[Cite as *Beck v. Camden Place at Tuttle Crossing*, 2004-Ohio-2989.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Charles Beck et al.,	:	
Plaintiffs-Appellants,	:	
		No. 02AP-1370
v.	:	(C.P.C. No. 01CVC04-3580)
Camden Place at Tuttle Crossing,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

O P I N I O N

Rendered on June 10, 2004

Mitchell, Allen, Catalano & Boda Co., L.P.A., William Mann and *Daniel K. Boda*, for appellants.

James E. Featherstone, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

WATSON, J.

{¶1} Plaintiffs-appellants, Charles and Jane Beck (hereinafter collectively "appellants"), appeal from the decision and judgment directing a verdict in favor of defendant-appellee, Camden Place at Tuttle Crossing (hereinafter "Camden Place" or "appellee"). For the reasons which follow, we reverse the judgment of the trial court.

{¶2} On April 19, 1997, Charles Beck accompanied his daughter Tracy Mellis to Camden Place to assist her in finding an apartment. Upon arriving, they entered the clubhouse-leasing office (hereinafter "office") and spoke with leasing agent, Shannon

Rigo. Ms. Rigo offered to show Mr. Beck and Ms. Mellis an actual apartment. Accordingly, the group left the office and proceeded toward the apartment they were going to view.

{¶3} As they left the office, at Ms. Rigo's suggestion the group turned left along the sidewalk, then cut across the grass to the left of the office's front door. Proceeding on, they walked three abreast with Ms. Rigo on the left, Ms. Mellis in the middle and Mr. Beck on the right.

{¶4} As the group approached the curb and driveway Mr. Beck took another step on the grassy area adjacent to the curb. At that time, a slippery, unknown substance oozed up from under the grassy area, causing Mr. Beck to fall.

{¶5} After he fell, the unknown substance surrounded Mr. Beck, occupying a three foot square area. Ms. Mellis stated the substance continued to seep up from the ground as her father was sitting in it. Prior to Mr. Beck's fall, none of the three individuals saw the unknown substance in the grass.

{¶6} Mr. Beck suffered a broken ankle and torn ligaments as a result of the fall.

{¶7} On October 21, 2002, a jury trial in this matter commenced in the Franklin County Court of Common Pleas. At the conclusion of appellants' opening statement, appellee moved the trial court for a directed verdict. The trial court took appellee's motion under advisement while appellants proceeded to put on their case-in-chief. When appellants concluded their case-in-chief, the trial court granted appellee's motion for directed verdict. The trial court filed a judgment entry on November 13, 2002.

{¶8} Appellants timely appeal and assert the following assignment of error:

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DIRECTING A VERDICT FOR THE DEFENDANT WHEN THE RECORD CONTAINED EVIDENCE FROM WHICH

> REASONABLE, FAIR MINDED JURORS, COULD REACH A VERDICT FOR THE PLAINTIFFS.

{¶9} Civ.R. 50(A)(4) sets forth the standard for a directed verdict:

> * * * When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

{¶10} In ruling on a motion for a directed verdict, a trial court is required to construe the evidence most strongly in favor of the nonmovant. Civ.R. 50(A)(4); *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284. The motion must be denied where there is substantial evidence to support the nonmoving party's case and reasonable minds may reach different conclusions. *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275. The weight of the evidence and the credibility of the witnesses is not for the trial court's determination in ruling upon the motion. Id. Instead, a motion for directed verdict tests whether the evidence presented is legally sufficient to take the case to the jury. *Wagner v. Midwestern Indemn. Co.* (1998), 83 Ohio St.3d 287, 294.

{¶11} The first argument asserted by appellants is the trial court committed reversible error in holding appellants had the burden of proving the identity of the unknown substance which caused Mr. Beck's fall.

