LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
MONDAY, DECEMBER 23, 2024

Taking notice: Premises liability requires support

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On Dec. 31, 2017, Grace Gonzalez slipped and fell when she stepped on oranges on the floor of the common walkway of the Ontario Mills Shopping Center. Two years later, she filed a slip and fall lawsuit against the shopping center and the janitorial service responsible for cleaning the premises. The trial court granted summary judgment as to both defendants, and Gonzalez appealed..

On Oct. 25, a California Court of Appeals upheld the trial court's decision. In *Gonzalez v. Interstate Cleaning Corporation* (E081220 (Super. Ct.No. CIVDS1938974), modified and certified for publication Nov. 21, 2024) (Gonzalez), the appellate panel ruled that Gonzalez had not met her burden of showing a material issue of fact – that the defendant had breached a legal duty of care and that her injury was a direct result of that breach.

Essentially, the court said that the shopping center and the maintenance company met their obligations to keep the walkways clear by regularly checking them for hazards and, for the first time, found that an inspection time of eight to nine minutes prior to the incident was reasonable under the circumstances of this factual scenario.

Duty of care

To prove negligence, a plaintiff must first establish that the defendant owed a duty of care. "A plaintiff in any negligence suit must demonstrate 'a legal duty to use due care, a breach of such legal duty, and [that] the breach [is] the proximate or legal cause of the resulting injury.'" (*Beacon Residential Community Assn. v. Skidmore, Owings & Merrill LLP* (2014) 59 Cal.4th 568, 573, quoting *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 594.)

Property owners are obligated to maintain premises so as not to cause injury to others. "Premises liability 'is grounded in the possession of the premises and the attendant right to control and manage the premises;' accordingly, 'mere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty to act.' But the duty arising from possession and control of property is adherence to the same standard of care that applies in negligencecases." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158, citing *Preston v. Goldman* (1986) 42 Cal.3d 108, 118, quoting *Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368, 370.)

"It is well established in California that although a store owner is not an insurer of the safety of its patrons, the owner does owe them a duty to exercise reasonable care in keeping the premises reasonably safe." (*Girvetz v. Boys' Market, Inc.*, 91 Cal.App.2d 827 at p. 829 (Girvetz).) The shopping center owner, as well as the janitorial service to whom maintenance was subcontracted, owed a duty of care to customers such as Gonzalez who visited the premises.

Actual and constructive notice

Duty is just the first plank in a negligence claim. There must also be a failure to satisfy the terms of that duty - an act or omission that resulted in harm. If the property owner could not have changed the outcome of the event through its reasonable actions, it should not be held liable.

Notice is therefore critical. A property owner who directly observed or was notified about a hazard should, presumably, be in a position to remove or mitigate the hazard. His or her failure to act could therefore be considered a direct cause of any resulting injury. An owner who had no actual knowledge of the hazard despite reasonable and regular monitoring should be able to assert this as a defense against a negligence claim.

But how to prove notice? In the case of actual notice, proof should be simple. A time-stamped video showing the defendant's presence at the site of the hazard may be incontrovertible. A witness's state-

ment or a direct acknowledgement by the premises owner that he or she knew of the hazard may also support a conclusion that the defendant had actual notice.

Constructive notice is often more difficult to prove, but if properly established it will support a negligence claim. "The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence. Knowledge may be shown by circumstantial evidence 'which is nothing more than one or more inferences which may be said to arise reasonably from a series of proven facts.' ..." (*Ortega v. Kmart Corp.* (2001) 26 Cal. 4th 1200, at pp. 1206-1207 (Ortega).)

How long is too long?

At what point should a premises owner be deemed to have constructive notice of a hazard? A slippery floor in a grocery store could be the result of a spill that just happened, or it could have gone undiscovered for hours. In the first case, we can assume that there was no opportunity for the business to know about or remedy the situation; in the second case, there is a strong supposition that the property owner dropped the ball and breached its duty.

"Whether a dangerous condition has existed long enough for a reasonably prudent person to have discovered it is a question of fact for the jury, and the cases do not impose exact time limitations....The owner must inspect the premises or take other proper action to ascertain their condition, and if, by the exercise of reasonable care, the owner would have discovered the condition, he is liable for failing to correct it."" (Ortega, supra, at pp. 1206-1207.)

California appellate courts have refused to give any specific guidelines on how often a premises owner must inspect their premises. Likewise, the courts have generally been unwilling to state how long is too long for an owner to discover a dangerous condition on its property. Reasonableness is left to the purview of a jury, taking into account various factors such as the frequency of spills, the amount of foot traffic, the likelihood of harm, and other factors. However, in a few decisions courts have provided guidance that allows defendants to seek summary judgment when challenging notice.

