when there was no snow, but Jessica was not present when [the agent] went into the backyard." *Id.* The property owner's agent "testified that she looked at the backyard in February 2018, when it was covered in snow, but the other time she visited the property she stayed on the front porch." *Id.*

Plaintiff pointed to "Jessica's testimony" and "photographs of the porch to argue that a jury could infer that the hole in the porch existed long enough that defendant should have known of its condition." *Smith*, unpub op at 5. But the panel found that Plaintiff's evidence regarding notice remained merely speculative; "Plaintiff presented no evidence as to when the condition in the porch arose or how long the hole was present, and it is impossible to decipher from the evidence presented." *Id.* "It is impossible to know whether the hole in the porch occurred suddenly or over time." *Id.* "Plaintiff presented no expert testimony on cement deterioration or damage." *Id.*

Because the Defendant's lack of notice was dispositive, the panel found no reason to address whether the condition was open and obvious. See *Smith*, unpub op at 2 n 2.

Because the Plaintiff was not a tenant – but rather, was a social guest of the tenant – Plaintiff did not assert a claim under MCL 554.139. See *Mullen v Zerfas*, 480 Mich 989, 990 (2007).

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