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Civil Practice

You'd Better Watch Your Step

Premises liability defendants are having a banner year in Pennsylvania courts

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This year is proving to be a banner year for premises liability defendants in terms as various courts across Pennsylvania have handed down defense-favorable decisions.

While it is generally recognized that business owners owe the highest duty of care to business invitees to keep the premises free from hazards that could lead to injuries, as the recent decisions summarized below demonstrate, there are many instances in which a landowner or possessor of land may be found not liable for injuries sustained by a pedestrian on the premises despite existing hazards.

Notice Defense

In two separate decisions handed down this year from the U.S. District Court for the Eastern District of Pennsylvania, store owner defendants secured summary judgment in slip and fall cases based upon a notice defense. Generally speaking, the notice defense asserts that the plaintiff has failed to show that the defendant possessor of land actually knew of a dangerous condition or had enough time such that he or she should have reasonably discovered and remedied the condition that eventually caused the plaintiff to trip or slip and fall.

In *Hower v. Wal-Mart Stores Inc.*, 2009 WL 1688474 (E.D.Pa. June 16, 2009), the plaintiff was injured when she allegedly slipped and fell on a bit of bubble bath on the floor of the store. The plaintiff sued Wal-Mart on a premises liability negligence claim. After discovery, the defendant store moved for summary judgment on the grounds that the plaintiff could not produce evidence of the length of time the spill remained on the floor prior to the moment the plaintiff encountered it and fell.

In reviewing the notice defense, the court in *Hower* stated that in order to establish actual or constructive notice on the part of the defendant, the plaintiff had to prove that the defendant had a hand in creating the dangerous condition or that the condition existed for a sufficient amount of time such that the defendant should have noticed it and cleaned it up in the exercise of reasonable care towards its customers.

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In the *Hower* opinion it was noted that the courts of Pennsylvania have "consistently required a plaintiff to provide some proof as to the length of time a spill existed on the floor to establish constructive notice." The court provided a thorough review other Pennsylvania decisions granting summary judgment in the absence of such evidence and confirmed that constructive notice could not be inferred from the circumstances presented in its case.

More specifically, in *Hower*, the plaintiff failed to present any concrete evidence as to the length of time the spill was on the floor. It was additionally noted that there was no evidence presented as to any footprints or tracking through the spill, even though the store was very busy on the day of the incident. The plaintiff also admitted that she saw no dust or dirt in the spill. Consequently, the court found no evidence to even suggest that the spill existed long enough such that the defendant, in exercise of ordinary care, should have discovered it and cleaned it up.

The *Hower* court also rejected the plaintiff's attempt to rely upon her allegation that the store was negligent in that it failed to adhere to its "safety sweep" program of periodically checking the aisles for dangerous conditions. The court refused to allow the plaintiff to utilize evidence of an alleged failure to complete safety sweeps to overcome the total lack of evidence pertaining to the duration of the spill. In other words, the court noted that the defendant's alleged failure to do a safety sweep "says nothing about how long the spill was present." Accordingly, summary judgment was entered in favor of the Wal-Mart.

The *Hower* decision was relied upon by another more recent Eastern District decision involving similar facts and the same result. In the case of *Murray v. Dollar Tree Stores*, PICS Case No. 09-1532, 2009 WL 2902323 (E.D. Pa. Sept. 10, 2009), the plaintiff asserted that she slipped and fell on a liquid on the floor of an aisle in a Dollar Tree Store.

In *Murray*, the plaintiff likewise admitted at her deposition that she did not know how long the liquid was on the floor before she fell. No other evidence was presented about when the spill occurred. The court also emphasized that there was also no proof of any tracking through the liquid or dirt in the spill so as to show that it may have been present for a while.

The only evidence the plaintiff offered as to the duration of the spill was her assertion that she had been elsewhere in the store for about 15 minutes prior to her fall and, therefore, the spill must have also been present for that length of time as well. The court summarily rejected this notion.

The *Murray* court noted the general rule that a store owner is not an insurer of its patrons' safety. Rather, as stated, a plaintiff must prove that the defendant store owner had actual or constructive notice of the condition. The *Murray* court held that constructive notice requires proof that the condition was present long enough that in the exercise of reasonable care the defendant should have known of the spill. This in turn requires evidence of the duration of the spill. The court concluded that, without such evidence, as

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in the case before it, a plaintiff could not make out a valid case of negligence to proceed to a jury.

Significantly, this court also held that an allegation that the store failed to follow its own inspection procedures to keep the floors of the store safe could not meet the required burden of proof. In addition to noting that the plaintiff failed to offer any evidence of the inspection procedures of the store themselves or any violation thereof, the court in *Murray* also found that such evidence was immaterial in any event as it did not serve to establish how long a spill was actually on the floor in order to satisfy the required showing of constructive notice of the condition on the part of the store owner.

Thus, these cases show an increasing willingness of the Pennsylvania courts to grant summary judgment to defendant store owners on a notice defense where a plaintiff admits that they can not state how long a spill was on the floor prior to the incident and where there is no evidence of foot tracks or dirt in or around the spill.

These courts have also repeatedly rejected plaintiffs' efforts to attach liability to the defendant store owner in such cases under an argument that the store failed to follow its own floor inspection procedures. The courts have stated that such evidence does not offer any support to show how long a specific spill remained on the floor so as to establish constructive notice on the part of the defendant.

