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The common pitfalls of a slip-and-fall case

RECENT PREMISES-LIABILITY VERDICT AGAINST RALPHS GROCERY STORE SHOWCASES WAYS TO DEFEAT DEFENSE TACTICS

Success in slip-and-fall trials often depends on avoiding common pitfalls. In the early intake of an auto case, many of us who are familiar with the saying, "it's always the car," meaning the client gets frustrated battling the insurance company over fair compensation for the vehicle damages. In a slip-and-fall case, a similar anecdote would be "it's always *notice*."

Dealing with the issue of notice in a slip-and-fall case is a recurring theme and is addressed in other places in this issue of Advocate, nevertheless, it has to be covered in any article dealing with pitfalls of a slip-and-fall trial.

In a recent case I tried involving a slip and fall on spilled kitty litter at a grocery store, the issue of *notice* was raised repeatedly by the defense attorneys. The defense repeatedly beat their chest telling me that the kitty litter was only on the grocery store floor for 24 minutes. As such, we could never get around notice.

"Notice" is generally broken down to "actual" or "constructive" notice. For "actual" notice, the defendant had to have been aware of the spill or leak or whatever the problem was and failed to take reasonable steps to remedy the problem. For "constructive" notice, the spill, in this case kitty litter, had to be on the floor for an unreasonable amount of time so that the defendant "should have known" of the spill if they were taking care of the premises in a reasonable manner.

Ralphs Grocery, the defendant in this case, argued they did store "sweeps" every hour and had "sweep sheets" to prove their hourly sweeps of the aisle. Further, that the Ralphs Safety System trains every employee to constantly scan the floor for spills. As such, they felt their plan was reasonable, their sweeps were documented and we would lose on summary judgment or certainly at trial if the case ever went that far.

Summary judgment: Defendant created the dangerous condition

Ralphs filed for summary judgment. We were able to successfully defeat the motion, not by arguing that having kitty litter spilled on the floor for 24 minutes was unreasonable in terms of the length of time (even though we made this argument as well), but that Ralphs had *created* the dangerous condition by cutting the kitty litter bags with a razor blade when Ralphs employees removed the kitty litter bags from the pallets and stacked them on the shelves. We had video of the multiple kitty litter bags leaking as customers pulled them off the shelf. The last customer that handled a leaking bag placed it on the floor just after he took it off the shelf and wiped his hands off because the bag was leaking litter all over. This kitty litter bag on the floor was a visual cue that should have been seen by one of the trained employees who were supposed to be constantly scanning for spills. This led to a Prop 51 argument by defense (more on this subject below).

The kitty litter bag at issue in this case was a *Ralphs brand kitty litter*. It was put on pallets and wrapped in plastic by Ralphs in the warehouse. It was driven to the Ralphs grocery store in a Ralphs truck, driven by a Ralphs employee. It was then unloaded by Ralphs employees and taken in the grocery store, where the plastic wrapping was cut with hand-held razor blades so that the individual kitty litter bags could be placed on the shelf by Ralphs employees. These facts were all confirmed during deposition and at time of trial by the Ralphs assistant manager who was the only witness called by the store.

It is important to note that this manager was not an expert witness who could give opinion testimony; she could only testify as a percipient witness about what the Ralphs Safety Program was and how it was supposed to be implemented by the employees. She could not testify that the program was safe or rebut our expert's opinion that the program was inadequate and unreasonable, just that this was the Ralphs program that corporate had implemented and that her store was following this program.

Ultimately, the jury believed that Ralphs *created* the spill by cutting the kitty litter bags and that "notice," or how long the spill was on the floor was irrelevant. A point I do not believe the defense fully grasped until the jury was deliberating, even though they had lost a summary judgment motion with the same argument.

