STATE OF MICHIGAN

COURT OF APPEALS

OLGA ELIZABETH HERRERA,

Plaintiff-Appellant,

v

ROMP ENTERTAINMENT, INC., a/k/a TONIC NIGHT CLUB, L.L.C.,

Defendant/Cross-Defendant-Appellee,

and

27-29 SOUTH SAGINAW, L.L.C.,

Defendant/Cross-Plaintiff,

and

FRANKLIN PROPERTIES I, L.L.C., and FRANKLIN PROPERTIES, INC.,

Defendants.

UNPUBLISHED
February 16, 2010

No. 285471
Oakland Circuit Court
LC No. 2007-082632-NO

Before: Owens, P.J., and Servitto and Gleicher, JJ.

GLEICHER, J. (*concurring*).

I concur fully with the result reached by the majority. I write separately to further delineate why the constructive notice doctrine lacks applicability here.

Defendant Romp Entertainment, L.L.C., contends that "notice *is* a dispositive issue in this case" (emphasis in original), and because Romp neither created the dangerous condition nor knew of its existence, it bears no liability for plaintiff's injury. As the majority correctly explains, Romp had a legal duty to reasonably *discover* dangerous conditions on its premises, and a breach of that duty gives rise to liability here. An invitee such as plaintiff is "entitled to expect" that a premises possessor will "take reasonable care to know the actual conditions of the premises and either make them safe or warn the invitee of dangerous conditions." *Kroll v Katz*, 374 Mich 364, 373-374; 132 NW2d 27 (1965). In *Conerly v Liptzen*, 41 Mich App 238; 199

NW2d 833 (1972), this Court recognized that an occupier's knowledge of the "actual conditions" of the premises requires adequate inspection to discover latent dangers:

> "The occupier is not an insurer of the safety of invitees, and his duty is only to exercise reasonable care for their protection. But the obligation of reasonable care is a full one, applicable in all respects, and extending to everything that threatens the invitee with an unreasonable risk of harm. The occupier must not only use care not to injure the visitor by negligent activities, and warn him of latent dangers of which the occupier knows, *but he must also inspect the premises to discover possible dangerous conditions of which he does not know, and take reasonable precautions to protect the invitee from dangers which are foreseeable from the arrangement or use*." [*Id*. at 241, quoting Prosser, Torts (3d ed), § 61, pp 402-403 (footnotes omitted, emphasis added).]

More recently, in *Prebenda v Tartaglia*, 245 Mich App 168, 169; 627 NW2d 610 (2001), this Court explained that "[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land" if the possessor

> (a) knows, *or by the exercise of reasonable care would discover*, the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger. [Emphasis added.]

This elucidation of the elements of a landowner's duty closely mirrors the Restatement of Torts, 2d:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger. [2 Restatement Torts, 2d, § 343, pp 215-216.]

Indisputably, an invitor's duty encompasses reasonable inspection intended to detect dangerous conditions on the premises. Accordingly, Romp owed plaintiff the duties to (1) inspect the metal wall next to the box on which its customers regularly danced; (2) discern the wall's sharp and unprotected edge; and (3) determine the wall's safety under the circumstances.

Romp's failure to discover the dangerous corrugated metal wall edge tends to *prove* Romp's negligence, rather than excusing it.[1]

The absence of a prior injury related to the wall does not absolve Romp of its legal duties as an invitor. The notice doctrine does not shield a premises owner or possessor from liability for injury where the premises owner or possessor itself unreasonably creates, tolerates or causes a dangerous condition. *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 604-605; 601 NW2d 172 (1999). And "[g]enerally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Banks v Exxon Mobil Corp*, 477 Mich 983, 984; 725 NW2d 455 (2007).

Moreover, a finding of constructive notice often depends on the involved lapse of time, and the longer a defect is present the *stronger* the evidence of constructive notice. An invitor is liable when an unsafe condition "is known to the storekeeper or is of such a character *or has existed a sufficient length of time that he should have knowledge of it*." *Carpenter v Herpolsheimer's Co*, 278 Mich 697, 698; 271 NW 575 (1937) (emphasis added). "Notice may be inferred from evidence that the unsafe condition has existed for a length of time sufficient to have enabled a reasonably careful storekeeper to discover it." *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979). "[C]onstructive notice arises not only from the passage of time itself, but also from the type of condition involved, or from a combination of the two elements." *Kroll*, 374 Mich at 372.