One court, for example, found that a "minute and a half" was insufficient as a matter of law to confer constructive notice distinguishing "utmost" care from "reasonable" care. (Grivetz, supra, at pg. 831- 832). Another court held that five minutes "would not support the conclusion that the dangerous condition had existed long enough for the defendant, in the exercise of reasonable care, to have discovered and removed it." (*Oldenburg v. Sears, Roebuck & Co.* (1957) 15 Cal. App. 2d 737, 745). These cases have historically provided only limited guidance to parties on what constitutes "reasonable" care in the context of premises liability matters, making evaluation of liability more challenging and open to interpretation.

The Gonzalez defendants argued that they could not be liable for the plaintiff's injuries "because they had no actual or constructive knowledge of the spilled oranges and could not have remedied the dangerous condition in time to avert the fall." Their evidence showed that the premises were inspected by porters on predesignated routes every 20 to 30 minutes. Each porter's activity was tracked by tamperproof "beacons" in the shopping center ceiling and by a cell phone application that communicated their location to the beacons. Data was collected on each porter's identity, exact location while on their route, and inspection time while in the "beacon zone" - down to a hundredth of a second. Such data was transmitted in real-time to a third-party server and showed that an inspection was completed between eight and nine minutes prior to plaintiff's fall.

In a significant opinion, the Gonzalez court held that the defendants were entitled to summary judgment based on a lack of constructive notice where the defendants had adopted a maintenance program calculated to ensure regular inspections and where the evidence also demonstrated an inspection eight to nine minutes before the fall.

While the court was careful to clarify that there are no "exact time limitations" in determining how long is too long, its opinion seems to expand the ability of defendants to challenge liability via summary judgment when spill creation or inspections occur less than 10 minutes prior to an incident.

When notice is at issue in a mediation

When parties bring premises liability cases to mediation, notice is often the key question that must be answered. Did the party responsible for the premises know - or should they have known - about a hazardous condition? At what point should they have had this knowledge? The Gonzalez court found that because the shopping center and cleaning company regularly inspected the walkway and had done so shortly before the incident in question, it could not have had notice of the oranges upon which the plaintiff slipped and fell.

When a defendant has established a lack of actual notice, it is up to the plaintiff to establish constructive notice. "The plaintiff has the burden to prove the owner had actual or constructive notice of the defect in sufficient time to correct it." (*Louie v. Hagstrom's Food Stores* (1947) 81 Cal.App.2d 601, 606.)

But without actual evidence of when a hazardous condition first occurred, plaintiffs may need to rely on other measures. Courts have ruled that "evidence of the owner's failure to inspect the premises within a reasonable period of time is sufficient to allow an inference that the condition was on the floor long enough to give the owner the opportunity to discover and remedy it." (See *Bridgman v. Safeway Stores, Inc.* (1960) 53 Cal.2d 443.)

An inference means that the trier of fact may consider whether the evidence supports the plaintiff's negligence claim, but the plaintiff is not required to prove how long a hazard existed. (Evid. Code, § 600 (a).) Thus, a plaintiff can show that an inspection was not made within a certain period of time before the accident, but it will be up to the trier of fact to decide whether the defective condition existed for so long that it should have been discovered by a property owner who exercised reasonable care.

At mediation, unlike in a trial, there is no trier of fact. It will be up to the parties to review the information provided by the other side and, with guidance from the mediator, to evaluate the strength of their respective claims. It is important to gather discovery and evidence leading up to mediation that would establish or refute notice so that the parties can fully appreciate the risks in litigating premises liability cases with constructive notice disputes.

Conclusion

Where notice is disputed in premises liability cases, both plaintiffs and defendants should look to resolve their issues through mediation. There is just not enough direction from the courts on what constitutes "reasonable" inspections or the length of time necessary to confer constructive notice.

With its opinion in Gonzalez, the appellate court potentially expanded the opportunity for defendants to obtain summary judgment in premises liability cases by holding that a time period of up to nine minutes was insufficient to confer notice. Its opinion should provide further guidance to parties litigating notice-related claims, but the liability standard in these cases remains cloudy.

An effective mediator who is knowledgeable about premises liability claims can help the parties navigate these complex legal issues. When both sides understand the factors that must be examined when making a determination of notice, they should be better prepared to achieve successful resolution and settlement.

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