{¶12} "To establish negligence in a slip and fall case, it is incumbent upon the plaintiff to identify or explain the reason for the fall." *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 67-68, citing *Cleveland Athletic Assn. Co. v. Bending* (1934), 129 Ohio St. 152. As such, a plaintiff will be prevented from establishing negligence when he, either personally or with the use of outside witnesses, is unable to identify what

caused the fall. *Stamper*, at 68. In other words, a plaintiff must know what caused him to slip and fall. A plaintiff cannot speculate as to what caused the fall. However, while a plaintiff must identify the cause of the fall, he does not have to know, for example, the oily substance on the ground is motor oil. Instead, it is sufficient that the plaintiff knows the oily substance is what caused his fall. See *Christovich v. Gund Realty* (Apr. 4, 1996), Cuyahoga App. No. 69530.

{¶13} At trial, Mr. Beck testified he stepped in something and his feet began to slide and he lost his balance. After landing, he noticed he was sitting in a foreign substance that continued to ooze up from the ground when he pushed his hands into the ground attempting to get up.

{¶14} Contrary to the trial court's holding, appellants were not legally required to prove the identity of the unknown substance. Instead, appellants were required to identify that the cause of Mr. Beck's fall was the unknown substance. Construing the evidence most strongly in appellants' favor, appellant presented evidence regarding the cause of his fall which was legally sufficient to permit the case to go to the jury.

{¶15} Appellants assert the trial court erred in concluding the unknown substance was open and obvious to Mr. Beck. Appellee concedes the unknown substance was not open and obvious.[1]

{¶16} The testimony presented by appellants supports the conclusion the unknown substance was not open and obvious. Ms. Mellis testified she did not notice anything in the grass prior to her father falling. Similarly, appellee's agent, Ms. Rigo, did

[1]While appellee concedes the trial court erred in holding the unknown substance was open and obvious, appellee contends it was not the basis for the trial court's decision. Instead, the trial court granted the directed verdict based upon constructive notice.

not observe the unknown substance as they were walking across the yard. Likewise, Mr. Beck did not notice anything unusual as he was walking in the grass.

{¶17} As argued by appellants and conceded by appellee, construing the appellants' evidence most strongly in appellants' favor, leads to the finding that the unknown substance was a latent defect, not an open and obvious hazard, and therefore, the evidence was legally sufficient to permit the case to go to the jury.

{¶18} Appellants' final two arguments are interrelated and will be addressed together. Appellants contend appellee negligently inspected the premises and as a result appellee had constructive notice of the latent defect, the unknown substance.

{¶19} To prevail upon a claim of negligence, appellants are required to prove by a preponderance of the evidence defendant owed Mr. Beck a duty of care, it breached that duty, and the breach proximately caused his injuries. "Under the law of negligence, a defendant's duty to a plaintiff depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position." *Simmers v. Bentley Constr. Co.* (1992), 64 Ohio St.3d 642, 645. The existence of a duty is a question of law. However, the breach of the duty is a question of fact. The specific acts necessary to fulfill the duty imposed as well as the inferences and conclusions to be drawn from the evidence are ordinarily questions for the trier of fact. *Tarkany v. Bd. of Trustees of Ohio State Univ.* (June 4, 1991), Franklin App. No. 90AP-1398.

{¶20} The parties agree that Mr. Beck was a business invitee of Camden Place. Therefore, appellee owed him a duty of ordinary care to maintain the premises in a reasonably safe condition so Mr. Beck was not unnecessarily and unreasonably exposed to danger. *Paschal v. Rite Aid Pharmacy, Inc.* (1985), 18 Ohio St.3d 203. While a business owner is not an insurer of a customer's safety, *Paschal*, an owner, is "liable to

an invitee for injuries caused by a latent defect when the owner knows, or in the exercise of ordinary care should have known, about the hazard for a time sufficient to correct the defect." *Tarkany*, supra, citing Presley *v. Norwood* (1973), 36 Ohio St.2d 29, 31; see, also, Restatement of the Law 2d, Torts (1965) 215, Section 343.

{¶21} The duty of ordinary care includes the duties to warn and inspect. An owner must warn of latent defects of which the owner is aware. *Perry v. Eastgreen Realty Co.* (1978), 53 Ohio St.2d 51, 52. Also, the owner must conduct inspections of the premises to discover possible dangerous conditions of which he is unaware. Id. An owner is charged with constructive knowledge of defects which would have been revealed by a reasonable inspection of the premises. *State Farm Mut. Auto. Ins. Co. v. Chatham Dev. Corp.* (June 6, 1995), Franklin App. No. 94APE08-1243. "What is reasonable under the circumstances of a given case is ordinarily a question for the trier of fact." *Tarkany,* supra.

