

MARKETERS UPDATE

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GLASS MUST BE FULL BEFORE AFTER DELIVERY

THIS **0.00** GAL IS AT

DOLLARS CENTS

WITH SALES TAX

PER GALLON

GALLONS

00.00

COMPUTED AT

6 0

CENTS PER GALLON

EXTRA

**STUBBORN FACTS
IN PREMISES
LIABILITY LITIGATION**

**SWIP-FREE REFORM
EFFORTS CONTINUE**

**OVERLOOKED SMALL-BUSINESS
TAX DEDUCTIONS:
5 THINGS YOU NEED TO KNOW**

Stubborn Facts in Premises Liability Litigation

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Employees must take simple and tangible steps to improve the safety of business patrons to insure the business' financial success. To prevent an accident and/or injury on the business' premises, every business should make all employees a part of a team charged with limiting the

business' liability. However, should an accident occur, a proactive approach should be taken to decrease the likelihood that the business is held liable for an injury and is forced to compensate a patron-plaintiff for his or her damages.

Properly employed safety measures are advantageous to a business, though it is impossible to prevent all accidents. Realizing that proactive precautions help keep patrons safe is an invaluable asset. Every business should take steps to protect its patrons (1) out of genuine concern for the well being of those on the business' property, (2) out of a desire to provide a safe environment that will be welcoming to the business' potential customers, and (3) out of a desire to limit the business' liability should an accident occur.

As litigators, our practice focuses on defending businesses when accidents occur. Generally, a business owes a duty to its patrons "to keep the premises in a reasonably safe condition or to warn of dangerous conditions not readily appar-

ent, which the occupant or owner knows of, or should know of, in the exercise of reasonable care." *Fulton v. Robinson Industries, Inc.*, 664 So. 2d 170, 175 (Miss. 1995) (citing *Jerry Lee's Grocery, Inc. v. Thompson*, 528 So. 2d 293 (Miss. 1988)). Despite this duty, it should be noted that a business owner is not an insurer of the patron's safety. *Corley v. Evans*, 835 So. 2d 30, 37 (Miss. 2003) (citing *Caruso v. Picayune Pizza Hut, Inc.*, 598 So. 2d 770, 773 (Miss. 1992)).

In premises liability cases, the facts ultimately drive the final outcome. To provide an effective defense for the business, litigators must know and analyze precautions the business took to either prevent the accident from occurring or to warn of the dangerous condition. If the business did not take any provable actions to provide for the safety of its patrons, the business is more likely to be held liable for the accident. The facts of the case are investigated after an accident and the findings are used by both parties after a lawsuit is filed. During settlement negotiations and at trial, the attorney for the injured patron-plaintiff will emphasize favorable facts. Likewise, defense counsel will emphasize facts that place the business-defendant in the best possible light during the litigation process.

U.S. President John Adams famously stated: "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence." It is impossible to change the facts of the case whether they are favorable or detrimental. Arguments and persuasive remarks can

be employed in an attempt to minimize the damage of a harmful fact, though the harmful fact remains.

If patrons enter and exit a store with a floor that is slippery when wet, and it has been raining all day, then a dangerous condition is likely created inside the store. A patron who slips, falls, and is injured because of the wet, slippery floor may file a lawsuit against the business. When defense attorneys receive the lawsuit, they must determine through investigation what led to the patron's injury, and discover what steps the business and its employees took to prevent the accident. Was there a mat at the front entrance that reduced the amount of water being tracked into the store? Were there signs displayed in the store to warn patrons about the potentially wet floors? Did employees regularly dry mop or take other steps to remove as much water from the floor as possible? Answers to these questions would reveal important facts to guide and direct the case. President Adams' observation applies in that these important facts cannot be changed after the injury. If a mat was not located in the entryway and there were no warning signs, the patron-plaintiff will use those facts to show that the business is liable and should be forced to compensate the patron for his or her damages. However, documenting the accident with reports and actions taken by the business helps to build a stronger defense in a lawsuit.

Businesses must take the necessary steps to place themselves in the best possible position for a favorable settlement or a victory in the form of a defense verdict at trial. Losing a lawsuit can be very costly to a business. Similarly, if the

business is faced with the trial of an unfavorable case, any potential settlement will be gained only at a high price. Since the business cannot alter facts after an accident, it should focus on proactive steps to decrease the likelihood of an accident and decrease the likelihood that the business will lose a lawsuit should an injury occur. Every business should train its employees to take steps to decrease the business' potential liability. Returning to the slippery floor example, it is important to make sure that wet floor signs are visible if there is any possibility that the floor could become wet that day. Many safety products are available to implement safety measures. Businesses should place special emphasis on tangible safety procedures when training employees and educate employees on why these steps are important. For example, if an employee knows that his or her actions, or inactions, will be heavily scrutinized by members of a jury in a trial, the employee will have additional motivation to comply with the safety requirements.

