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Personal Injury

Store Owners Face Difficult Defense

Getting slip and fall dismissed at summary judgment is nearly impossible

By Alan R. Levy

The state of New Jersey is well known for its retail malls, shopping centers and outlet stores. With so many of these self-service retail establishments to choose from, it is no wonder that customers will invariably be involved in slip and fall accidents while shopping. Anyone who has shopped in a typical retail establishment such as a grocery store, supermarket or clothing boutique is fully aware of the fact that merchandise, ranging from food to clothing, can fall off shelves and land on the ground, thus creating potential slip/fall hazards. When a patron does suffer an injury as a result of this scenario, it often leads to litigation.

In New Jersey, it had been well settled law for nearly a century that a plaintiff who alleged injury resulting from a hazardous condition in a self-service commercial establishment was required to prove that the defendant store owner had either actual or constructive notice of the dangerous condition. Specifically, in 1911, the Court of Errors and Appeals held in order for a plaintiff to succeed against a defendant, they must prove that the dangerous condition had "in fact, been brought to the notice of the storekeeper before the accident" or "existed for such a length of time as to charge the storekeeper with notice thereof." *Schnatterer v. Bamberger*, 81 N.J.L. 558 (E. & A. 1911).

The law of notice held that if an item of merchandise had just fallen off of a shelf a few moments before a plaintiff had tripped over it, a storekeeper could not be held liable; not enough time had passed before defendant could have been placed on notice of the hazardous condition.

In the 1960s, the courts began to ease plaintiffs' burden of proof and carved out exceptions to the actual/constructive notice rule. One of the earliest exceptions was the holding that a plaintiff was not obligated to prove actual/constructive notice in situations where the alleged dangerous condition was created by the store owner. See *Torda v. Grand Union Co*., 59 N.J. Super. 41 (App. Div. 1959).

In *Bozza v. Vornado, Inc*. 42 N.J. 355 (1964), the Supreme Court went even further; and held that a plaintiff merely had to show circumstances that created a "reasonable probability" that a dangerous condition would occur. In expanding plaintiffs' rights, it appeared the high court was aware that the *Bozza* decision would be met with criticism that they were now placing store owners in the position of insurers of onsite accident. As a result, the court stated that once a plaintiff successfully submitted evidence of reasonable probability of a dangerous condition, a defendant store owner could negate that inference by submitting evidence that they engaged in due care to monitor and remedy any potential dangerous conditions. The court noted that this shifting of burden ensured that "it could not be said that this rule makes the proprietor an insurer." Clearly, store owners and their insurers would disagree.

Within two years, matters would get far more difficult for store owners. In *Wollerman v. Grand Union Stores, Inc*., 47 N.J. 426 (1966), the Supreme Court formally adopted the "mode of operation" rule. In *Wollerman*, plaintiff was shopping in a grocery store when she allegedly slipped on a string bean found on the floor of the store's vegetable section. Plaintiff was unable to show how the string bean fell to the ground or how long it was on the ground. Under the older "notice" rule, plaintiff would be unable to prove that defendant had actual or constructive notice of the dangerous condition. As a result, the trial court dismissed plaintiff's cause of action, which was affirmed by the Appellate Division. The Supreme Court reversed and laid out the standard of care that exists to this day:

> [Defendant] must do what is reasonably necessary to protect the customer from the risk of injury that mode of operation is likely to generate; and

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> this whether the risk arises from the act of his employee or of someone else he invites to the premises.

No longer did plaintiffs have to prove that the defendant store owner had actual or constructive notice of the dangerous condition. Further, plaintiffs were no longer required to prove that defendant's conduct created the dangerous condition. It was now sufficient for plaintiff to show that the defendant's "mode of operation," i.e., the day-to-day operations, could likely create a dangerous condition. Interestingly, the analysis laid out by the court no longer centered on how long the particular hazard was in existence, or even whether the hazard existed at all. The only thing that mattered now was whether the establishment's operations could have generated the hazard plaintiff claimed was in existence at the time of the incident. Essentially, lack of notice was no longer a valid defense. Rather, a storekeeper was now obligated to show that they had an appropriate system of due care in place.

Over the past 10 years, the practical impact of the "mode of operation" rule has been dramatically clear. While defendants may have a viable defense at trial before a jury, their ability to succeed at the summary judgment or directed verdict stage is essentially nonexistent. See *Nisivoccia v. Glass Gardens, Inc*., 175 N.J. 559 (2003); *Ryder v. Ocean County Mall*, 340 N.J. Super. 504 (App. Div. 2001); *Craggan v. IKEA USA*, 332 N.J. Super. 53 (App. Div. 2000); *O'Shea v. K Mart Corp*., 304 N.J. Super. 489 (App. Div. 1997).

In each of these case, the lower courts dismissed claims against retail store owners who claimed that plaintiffs had failed to prove their case. In many of the cases, the lower court judges were still requiring that plaintiffs prove actual/constructive notice. Nevertheless, in each appeal, the appellate court reversed and reiterated the impact of the "mode of operation" rule. It would appear that under the existing law, plaintiffs may benefit from what is tantamount to immunity against summary judgment dismissals, and they may get a free shot at a jury. So long as the plaintiff alleges the dangerous condition consisted of a product sold in that particular establishment, they can prove the risk of a hazardous condition.

So, what is a store owner to do if they can never succeed at the summary judgment or directed verdict stage? Certainly, a defendant can present evidence at trial to show that they took all necessary precautions and acted reasonably. Hence a store owner can offer testimony that indicates they conducted regular patrols and safety inspections for fallen merchandise or other potential hazards. Supposedly, a jury can weigh the defendant's policy and determine that defendant's actions were reasonable under the circumstances. However, store owners would contend that under this scenario, the ultimate burden of proving negligence has shifted away from plaintiffs to defendant store owners, who are now forced to prove their store was safe and they acted reasonably.

Store owner defendants may find some support in two recent unpublished decisions in which defendants were granted summary judgment. See *Guzman v. K-Mart Corp*., 2002 WL 1012873 (App. Div. 2002) and *DiMatties v. Incollingo's Market, Inc*., 2005 WL 1801844 (App. Div. 2005). In *Guzman*, plaintiff alleged that she slipped in a K-Mart bathroom on water that came from either the sink or toilet. Plaintiff contended that she was entitled to a "mode of operation" inference. The lower court disagreed and held that the plaintiff was required to prove notice. The Appellate Division affirmed.

In *DiMatties*, again, the lower court granted summary judgment, which was upheld by the Appellate Division. In this case, the court analyzed the "mode of operation" rule a little more closely. Plaintiff claimed to have slipped at a supermarket on liquid detergent that had leaked onto the floor from a display case. Interestingly, the appeals court held that plaintiff presented facts that supported the inference that one of defendant's employees created the hazardous condition. The scenario was that an employee "nicked" the detergent's plastic container with a knife while removing the container from a cardboard carton to be displayed. Despite this factual finding, the court determined that plaintiff was not entitled to a "mode of operation" inference since plaintiff's factual theory was only one possible scenario. Further, plaintiff failed to prove that it was reasonably probable that a hazardous condition would occur by the manner in which defendant removed containers and displayed the detergent.

It is interesting to note that the only two pro-defendant "mode of operation" cases happen to be unpublished. Furthermore, it is also ironic that trial judges continue to apply the actual/constructive notice rule rather than the "mode of operation" rule. Nevertheless, if the trend of published appellate decisions continues, retail store owners will have little legal ammunition for their defense other than to prepare for trial. ■