Trivial Defect

There also appears to be an increasing willingness of trial courts, at least in Pike County to grant summary judgment to possessors of land in cases involving a trivial defect in the walking surface even if the defendant had actual or constructive notice of that minimal defect.

On June 19, Judge Gregory H. Chelak of the Pike County Court of Common Pleas issued an opinion granting summary judgment in favor of the defense in *Melchiorre v. Lords Valley Xtra Mart*, 2009 WL 2430339 (C.P. Pike June 19, 2009), a case involving a plaintiff who tripped and fell allegedly because of the edge of a concrete pad at a gas station being raised a mere one inch above the surrounding asphalt.

Relying upon another prior Pike County decision, *Rocklin v. Hartmann*, No. 248-2003-Civil (June 22, 2006) aff'd No. 1673 EDA 2006 (Pa. Super. Feb. 13, 2007), in favor of the defense in a case involving a 1.5 inch elevation, Chelak held that, under the "trivial defect" doctrine, the one inch discrepancy involved in the case before him was "so trivial that, as a matter of law, defendants were not negligent in permitting it to exist." The court based its decision, in part, on photographs of the defect supplied in the motion for summary judgment materials.

In so ruling, Chelak rejected the plaintiff's argument that the trivial nature of the defect should be disregarded on account of the fact that the defendants had actual notice of the defect prior to the incident. Chelak held that "[p]ursuant to the trivial defect doctrine, the

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existence of such defects does not give rise to a negligence claim, with or without notice."

The plaintiffs in *Melchiorre* filed an appeal from the trial court's opinion on July 1 and the case is currently pending before the Superior Court.

Immunity from Suit

As exhibited in the case of *Davis v. City of Chester*, PICS Case No. 09-1536 (E.D. Pa. Sept. 9, 2009, Fullam S. J.), immunity from suit can provide another avenue for dismissal, at least with respect to municipal possessors of land. In *Davis*, both a municipal defendant, the city of Chester, and private defendant, Amtrak, were both granted summary judgment in a slip and fall case involving ice on a sidewalk.

The city was found to be immune from suit because the claims presented did not arise under any of the exceptions to the Pennsylvania Political Subdivision Tort Claims Act. More specifically, the court held that the real property exception did not apply to sidewalks. Also, the streets exception was found inapplicable in this case where the accident did not occur in a street.

The court also concluded that, in order for the sidewalk exception of the Tort Claims Act to apply, the cause of the fall must have been an artificial condition or defect of the sidewalk itself. The *Davis* court reiterated the rule of law that, under Pennsylvania precedent, ice and snow do not count under the sidewalk exception of the act even where it is shown that city employees repeatedly cleared the sidewalk. As such, summary judgment was granted to the city in this slip and fall claim.

Amtrak was separately granted summary judgment in this case because it did not own or control the sidewalk in question. The court also ruled that Amtrak had no liability for an abutting sidewalk unless the sidewalk conferred some benefit to Amtrak. As the sidewalk in question was across the street from the station, the court found that it did not confer any benefit to Amtrak. Accordingly, the court granted summary judgment to both defendants.

Assumption of Risk

Whether or not the assumption of risk doctrine remains a valid defense in Pennsylvania civil litigation matters has been a recurring topic of this column, with the conclusion being that it is indeed an ongoing viable defense. See "Alive and Well: Assumption of risk doctrine remains a valid defense." 32 *Pennsylvania Law Weekly* 838 (July 27, 2009); "Dead or Alive? The Assumption of Risk Doctrine in Pennsylvania," 29 *Pennsylvania Law Weekly* 860 (July 31, 2006).

The appellate courts of Pennsylvania, however, have kept the issue in a state of flux. In two recent decisions by the Commonwealth Court, *Cochrane v. Kopko*, 2009 WL 1531646, PICS Case No. 09-0956 (Pa.Cmwlth. June 3, 2009) and *Vinikoor v. Pedal*

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Pennsylvania Inc., 2009 WL 1544267, PICS Case No. 09-0948 (Pa.Cmwlth. June 4, 2009), it was held that the assumption of risk defense was a valid defense.

Yet, as established by its recent decision in the case of *Zeidman v. Fisher*, 2009 WL 2462563 (Pa.Super. August 13, 2009), the Superior Court continues to call into question the continuing validity of the doctrine as a complete bar to a plaintiff's cause of action.

Although none of the assumption of risk cases noted above involve slip or trip and fall events, the question of the viability of the assumption of risk doctrine as a complete bar to a cause of action will surely come into play in cases where, for example, a plaintiff voluntarily chooses to attempt to walk over an icy area despite alternate routes available.

As such, guidance is needed from the Supreme Court on this issue. In the words of Pennsylvania Supreme Court Justice Stephen A. Zappala in his concise dissenting opinion found in *Howell v. Clyde*, 620 A.2d 1107 (Pa. 1993), more than 15 years ago: "Until such time as this [Pennsylvania Supreme] Court arrives at a clear-cut majority, we will continually muddy the waters in the sensitive areas of both comparative negligence and the assumption of risk, both of which are cornerstones of the negligence law in this Commonwealth."

Given the trend of recent court opinions granting summary judgment to the defense in various slip or trip and fall scenarios, plaintiffs' counsel might want to be more discriminating in the types of premises liability cases they may be willing to take on under a cost/benefit analysis. Surely, the defense bar will continue to rely upon these 2009 decisions long into the future in their ongoing effort to limit the liability of their landowner clients. •

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