{¶22} Three cases offer guidance as to what evidence appellants must introduce to establish a claim of negligent inspection. In *Collins v. Emro Marketing Co.* (May 11, 1999), Franklin App. No. 98AP-1014, Michael Collins was attempting to get on his bicycle when his foot slipped on an oily substance on the ground in front of the handicapped ramp located on the premises of a Bonded gas station. The trial court granted summary judgment to Emro. The relevant issue in *Collins* was whether a genuine issue of material fact existed as to whether Emro had constructive notice of the oily substance. In concluding a genuine issue of material fact existed, the *Collins* court stated:

> Although there was little direct evidence as to how long the oil had been on the ground, * * * this court must ascertain whether or not a reasonable trier of fact could find that [Emro] failed to conduct a reasonable inspection, and whether or not [Emro is] deemed to have constructive knowledge of the oil

> accumulation and therefore had a duty to warn [Collins] of the existence of the oily substance on the ground.

{¶23} After reviewing the evidence of Emro's inspection procedure, the *Collins* court concluded:

> Given the testimony and evidence in this case, and construing it in favor of [Collins], we find that a reasonable trier of fact could conclude that the accumulation was a latent defect that [Emro] should have known about. Therefore, there remains a genuine issue of material fact as to whether their failure to warn [Collins] constituted a breach of duty. For this reason, we find that the trial court's granting of summary judgment was improper insofar as reasonable minds could conclude that [Emro] could be charged with constructive knowledge of the oil accumulation and a corresponding duty to warn. * * *

Id. at 18.

{¶24} In its analysis of the duty to inspect, the *Collins* court did not focus on what evidence Mr. Collins presented demonstrating the length of time the substance was present prior to his fall. Instead, upon concluding the oily substance was a latent defect, its analysis was centered on whether Emro was charged with constructive knowledge because it failed to reasonably inspect and, relatedly, failed to warn.

{¶25} In *State Farm*, supra, L.B. Trucking Co., Inc. (hereinafter "LBT"), was delivering stone to a property being developed by Chatham. LBT drove over a hidden septic tank and sustained damage to its truck. It was undisputed Chatham did not have actual knowledge of the septic tank. Instead, the issue was whether or not Chatham reasonably inspected the premises and whether or not they had constructive knowledge of the septic tank. The *Chatham* court concluded:

> * * * [A]n owner owes the duty to warn of any latent defects of which he knows or should have known. Thus, a reasonable trier of fact could conclude that the septic tank was a latent defect that Chatham should have known about and, therefore, its failure to warn LBT constitutes a breach of duty. For this reason, this court finds that the trial court's granting of

> summary judgment was improper insofar as reasonable minds could conclude that Chatham's inspection was not reasonable and that Chatham could be charged with constructive knowledge of the septic tank and a corresponding duty to warn.

Id. at 11.

{¶26} Again, in determining whether Chatham knew or should have known about the septic tank, the *Chatham* court's analysis is devoid of any discussion of how long the septic tank was on the property. Instead, as the septic tank was a latent defect, the *Chatham* court's decision focused on whether Chatham was charged with constructive knowledge of the septic tank by failing to comply with its duties to inspect and warn.

{¶27} The final case in support is *Tarkany*, supra. In *Tarkany*, Christopher Tarkany was walking to his dormitory when the light fixture atop a light pole fell and struck him on the head. An examination of the fixture revealed the bracket which held the fixture to the pole was fractured and had weakened progressively over a period of time. Testimony from defendant's director of maintenance and engineering (hereinafter "director") revealed a policy of visual inspection of the fixtures. However, the director stated the visual inspection would not have revealed the defect as the bracket could only be inspected by disassembling the fixture. In affirming the trial court's judgment in favor of defendant, the *Tarkany* court's analysis focused on defendant's duty to inspect:

> Defendant has a duty to conduct reasonable inspections to uncover hidden dangers on its premises. Should defendant fail to use ordinary care and conduct reasonable inspections, defendant will be charged with constructive knowledge of any latent defect which would have been discovered had a reasonable inspection been conducted. The uncontroverted evidence indicates that the defective bracket which caused the fixture to fall from the pole could only have been discovered by dismantling the fixture. * * * Defendant has a duty to undertake reasonable inspections, not to inspect everything that might conceivably cause injury. * * * Under these circumstances, a rational trier of fact could conclude

> that a routine visual inspection was all that ordinary care required and that defendant did not breach its duty to conduct reasonable inspections by failing to dismantle and inspect some five thousand lighting fixtures when there was no other indication that they were defective.

Id. at 5-6.

{¶28} As with *Collins* and *Chatham*, where a party alleges harm arising from a latent defect, the appropriate inquiry focuses on whether a reasonable inspection would have revealed the defect. If the trier of fact determines the defect would have been revealed by a reasonable inspection of the premise, the owner is charged with constructive knowledge of said defect. Accordingly, there is no need to present evidence as to how long the defect was present, as would be the case in a non-latent defect slip and fall. To the contrary, to require evidence of how long a latent defect was present emasculates the well-established principle of constructive notice. Thus, in this matter, if the trier of fact concludes the defect would have been revealed by a reasonable inspection, and appellee did not conduct a reasonable inspection, constructive knowledge of the defect is conferred upon appellee.

{¶29} As stated earlier, appellee owes Mr. Beck a duty of ordinary care, which imposes upon appellee the duty to warn and inspect. In pursuing a theory of liability against appellee for breaching its duty to inspect, appellants are required to present sufficient evidence of whether or not appellee reasonably inspected the premises. At trial, appellants presented the testimony of Pamela Stafford, Community Manager, as evidence of the inspection procedures at Camden Place:

> Q. [Plaintiffs' counsel]: And you inspected the Camden Place premises everyday by driving around the property, right?
>
> A. [Ms. Stafford]: Yes.

Q. And the procedure you utilized with regard to your drive-around inspections was you would drive around and eyeball the property and then go back to the leasing office, correct?

A. Yes.

Q. And your drive-around inspections were also started at the leasing office, right?

A. Correct.

* * *

Q. About one time a week you would do a more detailed inspection of individual sections of the property, correct?

A. Correct.

Q. You would inspect, among other things, a section of the property where the clubhouse and office is, correct?

A. Correct.

Q. And your detailed property inspections would involve just walking around the buildings looking at the drain spouts, checking the flashings type things, checking building things, correct?

A. Correct.

* * *

Q. Other than the people who worked, were employed at Camden Place, nobody had any responsibility to inspect the Camden Place premises, correct?

A. Yes.

Q. And you don't remember how many, if any, detailed inspections you made to the clubhouse area in the 30 days before April 19 of '99, the day Mr. Beck was hurt, correct?

A. Correct.

Q. And you don't remember how many, if any, detailed inspections of the clubhouse section you did in the week before Mr. Beck was hurt?

A. Correct.

(Tr. 80-82.)

{¶30} As stated previously, whether appellee conducted a reasonable inspection is a question for determination by the trier of fact. Accordingly, construing the evidence most strongly in appellants' favor, under the circumstances of this case, appellants presented sufficient evidence regarding appellee's inspection procedure to permit the issue to be determined by the trier of fact. Thus, the granting of a directed verdict by the trial court was error. The issue of whether appellee is charged with constructive knowledge of the defect cannot be resolved until a determination is made as to whether appellee's inspection procedure was reasonable. To again quote from *Tarkany*, "[s]hould defendant fail to use ordinary care and conduct reasonable inspections, defendant will be charged with constructive knowledge of any latent defect which would have been discovered had a reasonable inspection been conducted." Id. at 5.

{¶31} Accordingly, appellants' assignment of error is hereby sustained, and the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with this opinion.

Judgment reversed

and cause remanded.

BRYANT, J., concurs.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶32} I respectfully dissent from the majority's viewpoint regarding the issue of constructive notice. Because I believe that appellant failed to adduce sufficient proof of appellee's negligence, I would affirm the trial court's directed verdict. To have allowed

this case to go forward would have invited, and indeed would have *required*, a jury verdict based upon speculation.

