A Premises Owner's Primer

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A premises owner wants people to frequent his/her business. The owner must, however, make the premises reasonably safe for his/her patrons. This is not only important for the safety and well-being of patrons, but also for the landowner's ability to put forth a defense to liability claims. This article will shed light on what an owner should do to protect against claims and what a plaintiff's attorney should look for when prosecuting a premises liability case.

In general, a plaintiff has the burden to prove negligence against a premises owner by proving that the owner knew, or should have known, of any defect or hazard on the premises that caused plaintiff's injury. Just because an incident occurs on someone's premises does not mean that liability lies with the owner, as an owner is not an insurer. *Gunlock v. New Frontier Hotel Corp.,* 78 Nev. 182 (1962). Instead, the owner's duty is to keep the premises in a reasonably safe condition. *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247 (1993). How does an owner best accomplish this goal?

Sweep Logs and Training

An adept business owner will create and maintain a sweep log to acquire notice of any spill or defect in time to mark the hazard, correct it and avoid any injury relating to it. Protection from liability comes with more frequent sweeps, but since business owners incur a cost associated with more frequent sweeps, the sweep logs, if they exist at all, are sometimes not well kept, or contain infrequent or inconsistent sweeps. Since an owner is responsible for any known defect or any defect that *should have been* known, plaintiff's counsel must focus closely upon the sweep log and/or any store policies intended to discover hazards.

Even frequent sweep logs and inspections may not be enough. In *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247 (1993), a patron tripped on a grape in the produce section. Sprague was obligated to establish constructive notice. Despite testimony from the produce manager who claimed that he conducted six to seven sweeps per hour in addition to general store sweeps, the Nevada Supreme Court held that summary judgment was improper because factual issues remained, such as whether Lucky's could have implemented other safeguards, e.g. mats. Given the high volume of spills in the produce

department, factual issues remained whether Lucky's was negligent by not taking further precautions besides an aggressive sweep policy.

A diligent landowner should also engage its employees in training that involves safety instruction. Employees who roam the store should be trained to search for hazards and, if discovered, stop what they are doing and address the hazard. Waitresses and waiters in a restaurant, for example, should be trained to immediately react to spills. An employee who testifies to such training provides the landowner substantial protection against liability. Therefore, the plaintiff's attorney should inquire into any such training, as this employee training could undermine the negligence claim. The landowner, on the other hand, should document the date and names of employees who attended the training.

Video Surveillance and Spoliation

Most business owners implement some level of video surveillance. Often the coverage is limited to heavy traffic areas such as the cash register and front entrance. A fall may not occur within the covered areas. When there is reasonable notice of a claim and video coverage exists, it should be preserved whether store personnel believe the video is relevant or whether it illustrates the fall or not. Deciding the relevance of the coverage is not up to store personnel.

In *Patton v. Wal-Mart Stores, Inc.*, 2013 U.S. Dist. Lexis 165617, 2013 WL 6158461 (D. Nev. Nov. 20, 2013), a slip-and-fall occurred in an aisle that was not covered by video. Walmart decided that the video of the surrounding areas illustrated nothing, so the video was not preserved. Patton filed a spoliation motion and the court ruled that the problem was that "Walmart made a conclusion – (*viz.* that 'nothing' was caught on film) – that was not Walmart's to make." The question of whether something or nothing was caught on video was a question for a fact-finder. Even video that did not capture the incident could be probative to show whether anyone entered the aisle-way where the fall occurred, whether an employee had inspected at reasonable times, compliance with sweep policies, etc.

Although an owner is to preserve evidence even if there is only a *potential* for litigation (*GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995)), plaintiff's counsel should immediately send the property owner a preservation letter. This letter must be carefully tailored to the specific facts being alleged and broad enough to encompass more than just video "of the incident." Arguably, if video of only the incident is all that is requested, video of only the incident may be all that is required to preserve, thereby losing potentially relevant footage. Lengthy video, such as a request for video from the point the plaintiff entered the store until he/she exited, could provide evidence of compliance with sweep policies or a lack thereof, images of plaintiff's movements and signs of injury or lack thereof.

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Spoliation has become a common tool to assist plaintiff's counsel in establishing liability. Since the plaintiff must establish notice against the owner, and this burden is often difficult, acquiring an adverse inference or a rebuttable presumption makes plaintiff's counsel's job much easier. In Nevada, to secure the rebuttable *presumption,* plaintiff must establish the business owner's "willful or intentional spoliation of evidence" with the intent to harm plaintiff's claim. *Bass-Davis v. Davis*, 134 P.3d 103 (Nev. 2006). The presumption is that the evidence would be adverse if produced and will apply unless rebutted. By contrast, to establish an *adverse or permissible inference*, plaintiff's counsel must establish merely that the property owner negligently lost or destroyed the evidence.

Open and Obvious

Premises owners could historically defend against injury claims by establishing that the hazard leading to an injury was "open and obvious." If the plaintiff could have, or should have, seen the hazard, thereby having the opportunity to avoid the hazard, the owner could not be held responsible. The duty to avoid that hazard was solely with plaintiffs. Further, case law essentially held that there was no duty to warn of an open and obvious condition.

In *Gunlock*, plaintiff entered a hotel and walked down a hallway with a two-foot planter box along the wall. The box was slightly elevated above the ground and covered by artificial foliage. Gunlock was injured when her heel caught the planter box while she was stepping backward and turning around. The hotel owner escaped liability by arguing that the presence of the box was obvious and, therefore, Gunlock should have avoided the incident. The court agreed.

The holding in *Gunlock* was weakened by *Foster v. Costco Wholesale Inc.*, 128 Nev. 773 (2012). The facts were similar to *Gunlock* in that a wooden pallet was partially blocking the aisle-way. Like Gunlock, Foster tripped on the pallet as he walked by. However, instead of holding Foster solely responsible, the Supreme Court held that the open and obvious nature of a condition no longer automatically relieves a landowner from the duty of providing a reasonably safe premises, but bears on the assessment of whether reasonable care was exercised by the landowner. In other words, if the hazard is open and obvious to the patron, it is also open and obvious to the owner. Both patron and owner have a duty to avoid the risk, thereby setting up a situation of potential comparative negligence. The *Foster* case can be

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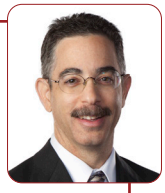
differentiated from *Gunlock*, however, as *Foster* arguably is limited to situations where the condition on the premises was deemed "not" to be open and obvious. This is because in *Foster* the section of pallet tripped on was obscured by a box.

Incident Reports

There isn't much better evidence as to how an incident occurred than a well-written incident report based upon evidence gathered right after the incident. This report should include witness statements. Documenting an incident is typically required by premises owners, and these documents should be requested by plaintiff's counsel. Further, any such reports are not protected by a privilege unless they are drafted or based on statements taken at the express direction of counsel. *Ballard v. Eighth Judicial District Court*, 787 P.2d 406 (Nev. 1990). As a result, some owners mandate, especially when the incident has caused significant injury, that counsel be contacted right after a serious incident to direct the investigation.

While this article does not cover all potential issues, hopefully it "pulled back the curtain" on important issues on which counsel should focus.



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