For questions, call Anthony J. Madormo
(312) 540-7680

Querrey & Harrow

www.querrey.com®

ILLINOIS LAW MANUAL

CHAPTER V
PREMISES LIABILITY

B. FOREIGN SUBSTANCES

1. Basic Law

Cases involving injuries from foreign substances or objects generally arise in a commercial setting where business owners or occupiers of land invite customers onto their premises. Generally, a business proprietor (owner or occupier of land) is not liable to a customer for injuries attributable to substances or objects unless there is evidence to show that:

(1) the substance or object was placed on the floor through the negligence of the proprietor or his employees;

(2) the proprietor or his employees knew of the presence of the substance or object; or

(3) the substance or object was present for a sufficient amount of time so that, in the exercise or ordinary care, its presence should have been discovered.

Olinger v. Great Atlantic & Pacific Tea Co., 21 Ill. 2d 469 (1961); Tomczak v. Planetsphere, Inc., 315 Ill. App. 3d 1033 (2003).

The most important factor in assessing a business owner's potential liability in a case involving a foreign substance is whether the plaintiff must establish notice. Where the substance

was placed on the floor through the negligence of the proprietor or its business practices, proof of notice is not required. Where the foreign substance is on the floor due to the conduct of a third party, such as a customer, then notice can either be actual (owner or its employees knew) or constructive (the owner should have known) that the substance was present. To determine if notice must be proven, recent decisions have distinguished between a condition existing on the property, where notice is required, and liability based upon the owner's negligent activities, causing the condition.

2. Analysis

A plaintiff is not required to establish the business owner's actual or constructive notice of the foreign substance where there is evidence that the foreign substance was a product sold or related to the defendant's operations, and the plaintiff offers some further evidence, from which it could be inferred that it was more likely that the owner or his employees, rather than a customer, dropped the substance on the premises. Donoho v. O'Connell's, Inc., 13 Ill. 2d 113 (1958). This further evidence, "however slight," may include such information as the location of the substance or the business practices of the defendant. Id. Even if there is proof that the foreign substance was related to the defendant's business, but no further evidence is offered other than the presence of the substance and the occurrence of the injury, a business owner will not be found liable. Thompson v. Economy Super Marts, Inc., 221 Ill. App. 3d 263 (1991); Wiegman v. Hitch-Inn Post of Libertyville, Inc., 308 Ill. App. 3d 789 (1999).

In Donoho, the defendant was a restaurant owner, whose employee, a busboy, had cleaned a table in the vicinity of the occurrence shortly before plaintiff fell. From the time the table was cleaned until the plaintiff fell, no one used the table or area that had been cleaned. The plaintiff fell on an onion ring, which the owner's employees denied was present. The plaintiff was not

required to prove notice because there was a circumstantial link, "however slight," between the busboy's cleaning activity and the dropped food.

A second situation where proof of notice is not required is where the business owner knew of prior occasions where the same type of substance or object was present, and the substance or object created a dangerous condition. In Perminas v. Montgomery Ward & Co., 60 Ill. 2d 469 (1975), evidence that the defendant's employees knew customers used a product sold by the business to skate up and down the aisles on prior occasions, along with the fact that the object was placed on the low shelves where it was easy to access and had fallen onto the floor on prior occasions, was sufficient to allow the plaintiff to maintain an action against the business owner. Specific evidence as to how the object came to be on the floor or that the defendant knew of its presence on the floor on the date of the occurrence was not required. Evidence that the business owner was aware of this "dangerous condition" created a duty for the business owner to provide sufficient warning to allow persons on its premises to avoid harm. Id.

Evidence of prior accidents, occurring at the same place, or close in time, is admissible to show that the common cause of such accidents was a dangerous and unsafe condition. The frequency of such accidents may raise a presumption of knowledge on the part of the owner and, as such, proof of notice of a condition on the date of the occurrence may not be required. Grewe v. West Washington County Unit District No. 10, 303 Ill. App. 3d 299 (1999).

Other decisions have mentioned an additional distinguishing factor which may allow a plaintiff to recover due to a foreign substance being on the floor without proving notice. Where an unreasonably dangerous condition is on the premises due to the activity of the business owner's employees, notice is not required. Reed v. Wal-Mart Stores, Inc., 298 Ill. App. 3d 712 (1998). In Reed, the plaintiff was injured when she stepped on a rusty nail protruding from a board from a

pallet in an outdoor garden area, which was shared by several stores. Where the board came from was unknown. The plaintiff alleged active negligence on behalf of the business owner for permitting a dangerous condition to exist and failing to remove the dangerous condition. Predicated upon these allegations and the evidence presented at trial, which convinced the court that it was more likely that the board was present through the acts of the store employees, the plaintiff was allowed to proceed with her action against the business owner without showing the owner had actual or constructive notice of the defective condition.