{¶33} In 1950, the Supreme Court of Ohio set forth several principles regarding causation in negligence cases, which principles remain binding upon this court today, and are particularly useful in analyzing the issues in this case. In *Gedra v. Dallmer Co.* (1950), 153 Ohio St. 258, 91 N.E.2d 256, the court held:

> In a negligence action, it is not sufficient for plaintiff to prove that the negligence of defendant *might* have caused an injury to plaintiff but, if the injury complained of might well have resulted from any one of several causes, it is incumbent upon plaintiff to produce evidence which will exclude the effectiveness of those causes for which defendant is not legally responsible.
>
> In such an action, *if the cause of an injury to a plaintiff may be as reasonably attributed to an act for which defendant is not liable as to one for which he is liable, the plaintiff has not sustained the burden of showing that his injury is a proximate result of the negligence of the defendant*.

Id. at paragraphs two and three of the syllabus. (Emphasis added.)

{¶34} In *Westinghouse Electric Corp. v. Dolly Madison Leasing & Furniture Co.* (1975), 42 Ohio St.2d 122, 326 N.E.2d 651, the court explained that, "[t]he logic of [*Gedra* and its progeny] is that a jury verdict may not be based upon mere speculation or conjecture." Id. at 126. The court in *Westinghouse* went on to explain:

> Where there is a failure to warrant an inference of negligence, the rule in *Gedra* applies. That rule merely states the logical principle that where several reasonable explanations of an event are possible, the disproof of all but one necessarily acts as the proof of that one, and there are cases where this method of proof is the only way in which plaintiff can make his case. The rule does not intrude on the jury's role as the finder of facts, nor does it impose on a plaintiff the burden of always effectively eliminating all other possible causes in order to make his case, which would impose a burden of proof analogous to the burden in criminal cases of proof beyond a reasonable doubt. Rather, the rule holds that *where the facts*

> *from which an inference of probable proximate cause must be drawn are such that it is as reasonable to infer other causes, plaintiff has failed to supply proof of probable cause*. *Where plaintiff has only presented proof that the actual cause was one of a number of possibilities, to enable an inference to be drawn that any particular cause is probable, the other causes must be eliminated*.

Id. at 127. (Emphasis added.)

{¶35} Consistent with the express requirement that the trier of fact in a negligence case be presented with proof sufficient to link the defendant's breach with the *actual cause* of the plaintiff's injury, the Supreme Court of Ohio, in *Johnson v. Wagner Provision Co.* (1943), 141 Ohio St. 584, 589, 49 N.E.2d 925, established the following requirements with respect to proof in cases involving slips and falls on foreign substances:

> To be entitled to recover in cases of [a slip and fall on a foreign substance], it is necessary for a plaintiff to show:
>
> 1. That the defendant through its officers or employees was responsible for the hazard complained of; or
>
> 2. That at least one of such persons had actual knowledge of the hazard and neglected to give adequate notice of its presence or remove it promptly; or
>
> 3. *That such danger had existed for a sufficient length of time reasonably to justify the inference that the failure to warn against it or remove it was attributable to a want of ordinary care*.

(Emphasis added.) See, also, *Anaple v. The Standard Oil Co.* (1955), 162 Ohio St. 537, 124 N.E.2d 128, paragraph one of the syllabus; *Presley v. Norwood* (1973), 36 Ohio St.2d 29, 31, 303 N.E.2d 81.

{¶36} This court has consistently adhered to the principle that a plaintiff in a slip-and-fall case involving a foreign substance bears the burden of proof that the hazard existed for a length of time sufficient to reasonably put the premises owner on notice of

the hazard in time to warn the plaintiff of it or to remove it.[2] This court most recently adhered to this principle in the case of *Dodson v. The Ohio State Univ. Med. Ctr.*, Franklin App. No. 03AP-54, 2003-Ohio-4410.

