PLUNKETT COONEY
ATTORNEYS & COUNSELORS AT LAW

Slip & (Pit)Falls

Beyond Routine Premises Liability Claims

Presented by
Rick Szymczak
Alannah Buford
Brian Mitzel

Today's Presenters

Rick G. Szymczak
(810) 342-7007
rszymczak@plunkettcooney.com

Alannah M. Buford
(517) 324-5638
abuford@plunkettcooney.com

Brian K. Mitzel
(248) 594-6718
bmitzel@plunkettcooney.com

Open & Obvious / Notice Defense

- They are not automatic wins with dispositive motions

'Special Aspects' Exceptions

- Unavoidability — "trapped" by the risk
  Hoffner v Lanctoe, 492 Mich. 450
- Unreasonable risk —30 foot deep pit
  Lugo

Premises Liability

- Built into the notice defense is constructive notice.
- Use of statutes and ordinances in the landlord tenant context MCL 554.139
- Ordinances that provide for landowners' liability for defective sidewalks
- No "sure things" in premises liability law

RECENT CASE LAW DEMONSTRATES THE POINT

Blackwell v Franchi

318 Mich App 573 (2017)

- Issue: Dinner party guest sued home owners after she fell off the eight inch drop off into the unilluminated mudroom of a home. Was it open and obvious?

Blackwell v Franchi

- Determination of whether defendants had a duty to warn the plaintiff of the drop-off will depend on how the conflicting testimony from other guests, regarding whether the drop-off was open and obvious is resolved.
- As a general rule, a drop-off, like a step, does not in and of itself create a risk of harm.

Taylor v PetSmart, Inc

2018 WL 398445 (ED Mich Jan. 12, 2018)

- Walking down an aisle, plaintiff "fell violently to the floor," after "slip[ing*] on a clear liquid that could not be seen."*
- In an incident report about the plaintiff's fall, the PetSmart employee wrote that "there was a strip of water on the floor" and this water "was immediately cleaned up."

Taylor v PetSmart, Inc

- This case is different from *Lowrey* because this was the first time the plaintiff walked down the aisle.
- No explanation why the fact it was a strip of water means it was there long enough or its character suggests PetSmart should have know about it.

Kahn v Target Corp

2016 WL 1732694,(ED Mich 2016)

- Issue: Upon exiting the restroom, plaintiff slipped and fell in hallway immediately adjacent to the bathroom entrance. Target employees or other customers, who were in the hallway when she fell; did she see a wet floor sign in the area. Did one of defendants' employees create the unsafe condition to avoid a notice defense?

Kahn v Target Corp

- Decision: One of the defendant's employees had recently mopped the hallway where plaintiff slipped and fell. According to this testimony, the wet floor sign that was observed in the hallway was suggestive of either mopping or a spill (even though the record lacks any indicia of a spill), such as evidence that a Target employee remained in the vicinity or blocked off the area.

Hendrix v Lautrec, Ltd.

2016 WL 6393805, (Mich. App. 2016)

- Issue: Plaintiff filed suit after falling on ice in a common area of the apartment complex where she resided.
- Did she create a triable question of fact that the defendant violated its covenant under MCL 554.139(1)(a) that this common area –adjoining driveway – was "fit for the use intended by the parties?"

Hendrix v Lautrec, Ltd.

- Decision: The ice formed when water flowing from a downspout connected to the garage pooled in an area of broken and depressed concrete before freezing. This ice created a dangerous condition, making the driveway unfit for pedestrian use.
- Avoids rule of *Allison v AEW Capital Mgt, LLP,* 481 Mich. 419; 751 NW2d 8 (2008), which addressed parking lots

Beard v Target

2016 WL 5073738 (E.D. Mich)

- Plaintiff's statement was given five days after fall but four years before her deposition
- Concrete curb was deteriorated in her account and in photographs.

Beard v Target

- Ruling: There exists an issue of fact whether the defect at issue in this case was discoverable upon casual inspection.
- Distinction: Not only see the defect but appreciate and analyze its risk … defeating the concept of casual inspection for the objective/reasonable person standard

Lymon v Freedland

314 Mich App 746 (2016)

- Issue: Home health care aide fell on snow covered driveway of private home. Was this unavoidable?
- Reasoning: A reasonable juror could conclude that the plaintiff in this case did not have a choice about whether to confront the icy conditions.

Lymon v Freedland

- Snow and ice covered driveway was open and obvious.
- Still, the plaintiff had no choice but to confront it, making the condition unavoidable.

Conclusion

- Exceptions to defenses are, of course, fact specific.
- Perhaps more importantly, predilections of the trier of law
- What we mean when we say the "great" lawyer knows the judge — we really mean the lawyer knows the judge's history.
- Wealth of cases means research can discover authority for virtually any position, but that research should include how that precedent will be viewed from the bench.

Questions?

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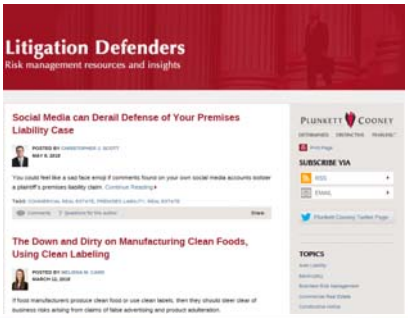

Today's Webinar

Thank You!

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