FALL 2016 NEWSLETTER

PREMISES LIABILITY UPDATE

By George Lankford

In *Carey v. Hi-Lo Auto Supply*, LP, 2016 WL 3198872 (Tex.App.-Fort Worth June 9, 2016), the Defendant was an automotive parts and supply store. The Plaintiff was a customer who went down the oil products aisle, his right foot 'hit something slick' on the floor, causing him to slip and fall to the floor. He contends he did not notice anything on the floor before he slipped, and he stated the store was clean and well kept. He became unconscious when he hit the floor, and when he regained consciousness he had to use his cell phone to call for help. The store manager the Plaintiff's shirt was covered in oil. The Plaintiff then noticed the oil was clear, making it undetectable on the white floor. He also noticed leaked oil on a nearby shelf, but ultimately no one was able to find the source of the leak. Plaintiff filed suit for premises liability under theories of negligence and negligence *per se*. He contended the Defendant (1) failed to maintain its premises in a reasonable and safe condition, (2) created a dangerous condition, and (3) failed to adequately warn him of the dangerous condition or make it reasonably safe.

The Defendant moved for a traditional summary judgment on the basis that Defendant did not have actual or constructive notice of the condition. The Defendant also moved for a no evidence summary judgment on the basis that there is no evidence of actual or constructive notice. The trial court granted the summary judgment without stating its reasons.

The Court of Appeals ultimately held that the trial court did not error in granting the no evidence motion for summary judgement because the Plaintiff failed to raise a material fact issue regarding actual or constructive notice.

It is undisputed that the Plaintiff was a business invitee. Therefore, a premises owner has a duty to use reasonable care to keep the premises under his control in a safe condition for business invitees by making the premises safe or to warn invitees of any concealed, unreasonably dangerous conditions that the owner is, or reasonably should be, aware but the invitee is not. The duty is limited to exercising ordinary, reasonable care and does not make the owner an insurer of an invitee's safety.

In this matter, the Court of Appeals concluded the evidence was insufficient to show "actual notice" of the condition. Plaintiff had testified that two weeks after his fall, an employee told him a customer had brought in jugs of oil that left oil "all over the counter." However, there was no evidence as to how long before his slip and fall this occurred. Any inference that the oil from the counter gave the employee actual notice on the floor of the oil aisle is merely speculative and does not raise a fact issue.

The Court of Appeals then held there was no evidence of "constructive knowledge" supporting the application of the "time-notice rule." This rule states that when the oil was on the floor long enough to give the Defendant a reasonable opportunity to discover it, rectify it, or warn about it, then the Defendant is considered to have constructive knowledge. However, the Supreme Court has held that constructive knowledge cannot be found in the absence of evidence indicating how long the hazard was present. In this matter, Plaintiff's evidence that sometimes oil would leak from oil cans in a shipping box was not evidence of notice. The Plaintiff further argued, (1) the employee recognized a continuing duty to keep the aisles free of hazards, (2) Defendant's regional manager testified that they did not have a process for routine aisle inspections, and (3) no one knew when the last time the oil aisle had been inspected before the fall, although the store opened 2 and ½ hours before the accident. The Court of Appeals held this evidence did no more than raise a speculative possibility of constructive notice. The Court specifically noted the absence of evidence that the oil spill was "conspicuous" or when or how the oil spill got there, or how long it had been there.