{¶37} In *Dodson*, the plaintiff was injured when she slipped on coffee spilled in the hallway of a hospital building while visiting a patient. After a bench trial, the trial court rendered a defense verdict, and specifically found that the plaintiff had failed to prove, by a preponderance of the evidence, that the coffee spill had been on the floor for a length of time sufficient to justify the inference of negligence on the part of the hospital. The plaintiff appealed, asserting the judgment was against the manifest weight of the evidence.

{¶38} In *Dodson*, the plaintiff submitted more circumstantial evidence of the length of time the coffee had been on the floor than appellant herein has presented with respect to the oozing substance upon which he fell. The plaintiff in *Dodson* also introduced evidence of the frequency and character of inspections of the hallways conducted by hospital personnel. On appeal, the plaintiff argued that the trial court erred in not giving more weight to this evidence.

{¶39} In affirming the trial court's judgment, a unanimous panel of this court discussed the importance of length-of-time evidence in establishing negligence in slip-and-fall cases involving foreign substances, and the relatively subordinate role played by inspection-related evidence, particularly with respect to proof of causation:

> Because the case at hand is a slip-and-fall case and plaintiff was on defendant's premises as a business invitee, this case

[2]See, e.g., *Barker v. Wal-Mart Stores, Inc.* (Dec. 31, 2001), Franklin App. No. 01AP-658; *Cooper v. Red Roof Inns, Inc.* (Mar. 30, 2001), Franklin App. No. 00AP-876; *Wilson v. The Kroger Co.* (Dec. 21, 1999), Franklin App. No. 99AP-469; *Dickerson v. Food World* (Dec. 17, 1998), Franklin App. No. 98AP-287; *Gilbert v. The Kroger Co.* (Dec. 19, 1996), Franklin App. No. 96APE03-374; and *Mackin v. Wendy's International, Inc.* (Mar. 2, 1989), Franklin App. No. 88AP-1031. See, also, *Sweet v. Big Bear Stores Co.* (1952), 158 Ohio St. 256.

> falls within the ambit of *Wagner Provision Co*. In this case, no evidence was presented at trial that would indicate OSUMC either created the hazard or had actual knowledge of the hazard. Accordingly, *the core issue at trial was whether the coffee was on the floor for a sufficient length of time to justify the inference that the failure to warn against the hazard or remove it was attributable to any want of ordinary care*. Essentially, this requires plaintiff to prove that OSUMC breached its duty to her.
>
> *The frequency of rounds formally performed by OSUMC security is not directly relevant to whether OSUMC was on constructive notice of the hazard. Whether or not this practice is reasonable is not relevant to whether the hazard existed for a sufficient period of time to impute constructive knowledge to OSUMC*. * * * Performing formal rounds every four hours may not be reasonable, but that finding, in itself, would not necessarily impute constructive knowledge of a hazard that may have existed for ten to fifteen minutes.

Id. at ¶¶8-9. (Emphasis added.) In other words, there must be sufficient evidence from which the trier of fact may reasonably find a causal link between any unreasonableness of the premises owner respecting the inspection process, and the existence of the hazard that injured the plaintiff. As noted in *Dodson*, the core issue in determining whether this causal link exists is the length of time that the hazard existed prior to the plaintiff's encounter with it.

{¶40} Contrary to the rationale in *Dodson* and the well-established line of cases to which it belongs, the majority holds that evidence establishing that an inspection was not conducted within a particular period of time prior to an accident may warrant an inference that the hazardous condition existed long enough such that a person exercising reasonable care would have discovered it. Put another way, the majority holds that a premises owner's unreasonableness in discharging its duty to inspect may serve as circumstantial evidence that a dangerous condition existed for an unreasonable period of time.

{¶41} This holding essentially requires the "unreasonable" premises owner to prove that its unreasonableness is *not* the actual cause of the plaintiff's injury; congruently; it relieves plaintiffs of the customary burden of proving that the premises owner's unreasonableness *is in fact the cause* of the injury, as opposed to one of several possible causes. In my view, this departs from traditional tort concepts of burdens of proof, and the justifications for, and limits upon, the imposition of liability for negligence. It also presents a serious risk of speculative verdicts, which may pronounce truths bearing little or no resemblance to the events that actually transpired. At its essence, the majority's holding allows imposition of liability without proof of causation.

