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Buyer Beware: Premises Liability and Constructive Notice

By Aaron D. Swayne **February 15, 2024**

In *Whitaker v Meijer, Inc.*, Plaintiff was shopping at a Meijer grocery store with her fiancé. While Plaintiff was in the beauty and health section of the store, she rounded a corner to enter a different aisle and slipped on an unidentified liquid on the floor which Plaintiff described as "yellowish-brown" in color. Because the nearby security camera was inoperable at the time of the slip and fall, Plaintiff was unable to ascertain how long the liquid was present. The trial court held that the nature of the liquid was such that a reasonable trier of fact could infer that Defendant Meijer had constructive notice and could therefore be held liable. Defendant appealed, arguing that the trial court erred by concluding that the record could support a finding that Defendant had constructive notice of the hazardous condition. *Id.*

A premises owner generally owes a duty to an invitee to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Id*. citing *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 693 (2012). "It is the plaintiff's burden to prove that the defendant had actual or constructive notice." *Lowrey v LMPS &LMPJ, Inc*, 500 Mich 1, 10 (2016). "A plaintiff establishes constructive notice if the plaintiff shows 'that the hazard was of such a character, or had existed for a sufficient time, that a reasonable premises possessor would have discovered it.'" *Lowrey* at 11-12.

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The crux of the notice element of a slip and fall case is whether the alleged hazardous condition was allowed to develop or exist over an extended period of time.

A premises owner may be held to have constructive notice of a hazardous condition and therefore be liable if the claimant can prove "that the hazard was of such a character, or had existed for a sufficient time, that a reasonable premises possessor would have discovered it."

Whether a hazardous condition is unusual or unforeseeable is not definitive proof of a defendant's liability.

Interestingly, Plaintiff in *Whitaker* argued that the spilled liquid was highly irregular and that it was unforeseeable for there to be a spill in the beauty and health section of the store. But this argument only helped Defendant. As the Court observed, "this argument is upside down because it is less likely that a reasonable shopkeeper would have notice of an unforeseeable hazard." *Id*. This in turn strengthened Defendant's case.

Moreover, *Whitaker* was distinguished from two otherwise controlling cases: *Kroll v Katz* and *Yarington v Huck*. In *Kroll*, the plaintiff was a plumber visiting a private home to conduct work and was injured while walking down to the basement because he did not know that the bottom step was missing. In *Yarington*, the plaintiff was entering an inn to have dinner and she caught her foot in a hole in a rug after stepping over the threshold of the main door.

Unlike *Whitaker*, a missing stair step or a hole in a rug were conditions which would not suddenly arise. "A broken stair is not the sort of hazard that could have suddenly arisen immediately before the plumber went down the stairs." And "a hole typically takes an appreciable amount of time to be worn into a carpet." *Whitaker*, at 3. These were both conditions that the defendant premises owners in those cases should have discovered because they do not occur surprisingly or immediately by their very nature. As noted, the Plaintiff in *Whitaker* could not prove how long the spilled liquid was present. This was entirely different from a hazardous condition which had been allowed to develop or exist over time. Such an arising-over-time condition could support a claim that a premises owner had constructive notice of a hazardous condition, unlike the spilled liquid in *Whitaker*.

Whitaker highlights the fact that proof of a hazardous condition that was allowed to exist and should have been discovered remains the crux of the notice element of any slip and fall case. The Court of Appeals ultimately agreed with Defendant Meijer and ruled for dismissal of the case.

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