The Michigan Supreme Court's analysis in *Clark v Kmart Corp*, 465 Mich 416; 634 NW2d 347 (2001), illustrates this fundamental notice principle. In *Clark*, the Supreme Court examined whether evidence of smashed grapes on a store's floor "would permit a jury to find that the dangerous condition was present long enough that the defendant should have known of it." *Id*. at 419. Although the record did not clarify precisely when the grapes landed on the floor of the checkout lane where the plaintiff had slipped and fell, circumstantial evidence reasonably supported that a "sufficient length of time" had elapsed since the grapes fell on the floor, from which "the jury could infer that defendant should have discovered and rectified the condition." *Id*. at 420. The Supreme Court explained, "The availability of the inference that the grapes had been on the floor for at least an hour distinguishes this case from those in which defendants have been held entitled to directed verdicts because of the lack of evidence about when the dangerous condition arose." *Id.* at 421.

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[1] Other evidence reasonably substantiates that Romp possessed full awareness of the wall's metal edge, and disputed only that the edge qualified as sharp or dangerous. However, because the testimony disagreed about the dangerousness of the wall's edge, a material fact, the circuit court should have construed the evidence in the light most favorable to plaintiff. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). A court may not make findings of fact when deciding a summary disposition motion. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995).

Whitmore, *Kroll*, and *Clark* instruct that constructive notice may be found if a danger has existed for a length of time sufficient that the invitor, in the exercise of reasonable care, should have discovered and remedied it. Given the considerable length of time in this case that the metal wall had been present next to the box on the dance floor, a jury could reasonably infer that Romp knew of, or should have discovered, the risk posed to dancers and taken some precaution to protect the wall's metal edge.

The fact that other patrons had not suffered injury caused by the metal wall neither eliminates Romp's duty of inspection nor precludes a finding of Romp's constructive notice that the metal edge constituted a dangerous condition. The absence of other accidents is relevant evidence regarding whether the edge was sharp enough to qualify as dangerous. But Romp's notice of the wall's edge remains a question for the jury alone, particularly in light of the record evidence establishing that the edge was sharp and Romp president Martin Coats's admission that it was "foreseeable" that a dancer would grab hold of the wall. See also M Civ JI 19.03 (providing that if a case involves an issue of constructive notice, the jury should receive instruction that "[i]n determining whether the possessor should know of the condition, you should consider the character of the condition and whether the condition existed for a sufficient length of time that a possessor exercising ordinary care would discover the condition."). Furthermore, the absence of a previous injury related to the wall does not relieve Romp of liability for plaintiff's injury, should a jury find that Romp knew or should have known that the metal edge posed a danger to dancers. That no one else had suffered injury lacks legal relevance concerning Romp's negligence because "it would not be competent to prove an absence of accidents as tending to show an absence of negligence." *Larned v Vanderlinde*, 165 Mich 464, 468; 131 NW 165 (1911). "Evidence of absence of accidents usually involves generally unreliable negative evidence and does not tend directly to prove absence of negligence." *Grubaugh v City of St Johns*, 82 Mich App 282, 289; 266 NW2d 791 (1978).

Defendant's reasoning would deny recovery to the first Romp patron injured by the sharp metal edge of the wall, but then permit recovery to subsequent victims. The fact that no prior injury has occurred simply does not prove that Romp should not have reasonably anticipated an injury. As the Idaho Supreme Court put it,

> Reduced to its essence, the "prior similar incidents" requirement translates into the familiar but fallacious saying in negligence law that every dog gets one free bite before its owner can be held to be negligent for failing to control the dog. That license which is refused to a dog's owner should be withheld from a building's owner … as well. [*Sharp v W H Moore, Inc*, 118 Idaho 297, 301; 796 P2d 506 (1990).]

In conclusion, because sufficient record evidence reasonably supports that the wall posed a danger and Romp possessed actual or constructive notice of the wall's sharp edge, the majority has correctly reversed the circuit court's grant of summary disposition.

/s/ Elizabeth L. Gleicher