Employee education must go beyond the use of written policies and procedures. In fact, written policies and procedures can be used against the business if the business' employees do not comply with them. As an example, assume a business issues a written manual that requires employees to use a dry mop or other drying method every 15 minutes on rainy days to help keep the floors inside the store safe. A patron is injured when he or she slips and falls in the store and subsequently files a lawsuit. On the day of the fall, it was raining outside and the patron-plaintiff claims he or she fell because other patrons tracked rain water all over the floor, creating a dangerous condition in the store. As the discovery phase of the lawsuit commences, the written policy (mandating that the business-defendant's employees take measures to dry the floor every 15

minutes) is discovered by counsel for the patron-plaintiff. If the employees did not comply with the written requirement, then the business will be in a worse position in its defense than it would have been without the written requirement. The patron-plaintiff will highlight the written requirement as an admission by the business-defendant that the actions were necessary to keep the store safe on a rainy day. Furthermore, the patron-plaintiff will call attention to the fact that the business-defendant did not comply with the safety steps it mandated as necessary through the issuance of the written policy. It is important to have written safety procedures, but it is equally as important that the procedures are enforced so they do not become a proverbial "double-edged sword" that can be wielded against the business in the prosecution of a lawsuit.

Documentation of safety steps taken by the business' employees is crucial. If the employees did dry the floors every 15 minutes, but it is disputed at trial, it would be to the business' advantage to have records indicating that its employees complied with the safety precautions. It is critical to make sure safety efforts are documented or can otherwise be proven. After drying the floor, a checklist used by employees to record the time and then initial is helpful in the defense of the case. Surveillance video, photographs, and tangible proof beyond the employee's testimony allow the jury to accept the safety measures as a valid defense. In addition, if the employee cannot be reached or found by the time the accident is tried in a court of law, the documentation will serve as the business' only proof of the safety steps taken to protect its patrons.

Regardless of the time spent and efforts taken to establish and enforce safety procedures, a patron-plaintiff who was injured on business property will be steadfast in his

or her assertion that he or she was injured due to the business' negligence. Nonetheless, Mississippi Courts have held: "There must be some evidence of negligence given a jury before it can determine that a defendant is guilty of negligence." *Thompson v. Chick-Fil-A, Inc.*, 923 So.2d 1049, 1052 (Miss. App. 2006); *J.C. Penney Co. v. Sumrall*, 318 So.2d 829, 832 (Miss. 1975). Incident reports, check sheets, videos, and other tangible evidence will permit the business to show that it acted as any other prudent and responsible property owner would given the facts of the accident. Additionally, these tangible pieces of evidence help establish the facts of the incident to determine how long the danger existed, whether employees knew about the danger, or if other circumstances contributed to the patron's injuries.

At trial, a patron-plaintiff will present evidence of his or her injuries. The patron-plaintiff will offer medical records and bills as evidence for the jury to consider. He or she may also offer x-ray images, MRI scans, and other tangible evidence of broken bones or other alleged injuries and damages. The patron-plaintiff may also show photographs of wounds for the jury's consideration. Often, a patron-plaintiff will show his or her scars to the jury members and describe painful and traumatic injuries. After presenting this evidence, along with the rest of his or her case, the patron-plaintiff will ask the jury to find that the business-defendant is liable for the injuries and that it be ordered to compensate him or her for the damages. The business-defendant needs tangible and persuasive evidence of its own to counteract the plaintiff-patron's claims and evidence.

To counteract the patron-plaintiff's claims and evidence, proper documentation, witnesses, and photographs allow the jury to see and hear what preventative steps were taken by the business-defen-

dant. In its defense, the business owner can describe to the jury the business' policies regarding patron safety. If these procedures were in place at the time of the injury, the jury can see video of business employees drying floors, utilizing warning signs, and taking other steps to create a safe environment. The jury will learn that the business appreciates and respects its patrons. A business must be ready to tell its story and to present tangible supporting evidence to the jury. Otherwise, the only resounding images will be those of the patron's wounds, surgery, and resulting scars.

To present a strong defense of the business, all possible evidence must be preserved as claim may be brought without warning years after the actual injury. Often, the claim is made after witnesses and employees have moved, presenting a problem for the defense of the case. However, the claim is one that can be resolved with proper foresight. Incident reports should be preserved, along with any video and photographs of the premises in the location of the patron's injury. If possible, the business should record

the name and contact information for any witnesses who were on the business' property around the time of the accident. Also, the business should have witnesses complete a questionnaire and/or give a written statement of their observations, thus saving time and expense when later trying to locate key individuals to support the defense of a lawsuit. This documentation may also serve to refresh the memories of key witnesses. These statements should be taken even if the witnesses claim they do not have any knowledge regarding the accident. This helps to protect against a "convenient" or "selective" memory in the future.

One of the most important aspects of the defense of a lawsuit is minimizing the damages in the event a jury finds for the plaintiff on liability. Although a patron-plaintiff may desire the largest possible verdict, the damages are limited to what he or she can prove at trial. Businesses can help prepare for a potential case by placing an emphasis on collecting evidence at the time of the accident that may aid in minimizing potential damages. By memorializing the incident once it

occurs through the use of reports, photographs, and video, the business may be providing assistance in limiting the damages if a lawsuit is filed.

To maintain its vitality, a business must earn profits and minimize losses. When accidents occur, employees must stand ready to respond and record the events. As a result, potential losses as a result of legal actions can be minimized or avoided. President Adams was correct when he stated that "[f]acts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence." Therefore, each business must take proactive steps before the accident occurs and memorialize the evidence following the accident. In doing so, the business is aiding in its defense if a civil action is filed. ■

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