{¶42} Moreover, to impose what is essentially strict liability upon an unreasonable premises owner for all injuries that occur on the premises, whether or not they are proven to be causally related to the owner's failure to reasonably inspect, is to make business owners insurers of a customer's safety. The Supreme Court of Ohio has held that a business owner *is not* an insurer of customers' safety. *Paschal v. Rite Aid Pharmacy*, Inc. (1985), 18 Ohio St.3d 203, 480 N.E.2d 474. But this is precisely the effect of the majority's decision today. It imposes strict liability on the mere contention that the premises owner "should have known" of the dangerous condition.

{¶43} For support of its holding, the majority relies upon the cases of *State Farm Mut. Automobile Ins. Co. v. Chatham Dev. Corp.* (June 6, 1995), Franklin App. No. 94APE08-1243, *Tarkany v. Bd. of Trustees of Ohio State Univ.* (June 4, 1991), Franklin App. No. 90AP-1398, and *Collins v. Emro Marketing Co.* (May 11, 1999), Franklin App. No. 98AP-1014. Its reliance on these cases is based primarily on the fact that those cases did not discuss length-of-time evidence. However, facts rendering each of those cases distinguishable from the present case obviated the need for such discussions.

{¶44} *State Farm* involved property damage not occasioned by a foreign substance, whose presence on any business premises is typically short-lived and unexpected. Rather, the damage was caused by an underground septic tank whose existence on the premises was of a permanent, structural nature. Further, the tank's presence was indicated in construction drawings, a historical survey and a storm sewer survey in the possession of the premises owner. Thus, the owner in *State Farm* had *actual knowledge* of the permanent defect.

{¶45} In *Tarkany*, the court affirmed the judgment in favor of the premises owner because the evidence revealed that the latent defect in question could not have been discovered by a reasonable inspection. Because even a reasonable inspection would not have conferred actual knowledge upon the premises owner *no matter how much time had passed since the latent defect manifested itself*, it was unnecessary for the court to engage in a discussion of length-of-time evidence. This does not mean that length-of-time evidence is never required in premises liability cases.

{¶46} Finally, in *Collins*, this court applied a narrow exception to the general requirement that a plaintiff prove actual or constructive notice of the latent defect. The exception derives from the notion that if a specific, unsafe condition is foreseeably inherent in the nature of the business or mode of operation thereof – that is, it is an ongoing and intrinsic risk – then the plaintiff can establish liability by showing that the operator of the premises failed to conduct periodic inspections with the frequency required by the foreseeability of the risk. It is the very nature of the use to which the premises is put that confers notice upon the owner that the defect is likely to exist.[3] I find

[3]In *Collins*, the court's conclusion that the gas station owner had constructive notice of the oil spill, notwithstanding the lack of length-of-time evidence, was based upon the fact that station managers testified that they knew that customers' cars leaked oil onto the premises, and they knew that oil was frequently

the analysis in *Collins* to be inapplicable to the present case. The record herein contains no evidence that the defect involved in appellant's injury was foreseeably inherent in the nature of the operation of an apartment complex.

{¶47} If one assumes, for the sake of argument, that a daily walk over the grassy area where appellant fell would be considered a reasonable inspection procedure, then the holding of the majority would allow the imposition of liability upon appellee for not conducting such a daily walk even if, in actuality, the substance upon which appellant fell had been deposited by an unknown third party a mere two hours, or twenty minutes, or even two minutes prior to the moment appellant began his journey across the area. This result would impose liability where a "reasonable inspection" would not have revealed the existence of the hazard in time to save appellant from injury by removing or warning of it. It would allow a finding of negligence where no causation had been established.

{¶48} In ruling upon appellee's motion for a directed verdict, the trial court was required to determine if appellant had presented evidence as to whether the foreign substance involved in this case was capable of being revealed by a reasonable inspection. This is a crucial question that must be answered by the evidence (or by inferences that can be reasonably drawn therefrom) whenever the duty to inspect is applied to find constructive notice of a hazard. See, e.g., *Shetina v. Ohio Univ.* (1983), 9 Ohio App.3d 240, 459 N.E.2d 587, *Nice v. Meridia Hillcrest Hosp.* (Aug. 2, 2001), Cuyahoga App. No. 79384.