In Wind v. Hy-Vee Food Stores, Inc., 272 Ill. App. 3d 149 (1995), the court, using the rationale of the Donoho decision, distinguished between liability based upon a condition existing on the defendant's property and liability based on a defendant's negligent activities. In Wind, the plaintiff fell on a mat that had been placed in the entrance area of the grocery store by defendant's employees. There was testimony that the mat was not taped to the floor and may have been in poor condition. Based on this testimony, the plaintiff was not required to show that the defendant had actual or constructive notice of the condition of the mat because there was evidence that the defendant's employees negligently installed the mat. These and other decisions create a distinction between a condition of the premises versus a condition of the premises caused by the actions of the owner, or its agents, which eliminates the need for a plaintiff to prove notice. Id.

Where a substance is on the premises through acts of third persons, the time element to establish knowledge or notice to the proprietor is a material factor. Thompson v. Economy Super Marts, Inc., 221 Ill. App. 3d 263 (1991). In Thompson, the plaintiff slipped on a lettuce leaf and water in an area immediately adjacent to the produce section of the defendant's grocery store. There was testimony that the lettuce leaf was brown, wilted, and dirty and that the lettuce was displayed in packed ice near the location of the fall. Notwithstanding this testimony, the court

found there was no circumstantial link that made it more likely that the proprietor's employees placed the leaf or water on the floor, rather than by customers of the store, therefore, proof of actual or constructive notice was required.

Constructive notice can be established where the evidence shows that the substance or object was present for a "sufficient" time period that a reasonable business owner should have discovered it. In Hayes v. Bailey, 80 Ill. App. 3d 1027 (1980), the plaintiff slipped on water in the defendant's restroom, which had not been inspected by the defendant for at least two and one-half hours. Since there was no evidence showing that the defendant knew or should have known of the presence of the water on the floor, and since it was possible that the floor did not become wet until moments just prior to the incident, there was not sufficient evidence presented to show constructive notice of the water by the owner. Id. See also Tomczak v. Planetsphere, Inc., 315 Ill. App. 3d 1033 (2000) (where plaintiff presented no evidence that the owner had constructive notice that water was present on ice rink and the plaintiff herself did not see water on earlier turns around the rink).

Constructive notice will be decided on a case-by-case basis. In Brooks v. National Railroad Passenger Corp., 221 F.3d 1338 (7th Cir. 2000) (unpublished opinion), the plaintiff slipped on debris on the floor of the upper level of the defendant's lounge car. In upholding the jury verdict for the plaintiff, the court noted:

1) that both ice and water were present, permitting the inference that the ice had been present long enough to melt;
2) that at least one person had walked through the debris, leaving tracks through it; and
3) that the debris was scattered over a 2-2.5 square foot area at the top of the stairs and on the stairs themselves.

All of this tended to show that some time had elapsed between the appearance of the debris and the plaintiff's fall. Furthermore, testimony that the debris was easily visible from the lower

level suggested that the defendant's employees stationed there had constructive notice of the condition. In Canales v. Dominick's Finer Foods, Inc., 92 Ill. App. 3d 773 (1981), constructive notice was found to exist where a crushed tube of ointment was on the floor near the location where pasty ointment covered a three foot by one foot area on the floor. There were footprints through the ointment. These facts constituted a reasonable inference that the condition had existed for a sufficient period of time and that the business owner knew or should have known of the substance on the floor. Factual issues such as footprints, cart marks, and a general dirty appearance are often factors utilized to establish constructive notice.

However, if a plaintiff testifies that an unknown employee of the landowner or occupier makes a statement indicating the owner's/occupier's knowledge of the substance on the floor before the fall, the alleged statement of the employee can create a question of fact regarding whether the owner or occupier had notice of the substance on the floor. Pavlik v. Wal-Mart Stores, Inc., 323 Ill. App. 3d 1060 (2001).

In Pavlik, the plaintiff testified that she slipped and fell on a puddle of conditioner on the floor of a Wal-Mart store. She testified that one of the Wal-Mart employees "like a store clerk" stated that the puddle should have been cleaned up before. The plaintiff's father testified that an employee stated that "oh she was supposed to clean that up and she didn't." There was no testimony that the plaintiff knew what caused the conditioner to be on the floor or how long it had been on the floor. There were no markings that indicated that anyone had walked through the conditioner or that it had been on the floor long enough to have dried. Nevertheless, the Pavlik court reversed the trial court's entry of summary judgment motion for Wal-Mart and held that, where an employee makes a statement within the scope of his/her employment, that statement constitutes an admission against the employer. The alleged statement is admissible and creates a

question of fact regarding whether the defendant had notice of the substance prior to the occurrence. This decision may allow a plaintiff to avoid summary judgment based on notice, by alleging that a defendant's employees made statements within the scope of employment, because the alleged statement creates a question of fact regarding the defendant's notice of the substance on the premises.