Jury instructions

Keeping in mind a few specific CACI jury instructions in this area can be instructive and help to guide how you prepare your case. Many suggest that you read the applicable CACI instructions when you open your file, and some suggest even printing the instructions to have in your file (or creating a separate CACI Instruction file), so that anyone working on the file can review them any time they are working on the case, as a reminder for what key information they may be seeking in order to prepare and win your case. This could be particularly relevant in taking depositions of defense witnesses, employees, persons most knowledgeable, and expert witnesses. For example, CACI 1001 Basic Duty of Care: "A person who owns/leases/controls property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who owns/leases/controls property must use reasonable care to discover any unsafe conditions and to repair, replace or give

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adequate warning of anything that could be reasonably expected to harm others."

CACI 1011 Constructive Notice Regarding Dangerous Conditions on Property sets forth the following:

> In determining whether RALPHS should have known of the condition that created the risk of harm, you must decide whether, under all the circumstances, the condition was such a nature and existed long enough that RALPHS had sufficient time to discover it and, using reasonable care:
> 1. Repair the condition; or
> 2. Protect against harm from the condition; or
> 3. Adequately warn of the condition.
>
> Ralphs must make reasonable inspections of the property to discover any unsafe conditions. If an inspection was not made within a reasonable time before the accident, this may show that the condition existed long enough so that a store, using reasonable care would have discovered it.

In this case, Ralphs argued the kitty litter spill was not on the floor long enough (24 minutes) for Ralphs to have sufficient time to discover it and, using reasonable care, repair the condition. In this case, clean the litter from the floor.

CACI 1012 Knowledge of Employee Imputed to Owner, states: If you find that the condition causing the risk of harm was created by RALPHS or its employee acting in the course and scope of his/her employment, then you must conclude that RALPHS knew of this condition.

The practice pointer here is to use the jury instructions at the onset to craft and create your theory to win the case. If you can get all the ammunition you need to plug into the applicable jury instructions, it goes a long way toward winning your case. Focusing on Ralphs creating the dangerous condition is an easy concept for the jurors to understand and you can walk through your theory of the case applying the facts to the law that is on your side.

Liability expert witnesses

This leads us to the issue of which expert witnesses should be used in a slip-and-fall trial. At our firm, we like to have a liability expert to set forth the reasons why the defendant is legally responsible. Further, to cover issues dealing with the amount of time that is reasonable versus unreasonable for a spill to be on a floor. They also address other safety standards, protocols, practices and procedures which can help you show the jury what the defendant did wrong and why they are responsible for what happened to the injured party.

Your liability expert is an authority on safety and can lay a solid foundation for your case and give your theory of the case lots of credibility. Many times, the defense will try to limit or preclude experts for lack of foundation, essentially saying the opinions are not ones that require expertise, specifically, special knowledge, training or experience in the area of testimony offered. Making sure your expert sets forth the specific safety qualifications and training to make sure the opinion can be given at trial is essential. Further, you often need an expert declaration to defeat any summary judgment motions brought by the defense. We feel it is best practice to get an expert retained early in the case so that you have them available to help prepare the case, educate you on nuances of the case, and to explain it all to the jury if the case goes all the way to trial.

Medical experts on damages

Medical experts are also essential in any injury case. We prefer to have treating doctors testify if possible. The jury often gives more credibility to a doctor who has seen and treated a patient for years, as opposed to a hired gun defense doctor who has seen the injured party once, years later, and is paid exorbitant fees for his opinions at trial.

An issue that arises with treating doctors is whether or not to have your treating doctor also be your billing expert. Some believe it creates vulnerability under cross-exam for your doctor who is trying to defend expensive medical bills as opposed to just talking about medicine. I certainly believe that if you are familiar with the medical expert, many can handle this area perfectly fine.

Some lawyers prefer to sidestep any billing issues by hiring a billing expert who can provide opinions as to the reasonable value of the medical bills for all areas of billing, for example, ambulance, emergency room charges, MRI facilities, X-rays, epidural injections, physical therapy, pain medications, surgeries, hospital charges, etc. Some surgeons who you may want to use to address all the medical charges may not be overly familiar with all of the types of bills in the case to provide an adequate foundation that charges are reasonable and necessary. This is where a billing expert can be helpful to assuage these concerns. One must also be mindful of *People v. Sanchez* concerns over medical bills being hearsay and these experts attempting to opine on them, but that discussion is too voluminous to address in depth here.