---

spilled on the premises by customers adding oil to their vehicles. One manager testified that he considered oil spills to be potentially dangerous conditions when they were in the areas frequented by customers, because of the danger of a customer slipping and falling, and also due to environmental dangers posed by the spills. "However, even with this knowledge of the propensity of the oil to be spilled on the lot and knowledge of the dangers of such spills, [management] testified that there was no regular inspection program for checking the lot for spilled or leaked oil." *Collins*, 1999 Ohio App. LEXIS 2185, at *17.

{¶49} "[A] [d]efendant has a duty to undertake reasonable inspections, not to inspect everything that might conceivably cause injury. What is reasonable under the circumstances of a given case is ordinarily a question for the trier of fact." *Tarkany*, supra, 1991 Ohio App. LEXIS 2648, at *5-6, citing *Gibbs v. Village of Girard* (1913), 88 Ohio St. 34, 102 N.E. 299, paragraph four of the syllabus. In other words, liability will be imposed upon an owner who fails to make reasonable inspections only if such inspections would have revealed the defect. As this court held in *Shetina*, a "defendant should be charged with constructive knowledge of the latent defect * * * [only when] *actual knowledge would have been acquired if reasonable inspection had been made*." *Shetina*, supra, at 241. (Emphasis added.)

{¶50} In my view, appellant failed to present evidence that could have been utilized by the jury in deciding whether the oozing substance would have been revealed by a reasonable inspection, regardless of the duration of its presence on the grassy area where appellant fell. Appellant testified that he did not notice the substance until after he fell, when he saw it clinging to his clothing, and the weight of his body caused it to seep up from the ground. Appellant's daughter and appellee's leasing agent were walking alongside appellant. Appellant's daughter testified that she did not see the substance or otherwise know it was there in advance of appellant's fall. There was no evidence presented to show whether the substance had been deposited on the surface of the grass and had migrated into the ground, or was already present underground and had seeped up to the surface at some point in time.

{¶51} This evidence is insufficient to demonstrate the existence of a genuine issue of fact as to whether the defect would have been revealed by a reasonable inspection of the premises. Thus, constructive knowledge should not be imputed to the

defendant. Regardless of evidence of any actual inspection policy or compliance or non-compliance therewith, the evidence must support the inference that *any* reasonable inspection would have revealed the existence of the latent defect. See *Shetina*, supra. In a case such as the one at bar, where there is no evidence that the premises owner created the hazard, and no evidence that the owner had actual knowledge thereof, whether even the most keen inspection procedures would have revealed the existence of the hazard in time to save the customer from his injuries is crucial to proving constructive notice. This requirement cannot be ignored, even where the evidence suggests the owner acted unreasonably.

{¶52} Even if the evidence supports the conclusion that the substance was capable of being detected by a reasonable inspection, the fact remains that appellant presented no direct or circumstantial evidence showing how long the substance had been present on the premises. I am not persuaded that a jury could decide whether appellee's "unreasonableness" in discharging its duty to inspect is causally linked to appellant's injuries, without relying on speculation or imposing strict liability.

{¶53} "The court * * * may direct * * * a verdict for the defendant if * * * the evidence fails to show * * * anything from which * * * negligence can reasonably be inferred; or if the evidence on the issue of negligence is merely speculative * * *." 70 Ohio Jurisprudence 3d 427-428, Negligence, Section 222. In this case, appellant failed to carry his burden of proof with respect to causation because he presented no evidence – direct or circumstantial – that warrants an inference that the hazard that caused his injuries existed on the premises for a length of time such that the failure to remove it or warn of it is attributable to a want of ordinary care on the part of appellee.

{¶54} Accordingly, for all of the foregoing reasons, I respectfully dissent from the majority's discussion of constructive notice in paragraphs 18 through 30. I would affirm the trial court's grant of a directed verdict in favor of appellee, and the judgment entered thereon. Because the majority concludes that reversal and a new trial are appropriate, I respectfully dissent.