

CONNECTICUT SUPREME COURT CLARIFIES CONSTRUCTIVE NOTICE IN PREMISES CASES

The Connecticut Supreme Court recently held that defendants were entitled to summary judgment in a premises liability case, finding that the plaintiff had failed to meet her burden of proving constructive notice of the allegedly defective condition. Ryan Ryan Deluca partner Robert C. E. Laney, with associate Peter E. DeMartini, filed an amicus curiae brief on behalf of the Connecticut Defense Lawyers Association in the case.

In DiPietro v. Farmington Sports Arena, LLC, __ Conn. __ (Aug. 28, 2012), the plaintiff brought a lawsuit seeking damages for personal injuries her minor daughter sustained while playing indoor soccer. The plaintiff sued the manager and operator of the indoor soccer facility, the property owner, and the individual who controlled the facility and who had chosen the playing surface the plaintiff claimed caused her daughter's injuries.

The plaintiff alleged that the defendants had installed a playing surface that was inherently dangerous for indoor soccer. The trial court granted summary judgment in favor of the defendants on the grounds that the plaintiff had failed to produce expert testimony to establish the applicable standard of care and that the plaintiff had failed to produce any evidence to establish that the defendants had notice of the allegedly defective condition. The Appellate Court reversed, holding that expert testimony was unnecessary, and that the plaintiff was not required to prove notice because the defendants had created the unsafe condition.

In reversing the Appellate Court, the Supreme Court relied upon the well established principle of premises liability, that business owners "do not breach their duty to invitees by failing to remedy a danger unless they had actual or constructive notice of that danger," and the plaintiff has the burden to prove such notice.

Here, the Court agreed that expert testimony is unnecessary to establish standard of care, but held that the plaintiff nonetheless failed to satisfy her burden on the issue of constructive notice. It reasoned that constructive notice generally may be triggered by a general duty of inspection or arise from industry standards or government regulations. The Court found it significant that there was no evidence of defective installation or of visible defects in the playing surface. Nor was there any evidence of prior complaints or of prior injuries due to the surface. A visual inspection would not have revealed what the plaintiff claimed was the playing surface's inherent dangerousness and government or industry standards did not prohibit the use of this particular surface. The Court noted that other indoor facilities used the same type of surface, and the Connecticut Junior Soccer Association, which is responsible for sanctioning indoor soccer facilities, inspected and approved the facility months before the minor's injury. Addressing the plaintiff's claim

that the defendants should have conducted empirical safety testing to proactively discover allegedly inherent defects, the Court stated that “[b]usiness owners . . . are not insurers of their customers’ safety.”

The Court also rejected the plaintiff’s alternative theory, that she is exempt from usual notice requirements because the defendants affirmatively created the allegedly dangerous condition. This theory, known as the affirmative act rule, states that when a defendant creates an allegedly dangerous condition, the court or jury may infer that the defendant had knowledge of the condition it created. The Court expressly limited this rule, indicating that this inference will be permitted “only when the defendant or its employees created an *obviously* hazardous condition.” The Court also clarified that the affirmative act rule is not an alternative to the notice requirement, but merely allows an inference of notice when circumstantial evidence proves the defendant created a foreseeably hazardous condition.

DiPietro offers useful guidance as to what will, and will not, establish constructive notice in premises liability cases. In particular, it suggests that if an allegedly dangerous condition is not discoverable through visible inspection, a defendant will not be charged with constructive notice of that condition merely because an expert testifies that scientific tests could have revealed its existence.

If you would like the full text of this decision, please contact Attorney Robert C.E. Laney.