

Slippery When Wet

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September 20, 2024

One of the key components of any premises liability case is whether the landowner or possessor had notice of an alleged hazardous condition on the land. There are two kinds of notice: actual notice and constructive notice. The recent unpublished Michigan Court of Appeals case of *Heilman v Smith, Harting* highlights the importance of proving notice in an action based on premises liability.

In *Heilman*, the plaintiff was an independent contractor working for Nepa Painting. Plaintiff was injured when his ladder slid out from under him while painting the homeowner defendants' home. Plaintiff claimed the ladder slipped on a puddle of grease and water left behind after plaintiff and the owner of Nepa Painting moved the homeowner defendants' grill. Plaintiff asserted claims for negligence, premises liability, and respondeat superior by Nepa, among other claims. The trial court dismissed plaintiff's claims against the homeowner defendants due to lack of actual or constructive notice of the allegedly hazardous condition. Further, the trial court also dismissed plaintiff's claims against Nepa for failure to establish that it was responsible for the allegedly hazardous condition. Plaintiff appealed.

The Court of Appeals held plaintiff failed to present sufficient evidence to demonstrate the homeowner defendants' had actual or constructive notice of a hazardous condition. Notably, plaintiff also failed to present any testimony from the homeowner defendants or Nepa regarding their actual knowledge of the area.

Regarding constructive notice, plaintiff only offered his own deposition testimony. Plaintiff's deposition testimony failed to prove the hazardous condition was "of such a character, or had existed for a sufficient time, that a reasonable premises possessor would have discovered it." In his deposition, plaintiff testified that (1) he had no idea where the grease and water came from; (2) he did not see anything when he set up his ladder; and (3) he had no idea how long the grease and water had been there.

The Court of Appeals held that because plaintiff did not present any evidence regarding when the hazardous condition arose or the character of the condition to support an inference that it must have existed for any length of time, plaintiff was unable to show a genuine issue of material fact that the homeowner defendants had constructive notice. Plaintiff's mere assumptions regarding the hazardous condition were insufficient evidence.

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Notice, which can be actual or constructive, is an independent requirement to the imposition of liability in a premises liability action.

In order to show actual notice, a plaintiff must show the land possessor/owner knew of the hazardous condition on the land or should have known about the hazardous condition because of its character or duration of presence.

In order to show constructive notice, a plaintiff must show that the hazard was of such a character, or had existed for a sufficient time, that a reasonable

The Court also noted that plaintiff had not proffered any photographs, affidavits, or testimony indicating the hazardous condition existed or was such that the homeowner defendants should have discovered it.

Since the homeowner defendants did not have actual or constructive notice of the alleged hazardous condition, they could not be held liable. Relying on *Lowrey v LMPS & LMPJ, Inc.*, 500 Mich. 1 (2016), the Court reasoned that notice is an independent requirement to the imposition of liability in a premises liability action. Since plaintiff could not prove notice, he could not prove a premises liability action against the homeowner defendants.

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