What You Need to Know Now! Prevalent Trends and Up-to-Date Developments in Premises Liability Law

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PREMISES LIABILITY:
HOT TOPICS IN THE HOSPITALITY AND RETAIL INDUSTRY

I. INTRODUCTION

Premises liability is a cause of action that dates back numerous centuries. The doctrine is derived from the common law doctrine of negligence and “deals with an owner’s or occupier of real estate’s duty to protect people on or off the premises from dangerous conditions and defects in the property.” Laura R. Rose, *Litigating Tort Cases: Scope Note* § 55:1 (2017). Generally, claims of premises liability are “very difficult to prove” and have a “poor likelihood of prevailing at trial.” *Id.* While one might assume that these cases settle, most insurance carriers are not willing to negotiate what plaintiffs think is a reasonable settlement and, therefore, attorneys “must be prepared to go to trial.” *Id.* Because of the reality that many of these cases are tried before juries, it is very important that companies do what they can to minimize their risk of being sued in the first place, and to understand what policies and procedures set them up for success in a lawsuit if one gets filed.

While premises liability cases are difficult for plaintiffs to prove, the hospitality and retail industries still need to take precautions because their premises are “open to the public” and vulnerable to potential lawsuits, which brings with it inherent risks. *Id.* Premises liability cases have “evolved from the common law, and resulted in a complex legal system dependent on many factors, including the legal status of the plaintiff, theories based upon the relationship of the parties and the numerous defenses available to the defendant.” Douglas Danner, *Pattern Discovery Premises Liability: Overview* § 15:1 (2017).

In evaluating the strength of a particular plaintiff's case, the *status* of the plaintiff is extremely important because the duty of care owed may vary depending on the status of the plaintiff. Douglas Danner, *Pattern
In the hospitality and retail industry, plaintiffs are typically considered “business or public invitees” and are owed “the greatest duty of care” by either the landowner or occupier. Douglas Danner, *Pattern Discovery Premises Liability: Basis of Liability* § 15:4 (2017). While the distinction varies based on the jurisdiction, “establishing invitee statues involves either showing that the visitor had a business purpose or that the presence of the injured person on the premises resulted in a business advantage to the landowner or occupier.” *Id.* Generally, the owner of such business establishment is “liable for any hazardous conditions which one causes or negligently allows to remain on the land” as “holding the premises open to the public… implies a representation by the possessor that it is reasonably safe for such visitors, which entails a duty to make them so by inspection and repair or warning.” Douglas Danner, *Pattern Discovery Premises Liability: Invitees, Licensees, and Trespassers* § 15:12 (2017). The *Restatement of Torts* sets out the general premises liability rule that applies to business invitees:

A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he:

(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and

(b) has no reason to believe that they will discover the condition or realize the risk involved therein, and

(c) invites or permits them to enter or remain upon the land without exercising reasonable care

(i) to make the condition reasonably safe, or
(ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to receive, if the possessor is a public utility.

Restatement (First) of Torts § 343 (1934).

Even though Premises Liability is not a novel issue for premise owners, creative plaintiffs are still crafting new arguments aimed at expanding scope of the cause of action. From 2015 to 2017, there have been numerous developments around the country regarding

- the use of liability waivers,
- the ‘Mode of Operations’ doctrine,
- the duty to warn,
- the duty to inspect,
- spoliation of evidence, and
- wrongful acts of third parties.

In this article, these “hot topics” will be discussed in detail to alert the industries of these potential issues and provide various solutions to each issue, such as policies and mechanisms, to help both industries avoid potential law suits and develop successful defenses in the event of a lawsuit.

II. HOT TOPICS

A. Liability Waivers

1. Treatment in the Courts

This defense is based on contract – the theory that an invitee can agree to release the owner from the “liability that was associated with the certain activity.” *Littlejohn v. Timberquest Park at Magic, LLC*, 116 F. Supp.3d 422, 426 (D. Vt. 2015). While states have utilized various tests to determine whether a liability waiver should be upheld, Vermont and Colorado have recently held that the waiver must be fair from a “public policy” point of view. See *Raup*, 233 F. Supp. 3d at 935; *Littlejohn*, 116 F. Supp.3d at 429.

