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12:00 PM EASTERN TIME.

Becoming a Master of the Obvious: Understanding the Defense of Open and Obvious Conditions

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Retail, Restaurant & Hospitality Committee
Presents

Becoming a Master of the Obvious: Understanding the Defense of Open and Obvious Conditions

Speakers:

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Clutter Here...



Clutter There...



Clutter Everywhere!



The Profits of Clutter

- Previously, stores tried to shed clutter. Now, space is being redesigned to add clutter.
- April 7, 2011 New York Times article: [Stuff Piled in the Aisle? It's There to Get You to Spend More.](#)
- Wal-Mart decreased stock by 9% - customer satisfaction soared, but sales declined.
- Stores are now increasing shelf heights and intentionally adding merchandise in the aisles as “speedbumps.”
- Messiness and clutter signals value for customers
- Clutter also presents significant liability issues

28 So.3d 737
Supreme Court of Alabama.

DOLGENCORP, INC.
v.
Arlie TAYLOR.

1070900. | June 12, 2009. | Rehearing Denied Aug.
28, 2009.

Synopsis

Background: Customer brought action against retail store and the store manager, asserting claims of negligence and wantonness after allegedly falling over unopened boxes of merchandise in a store aisle. The Circuit Court, Clarke County, No. CV-05-40, *Stuart C. DuBose, J.*, entered judgment in accordance with jury verdict for the customer, and awarded compensatory and punitive damages. Store and manager appealed.

Holdings: The Supreme Court, *Smith, J.*, held that:
1 hazardous condition of boxes of merchandise in store aisles was open and obvious such that store had no duty to warn of hazard, and
2 since store had no duty to eliminate or warn of hazard, it could not be liable for wantonness.

Reversed and judgment rendered.

Cobb, C.J., filed a dissenting opinion.

West Headnotes (12)

- 1 **Appeal and Error**
↔Extent of Review Dependent on Nature of Decision Appealed from
Appeal and Error
↔Appeal from ruling on motion to direct verdict

When reviewing a ruling on a motion for a judgment as a matter of law (JML), the Supreme Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a JML.

1 Cases that cite this headnote

- 2 **Appeal and Error**
↔Extent of Review Dependent on Nature of Decision Appealed from
Appeal and Error
↔Appeal from ruling on motion to direct verdict

Regarding questions of fact, when reviewing a ruling on a motion for a judgment as a matter of law (JML), the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution.

- 3 **Appeal and Error**
↔Extent of Review Dependent on Nature of Decision Appealed from
Appeal and Error
↔Appeal from ruling on motion to direct verdict

For purposes of reviewing a ruling on a motion for a judgment as a matter of law (JML), the nonmovant must have presented substantial evidence in order to withstand a motion for a JML. Code 1975, § 12-21-12.

1 Cases that cite this headnote

- 4 **Appeal and Error**
↔Extent of Review Dependent on Nature of Decision Appealed from
Appeal and Error
↔Appeal from ruling on motion to direct verdict

A court reviewing a ruling on a motion for a judgment as a matter of law (JML) must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury.

1 Cases that cite this headnote

- 5 **Appeal and Error**
↔Effect of evidence and inferences therefrom on direction of verdict

Taylor v. Dolgencorp, 28 So. 3d 737 (Ala. 2009)

- Plaintiff attempted to push her shopping cart down an aisle filled with boxes of holiday decorations and fell over two cases of merchandise.
- Plaintiff testified that she did not see the cases even though they were at least knee high. Plaintiff argued that the focus of a shopper's attention is the items on the shelf, not boxes on the floor.
- Plaintiff sued alleging that Dollar General failed to maintain the premises in a safe condition
- Dollar General contended that the boxes of merchandise were an open and obvious condition and, as such, it had no duty to eliminate the hazardous condition or warn of its presence.
- In Alabama, an objective standard is used to assess whether a hazard is open and obvious - whether the danger should have been observed not whether it was consciously appreciated.
- If openness and obviousness is established, it negates the duty and defeats the claim

Open and Obvious Condition Jury Instruction

An owner or occupant of premises is under no duty to reconstruct or alter the premises so as to eliminate dangers which were known or obvious to the plaintiff, or in the exercise of reasonable care, should have been known or obvious to the plaintiff.

Alabama Pattern Jury Instruction 31.01A

Posturing Your Case for Success

- Establish Plaintiff's familiarity with the premises (frequent shopper)
- Explore Plaintiff's awareness of condition of store (merchandise in aisle, cleanliness, clutter, general disorganization)
- Determine Plaintiff's personal knowledge of the hazard (maneuvering around the alleged hazard, stepping over a spill, inquiries to store employees regarding the condition)
- Remember it is an objective standard - Should the danger have been observed by the customer?

The Availability of the Open and Obvious Defense is a Jurisdictional Analysis

- As the last holdout of contributory negligence, the open and obvious defense has easier application in Alabama than other jurisdictions.
- In comparative negligence jurisdictions, the application of the defense varies from state to state.
- Some states continue to use the defense as a complete bar to a Plaintiff's recovery: *e.g.*, Massachusetts, Nevada, Ohio.
- Other states have held that the defense is not a complete bar to recovery because the obvious nature of the hazard may not always defeat a landowner's duty: *e.g.*, Illinois, Kentucky, Michigan, Missouri, New Mexico, Utah and Tennessee.
- Still other states have abolished the defense and consider the known quality of a danger solely as a component of comparative fault: *e.g.*, Idaho, Mississippi, Oregon, Texas, Hawaii and Wyoming.
- Regardless of the type of negligence, the open and obvious nature of the hazard plays a determinative role even if it does not serve as a complete bar to recovery.

Scott v. Harris, 550 U.S. 372 (2009)

- **Motorist brought civil rights action against law enforcement for the use of excessive force during a police chase.**
- **Harris failed to pull over after being clocked for speeding. Chase ensues. Scott eventually uses his police car to spin Harris out. As a result of the accident, Harris is rendered a quadraplegic.**
- **Scott sought summary judgment on the grounds that he did not violate Harris's rights because his actions were reasonable given the danger of a hazardous high- speed driver who failed to observe traffic signals and placed the public at great risk.**
- **Not suprisingly, Harris's version of the chase was quite different – he was a “cautious and controlled” driver who posed no threat to motorist or pedestrians.**
- **On summary judgment, courts are required to view the facts in the light most favorable to the non-movant – in this case, Harris.**
- **Based on the standard, the lower courts adopted Harris's version of the facts and held that summary judgment was not appropriate.**

Scott v. Harris, con't.

On appeal, the U.S. Supreme Court noted an “added wrinkle” in the case: the existence of a videotape capturing the chase.

- The Court watched the tape and determined that the video “more closely resembled a Hollywood-style car chase of the most frightening sort.”
- **The Court reversed the 11th Circuit and ordered that Scott was entitled to summary judgment. In reaching this conclusion, the Court held:**

“When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”

What does *Scott* mean for Premises Liability Defendants?

- **Early dismissal of a lawsuit once Plaintiff's counsel learns of the existence of a contradictory video.**
- **Availability of summary judgment.**
- **But, in order to take advantage, retailers must preserve the footage of incidents, make defense counsel aware of the existence of the footage and maintain integrity of the footage.**
- **Potential pitfalls:**
 - **Inability to capture plaintiff's complete path**
 - **Grainy video**
 - **Allegations of doctoring or alteration**
 - **Subjective nature of video**
 - **Few cases in the premises liability context**

Q & A

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