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SPOILIATION OF EVIDENCE MAY SPOIL AN OPPORTUNITY FOR SUMMARY JUDGMENT

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Failure to preserve evidence that may be material to a given occurrence could potentially negate what would otherwise be a successful argument for summary judgment.

In a recent order issued in a premises liability case, *Banks v Exxon Mobil Corporation*, --- N.W.2d ---, 2006 WL 3883464 (Mich.), the Michigan Supreme Court held that, based on the facts presented to the trial court, a reasonable jury could have concluded that the defendants should have discovered a defect, and therefore the trial court erred in granting summary disposition to the defendants on the issue of constructive notice. While there was nothing particularly noteworthy in this result, a discussion of an issue of first impression in a concurring opinion may have a significant impact in future cases where a defendant's spoliation of evidence would warrant an adverse inference jury instruction.

In *Banks*, the plaintiff alleged that he was seriously injured while pumping gas at the defendant's gas station when the gas pump nozzle broke and fuel splashed into his eyes. The trial court granted summary disposition to the defendants on the grounds that the defendants were not actively negligent in damaging the pump, and that they did not have actual or constructive notice that the pump was damaged.

On appeal, the Michigan Court of Appeals upheld the trial court, holding that, based on the evidence before the trial court, a jury could only infer that the pump was damaged for eight minutes, at most, before its use by the plaintiff. Gas station records indicated that the pump in question was used to dispense more than \$25 worth of gasoline eight minutes before the plaintiff's alleged injury. The pump was also used five minutes before the plaintiff's injury and dispensed one-cent worth of gasoline.

The appellate court held that this was an insufficient amount of time for the defendants to have constructive knowledge of the damaged pump. Furthermore, the fact that there was a subsequent one-cent sale at the pump was not sufficient to put the defendants on notice that the pump was defective.

The court also held that the trial court's ruling that the plaintiff would be entitled to an instruction that the jury could infer that the visual evidence of the incident contained on a videotape, which was lost by the defendants, would be adverse to them, did not preclude the trial court from granting summary disposition on the issue of notice.

The Michigan Supreme Court disagreed, and in lieu of granting leave to appeal, reversed the appellate court holding that summary disposition was improperly granted on the issue of constructive notice. The Supreme Court noted that a defendant has a duty to a business invitee to exercise reasonable care to protect that invitee from unreasonable risk of harm caused by a dangerous condition on the land, and that this duty arises upon actual or constructive notice of the condition.

The court noted that constructive notice arises not only from a passage of time, but also from the type of condition involved, or a combination of these two elements. Furthermore, the determination of whether a defect has existed for a sufficient time or under circumstances to put the defendant on constructive notice is generally a question of fact and not of law. The court then held, given the evidence in this case, that a reasonable jury could have concluded that the defect should have been discovered by the defendants prior to the subject occurrence.

In a concurring opinion, Justice Marilyn Kelly addressed an issue of first impression not reached by the majority in its order (i.e., whether a trial court should consider an adverse inference jury instruction when ruling on a motion for summary disposition).

In an earlier order in this case, *Banks v Exxon Mobil*, 477 Mich. 855, 720 N.W.2d 749 (2006), the Michigan Supreme Court had directed the parties to address at oral argument both the constructive notice issue and the question of whether the trial court's ruling that the jury could infer that a missing videotape of the incident would be adverse to the defendants should be considered in a determination of summary disposition.

Justice Kelly wrote that the trial court erred in not considering the adverse inference when determining summary disposition because the inference was relevant to the issue of notice. Justice Kelly reasoned that if a jury is able to take an adverse inference into account, then it "logically follows that the trial judge must draw the adverse inference when ruling on a motion for summary disposition."

While Justice Kelly's analysis of this issue of first impression in her concurring opinion is not binding precedent, it is likely that some Michigan courts will find it to be persuasive in future cases whenever this issue should arise. If Justice Kelly's view is adopted, it would appear that the court would be required to draw the appropriate adverse inference against the defendant when deciding that defendant's motion for summary judgment.

For a complete copy of the Michigan Supreme Court's order in *Banks v Exxon Mobil Corporation*, --- N.W.2d ---, 2006 WL 3883464 (Mich.), click [here](#).