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

It seems that we all love stuff. While not a frequent shopper, I have recently noticed what seems to be a greater effort on the part of retail stores to get more merchandise in front of the potential buyer. This observation is supported in an April 7, 2011, *New York Times* article: "Stuff Piled in the Aisle? It's There to Get You to Spend More," which details our love for stuff. The article indicates that after years of shedding inventory, retailers have shifted directions and are redesigning their stores to add more inventory. The article cites major retailers' efforts to raise shelf height, turn empty walls into additional areas for merchandise storage, add lanes and bring in bigger items – tactics calculated to increase the number of items for sale. Marketing research supports the theory "the messier the store, the better deal it projects to the customer." Retail marketing consultants say research indicates that "messiness, or pallets in the middle of an aisle, are also a cue for value." Organization and simplification alter the shopper's perception of the best environment and opportunity to snag a bargain. In essence, the greater the mess, the bigger the bargain.

For the Premises Liability defense practitioner, messiness and clutter create particular problems with increased risk of danger created by falling merchandise, as well as trip, slip and fall hazards. When defending any type of Premises action, particularly cases involving store clutter, the defense of open and obvious condition should always be considered as a potential bar or limitation on the claimant's recovery. The open and obvious doctrine holds that a premises owner is not required to protect an invitee from open and obvious dangers. Common open and obvious hazards include holes, boxes and spilled liquids.

Several years ago I had the privilege of representing a major retailer in a case where a woman claimed injury due to the messy condition of the store where she fell. In this case, the claimant attempted to push her shopping cart down an aisle filled with boxes of holiday decorations eventually falling over two cases of merchandise. Plaintiff testified that she did not see the cases even though by her own testimony they were at least knee high. She argued that the focus of her attention was merchandise on the shelf, not boxes in the aisle of the floor. Suit was filed alleging that the store failed to maintain its premises in a safe condition. We argued that the boxes were an open and obvious condition and that as such, the store had no duty to eliminate the condition or warn of its presence. Although the jury returned a verdict in the plaintiff's favor, the Alabama Supreme Court reversed and rendered a judgment in favor of the retailer. The Court followed precedent establishing that an objective standard is used to assess whether a hazard is open and obvious – the question being whether the danger should have been observed, not whether it was consciously appreciated.

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A Brief History of Time: The Jurisdictional Analysis

The availability and effect of the open and obvious defense varies by jurisdiction. 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 and 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.

It is important to remember that a landowner may be liable for an unreasonably dangerous condition, even if it is open and obvious, but not if a reasonable person would avert harm. That is the rule of the Restatement (Second) of Torts §343A(1) (1965), which states:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Thus, regardless of the negligence scheme in your state, the open and obvious nature of the hazard can play an important role in your case even if it does not serve as a complete bar to recovery.

Posturing Your Case for Success

In order to posture your case for success, it is important to establish plaintiff's awareness of the store's condition during discovery of the case. During deposition, attempt to elicit information regarding the following:

1. **Establish Plaintiff's Familiarity With the Premises** – Whether the plaintiff frequents the store on a weekly to monthly basis.
2. **Explore Plaintiff's Awareness of the Condition of the Store** – Whether the plaintiff noticed merchandise in the aisle. Whether the plaintiff was aware of the store's general condition, e.g., store frequently had boxes of merchandise in the aisle, generally cluttered or messy, etc.
3. **Examine Plaintiff's Personal Knowledge of the Hazard** – Whether the plaintiff attempted to maneuver around the alleged hazard; step over a spill; inquire or make comments to store employees regarding the store condition.
4. **Evaluate Using an Objective Standard** – Should the danger have been observed by the plaintiff? Not whether it was consciously appreciated, but whether the plaintiff should have seen the hazard given its size, location or other characteristics.

By obtaining this information as early as possible, you will be able to determine the availability and potential impact of the open and obvious defense on your case.

Conclusion

While certainly defense practitioners should continue to encourage our clients to vigilantly maintain safe premises, the open and obvious doctrine serves to provide protection in an age of growing retail clutter. Although the open and obvious defense may not always lead to a certain victory, the benefits that it can provide show that it should always be an important consideration in defending any premises claim.