

Michigan Supreme Court Reverses Court of Appeals on Inspection as Part of the Notice Defense

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A unanimous Michigan Supreme Court recently reversed the Michigan Court of Appeals on the issue of the proofs necessary to establish notice – or the lack of notice – in a premises liability case.

The court's published decision in *Lowrey v. MPS & LMPJ Inc., KSK Hospitality Group, Inc., d/b/a Woody's Diner*, _____ Mich_____; _____ N.W.2d _____ (2016), rejected the requirement of a reasonable inspection as a necessary element to a defendant's claim of lack of notice.

This ruling relieves the premises owner from the burden of proving it inspected the premises before relying on lack of notice of a defect as a defense. The decision also reaffirms the summary disposition standard in a case where the non-moving party failed to produce sufficient evidence to prove an essential element of its cause of action.

The case arises out of the plaintiff's slip and fall on the allegedly wet back steps of defendant Woody's Diner as she exited at 1:45 AM on St. Patrick's Day 2013. The plaintiff had been celebrating with friends and had used the back steps to access the smoking patio from the dance floor several times during the course of the evening before her fall. The plaintiff filed suit in the Oakland County Circuit Court, alleging a slip and fall on wet stairs resulting in her fractured tibia and fibula.

The circuit court granted the defense's motion pursuant MCR 2.116 (C)(10). That court found that the plaintiff had failed to raise a genuine issue of material fact regarding whether the defendant had actual or constructive notice of the condition of the stairs. On alternative grounds, the court found the hazardous condition to be open and obvious.

The plaintiff appealed, and the Michigan Court of Appeals reversed the circuit court in a published decision, 313 Mich App 500,885 NW2d 638 (2015). The appellate court stated:

"[W]hen, the defendant is convinced that the plaintiff will be unable to support an element of the claim at trial, but is unwilling or unable to marshal his or her own proofs to support of motion under MCR 2.116(C)(10), the defendant's recourse is to wait for trial and move for directed verdict after the close of plaintiff's proofs."

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The appellate court also decided that defendant had failed to prove that it lacked notice of the alleged condition because it did not present evidence of what a reasonable inspection would have been under those circumstances. Additionally, the appellate court ruled “the open and obvious danger” doctrine was inapplicable because the defense failed to present evidence that a reasonable person would have discovered the hazard.

The defense appealed to the Michigan Supreme Court, which analyzed the proofs necessary for notice and determined that the appellate court was mistaken when it imposed a new condition of reasonable inspection on the owners of the premises seeking summary disposition.

The Supreme Court specifically ruled that the defendant is entitled to summary disposition on a showing that the plaintiff has failed to present sufficient evidence of notice, whether actual or constructive, of the allegedly dangerous condition. In its ruling, the Supreme Court stated that *Grand Berry-Lovette v. Garascia*, 303 Mich at 566; 844 NW2d 178(2014) was incorrectly decided on the issue of the defendant's burden of proof on a motion for summary disposition based on notice.

The Supreme Court reaffirmed that the plaintiff had to prove that the defendant knew of the alleged defect or should have known of it because of its character or the duration of its presence. In the case before the circuit court, the plaintiff presented no direct evidence of actual notice. Further, the plaintiff could not infer notice merely because her pants were wet after her fall. The Supreme Court reasoned that there was no need for “proof of reasonable inspection” to show lack of constructive notice.

Further, the Supreme Court addressed the appropriate standard for summary disposition in this context, stating the rule is well-established that summary disposition may be granted as a consequence of the non-moving party's inability to produce evidence of an essential element of its claim. *Bernardoni v. Saginaw*, 499 Mich 470; 886 NW2d 109 (2016). The Supreme Court again found that the appellate court had erred by imposing an additional requirement on the defendant to produce evidence to negate an element of the plaintiff's cause of action.

The Supreme Court's ultimate ruling reversed the judgment of the appellate court on the issue of notice and reinstated the circuit court's order granting summary disposition in favor of defendant. In addition, the Supreme Court vacated the remainder of the appellate court's opinion.

This decision is significant for reestablishing the traditional standards for proof on a motion for summary disposition, pursuant to MCR 2.116(C)(10) regarding notice in a premises liability action. Premises owners can now return to traditional standards of proof in bringing their dispositive motions.