Life-care planners are often helpful when there are significant future medical needs to address. Sometimes this can be handled through the medical doctor, which can streamline the trial, but it is usually not as detailed as a life care plan. The life care plan is generally approved by the same treating doctor who is already testifying, so the doctor can often get in most of the future damages as an option in lieu of the life care planner providing this testimony.

An economist can be used to help quantify the amount in present value of the future damages including wage loss. This is generally needed when a life care plan is used, to boil the numbers down to an exact figure you will be asking the jury to award.

Accident reconstructionists are often helpful in these cases to help walk the jury through what happened, particularly if the event is not captured on video.

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A biomechanical expert can help explain the forces involved in the fall that create the injuries involved. This can be very helpful in explaining how a hip is fractured or a spinal process is fractured from a fall of only a few feet.

Proposition 51 argument

Another potential pitfall is the Prop 51 argument. Codified in Code of Civil Procedure section 1431.2, Prop 51 was an attempt to limit joint and several liability only to economic damages and abolish the rule of joint and several liability with respect to non-economic damages, such as pain, suffering, emotional distress, mental suffering, etc.

Under a joint and several liability paradigm, which is the rule of law in California, each tortfeasor is 100 percent liable for all awarded damages. So even a one percent at-fault defendant could pay the entire judgment if other tortfeasors are not financially viable. In cases in which Prop 51 applies, each defendant's liability for these damages is several only, in direct proportion to each tortfeasor's percentage of fault.

The legislation was passed to prevent going after deep-pocket co-defendants for the entire amount of non-economic damages regardless of the amount of their fault in the lawsuit. In my case, the defense argued that the customer who took the kitty litter bag off the shelf was partially responsible and should have a slot on the verdict form to assign a percentage of fault. Also, that some other customer may have hit the bags with their shopping cart, so they should also have a slot for percentage of fault. This, of course, would reduce the plaintiff's non-economic award by whatever percentage the jury would assign to the others on the list.

There are a number of ways to deal with this pitfall. The first is to address the issue via motion in limine to preclude the defense from making this argument. If the defense did not plead this as an affirmative defense, you could argue it is precluded on this basis as well. Further, there has to be some evidence to support the argument that another tortfeasor had fault for the harm. Note the person does not have to be a defendant in the case to be assigned a percentage of fault which would reduce the plaintiff's award.

Here, there was evidence that a customer took a kitty litter bag off of the shelf, but zero evidence that any other customer hit the kitty litter bag with a shopping cart. The judge allowed a slot for percentage of harm for the customer who took the bag off the shelf only. Ultimately, we used this to our advantage and showed that Ralphs would not take any responsibility for what happened and would even blame their own customers for the dangerous condition they created in their store. So, depending on the facts of your case, this can be turned to an advantage if such tortfeasors are allowed on the verdict form; however, it is probably preferable in most instances to keep them off the verdict form if possible.

Comparative negligence

In every slip-and-fall case, the defense will argue that your client bears some percentage of responsibility for not watching where they were walking, or not seeing the item they slipped on, etc. This can be a difficult argument to overcome. It should be dealt with during voir dire, by asking questions from the beginning, for example, "Do you think my client is automatically partially to blame simply because they fell?" And depending on the case, it is often a good idea to accept the notion that your client may have had some fault and may bear some responsibility, 5, 10 or 20 percent, and that is something the jury should discuss in deliberations. It is always better to address this in your case before the defense brings it up.

There are many pitfalls to avoid in successfully prosecuting a slip-and-fall case through verdict, but having them on your radar at the outset is most certainly advantageous. In this case we hit Ralphs with a $2,499,000 verdict (with small comparative) on a case they were convinced they would defense at trial. And remember, in premises cases, there's no car to deal with!

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