FLANAGAN & BODENHEIMER

INJURY AND WRONGFUL DEATH LAW FIRM

PRACTICE SERIES

PRACTICE SERIES #2

ESTABLISHING CONSTRUCTIVE NOTICE IN SLIP AND FALL CASES – PART II

Our last Practice Series newsletter discussed a creative way of proving constructive notice of a dangerous condition in a slip and fall case. We recommended retaining an expert that can test the slip resistance of the flooring surface where the fall occurred, and instead of focusing on the actual spill, focus on the floor. If you can prove that the floor was not reasonably slip resistant, you should be able to defeat any summary judgment motion claiming the defendant did not have notice of a dangerous condition.

In this newsletter, we want to highlight a different tactic we use to prove notice in slip and fall cases – prior incidents. If you look at the statute on transitory foreign substances (Florida Statutes § 768.0755), you will see that there are two enumerated ways to prove notice. The first way requires the plaintiff to show that the dangerous condition existed for such a length of time that the business establishment should have known the dangerous condition was present. The second way allows the plaintiff to

show that the condition ***occurred with regularity*** and was therefore foreseeable. When we use prior incidents to prove constructive notice in a slip and fall case caused by a spill, we are proving constructive notice through the second way. In other words, we are establishing that because the problem happened before, the defendant should have known about the problem. *See Nance v. Winn Dixie Stores, Inc.*, 436 So.2d 1075 (Fla. 3d DCA 1983).

The law in Florida is clear that evidence of prior incidents is discoverable, and the priors are admissible to prove notice of a dangerous condition in a slip and fall case. *See Costco Wholesale Corp. v. Marsan*, 823 So.2d 301 (Fla. 3d DCA 2002). You must be persistent in your discovery efforts to uncover prior incidents. I can't emphasize this enough. If you just go through the motions, ask about prior incidents in written discovery, get a discovery response that says none, and move on, you are likely going to be missing out on a lot of information.

We were recently working on a case where we asked about prior incidents in our initial written discovery and the initial response we received from the defendant was "none." Ultimately, it turned out that there were over 10 prior incidents in the three years before our client's fall and one in the exact same location where our client fell. We found this information by digging into the processes the defendants used to report issues at the premises. We learned that emails would be sent between certain employees when there was an issue at the property, and we obtained the emails in discovery. It turned out that in the emails we found evidence of numerous prior incidents. Now, this information should have been turned over initially, but it wasn't, and when we ultimately got it, it changed the landscape of the case.

We would also encourage you to ask about the efforts taken to uncover prior incidents when you take the deposition of the corporate representative. For instance, in our notices of taking depositions of a corporate representative in a slip and fall case, we will always include an area of inquiry that asks about the efforts taken by the defendant to uncover the existence of prior similar incidents. What you will find is that a lot of times there was no formal search to uncover prior incidents, an employee answered discovery and just said there was no prior incidents based off memory. If this happens, you need to file a motion requiring the defendant to conduct a more thorough search.

When you attempt to admit prior incidents at trial or use them at the summary judgment stage as proof of notice, you will undoubtedly get an objection from the defendant that the priors are not "substantially similar." You need to be thinking about how you will deal with this issue in advance. As an initial consideration, we want to point out that when you are using priors to prove notice, the "substantial similarity" requirement is relaxed. *See Godfrey v. Precision Airmotive Corp.*, 46 So.3d 1020 (Fla. 5th DCA 2010) ("Although prior incidents must be substantially similar to the incident at issue if used to prove the existence of a dangerous condition, this requirement is relaxed if evidence of prior incidents is introduced only to establish notice of a potentially dangerous condition, as it was in this instance.") Also, prior incidents do not require "exactly identical circumstances." *See Lewis v. Sun Time Corp*., 47 So.3d 872 (Fla. 3d DCA 2010).

One case we like when discussing the similarity requirement is *Costco Wholesale Corp. v. Marsan*, 823 So.2d 301 (Fla. 3d DCA 2002). In that case, the plaintiff fell on liquid laundry detergent in a large retail store. The plaintiff uncovered evidence of 22 prior slip and falls, but only 5 involved liquid detergent or were in the same area where plaintiff fell. The trial court admitted all 22 prior incidents, and this was upheld on appeal.

Even though you are not required to show that the circumstances are identical between your case and the prior incidents, you still want to show that the circumstances are similar. You can do this by deposing the individuals involved in the prior incidents. Or you can include an area of inquiry in your notice of taking deposition of the defendant's corporate representative and request information about the circumstances of the priors from the defendant.

Generally, you will want to prove that the prior incident occurred under substantial similar circumstances, i.e. same flooring material and same or similar liquid on the floor. During discovery, try to eliminate as many of the differences between the prior incidents and your case. You can do this in your corporate representative deposition by going through all of the facts known to the defendant about each prior incident. After you have exhausted the defendant's knowledge about any given prior incident, lock them in by asking, "Have we now discussed all of the facts about the Smith incident known by XYZ Company."

Next, go out and find some of the people who had the prior incidents. You are entitled to the names and contact information of individuals involved in prior incidents. *See Marshalls of M.A., Inc. v. Witter*, 186 So.3d 570 (Fla. 3d DCA 2016). We call them "prior incident victims". We send out letters to anyone disclosed as having had a prior incident asking them if they are willing to share information about their incident. If you word your letter correctly, you will be surprised by how many people call you and want to tell you their story. If you like what you hear, then notice your prior incident victims for video deposition.

A good prior incident victim might be your first witness at trial, so take the deposition as if you are on direct examination at trial. During the video deposition, focus on what happened to the victim and most importantly, what they told the Defendant about their incident. Try to frame the prior incident victim as a person who was hurt and wanted to make sure this didn't happen to anyone else. Also, use your prior incident victims to impeach the Defendant's corporate representative's testimony about the prior incident.

Use your prior incident victim depositions to turn a list of names of people who fell into real people who were victims of the defendant's negligence that the jurors will see and connect with. These depositions can anger jurors and motivate them to return a fair and full verdict for your client. In a case that we have set for trial next month, we plan to play the depositions of three or four prior incident victims in our case-in-chief.

In closing, make sure you are dogged about discovering information about prior incidents in your slip and fall cases. They could make the difference between losing on summary judgment or getting a very nice result for your client.

We hope this newsletter helps you in your practice. If you want to discuss any of the topics raised in the newsletter, or any other issues that you encounter in your practice, we would love to hear from you. You can email me at ZDB@Florida-Justice.com or call us at (305) 638-4143.