In *Littlejohn*, the United States District Court for the District of Vermont held that the owner of a “self-guided aerial adventure course” was liable for a patron’s injury when their exculpatory agreement required the patron to release them from all liability. *Littlejohn*, 116 F. Supp.3d at 442. In *Littlejohn*, a 76-year old man was injured on an aerial course when he mistook a guy wire for a zip line cable and ran into a tree. *Id.* at 424. Even though the plaintiff suffered severe injuries, the owners of the course refused to accept liability as every ticket included a liability waiver. *Id.* at 425. The District Court disagreed and ruled that the owners of the adventure course were liable on the basis that their waiver was contrary to public policy and therefore was not a valid defense. *Id.* at 433. While the owners tried to argue that the agreement was enforceable under *Thompson v. Hi. Tech Motor Sports*, 183 Vt. 218 (2008), the Court ruled that this particular liability waiver was different. *Id.* at 427. In its analysis of binding state court case precedent, the court noted that all previous cases “call for a flexible case-specific analysis of the factors.” The Court balanced several factors and concluded that even though the activity was not necessary, the two most important factors were whether the defendant was in control of the location where the injury occurred, and whether the premises was open to the general public. The Court also looked to the number of patrons generally visiting the premises, although it was “not convinced that the size of the business alone should play a significant role in whether or not the exculpatory clause should be enforced.” *Id.* at 428.
The Court also noted that, unlike a ski-resort, the course “did not offer training or require such skill.” Id. Finally, they reasoned that “business owners are responsible for the safety of their premises and, therefore, the owners should not be able to “contract out of liability of negligence in the design, maintenance, and operation of its business premises.” Id. at 429.

In contrast, in Raup v. Vail Summit Resorts, Inc, 233 F. Supp. 3d 934 (D. Colo. 2017), the United States District Court for the District of Colorado held that a waiver on the back of the plaintiff’s lift ticket barred her premises liability claim. The lift ticket said on the front “Important Warning on Reverse.” Id. at 938. The parties disputed the font size and placement of that warning. The plaintiff was injured when she had to jump off a ski lift after she failed to lift the safety rail when disembarking the lift at the top of the mountain. While both parties had differing descriptions of how the accident had actually occurred, the Court held that the resort was not liable for her injuries because of the resort’s ski lift liability waiver, despite not signing the waiver. Id. at 943. The court noted that while “contractual waivers of liability clauses were recognized under Colorado law, they were to be “construed narrowly and ‘closely scrutinized’ to make sure that the agreement was fairly entered into and the intention of the parties is expressed in clear and unambiguous language.” Id. at 942. The Court examined four factors to determine if the waiver agreement was valid: “1) the existence [or nonexistence] of a duty to the public; 2) the nature of the service performed; 3) whether the contract was fairly entered into; and 4) whether the intention of the parties is expressed in clear and unambiguous language.” Id. at 942 (quoting Jones v. Dressel, 623 P.2d 370 (Colorado 1981). When applying these four factors to the case at hand, the court found that the ski resort owed a duty to the public and the waiver regarding use of the chairlift was fairly entered into because “riding a chairlift is not an essential activity but is recreational in nature, and recreational activities ‘do not possess a decisive advantage of bargaining strength that puts participants “at the mercy” of any negligence by the
recreational company.”” Id. at 943 (alteration in original)(quoting Hamill v. Cheley Colo. Camps, Inc., 262 P.2d 945, 949 (Colo. App. 2011)). While the Court grappled with the fourth factor, Judge Daniel eventually held that the waiver “‘clearly reflects’ an intent to extinguish liability.” Id. The Court noted that the ticket specifically stated that the “[h]older agrees to not bring any claim or lawsuit against the Fun Park or its affiliates that could arise from the negligence of the Holder or others, including the negligence of the Fun Park operator or its employees,” that the holder “understands and voluntarily assumes all risks associated with visiting the Fun Park, including the risks of property damage, personal injury, and death. . .”and that “the Holder, by use of this ticket, hereby understands and accepts such denial of liability.” Id. at 943. The court found that this language was not too long and did not contain complex legal jargon. Id. Furthermore, the Court stated that it was not “dispositive that the Plaintiff did not sign or actually read the waiver.” Id.

2. Tips for Preventing Liability

When looking to liability waivers, the hospitality and retail industry can protect itself from liability by requiring guests to sign liability waivers before using any of the premises’ recreational amenities. See Raup, 233 F. Supp. 3d 934; Littlejohn, 116 F. Supp.3d at 442. Like Littlejohn and Raup, hospitality and retail industry owners need to make sure that these agreements are “fair from a public policy standpoint” to ensure that they will be upheld in a court of law. See id. In order to ensure that waivers are “fair” (which is an unspecific term) the waivers should be specific and should take into account particular cases in each jurisdiction so that courts will be more likely to accept the waiver. Unlike Littlejohn, owners should “offer training” if they provide an activity to patrons, and, if possible, should require guests to have some “skill” before allowing them to participate in the activity on their own. See Littlejohn, 116 F. Supp.3d at 448. Furthermore, owners of hospitality and retail premises should ensure the
“contract is fairly entered into” and the warning itself is visible and “uses clear and unambiguous language.” See Raup, 233 F. Supp. 3d 934 (D. Colo. 2017). While Courts do not consider “signing or actually reading the waiver of liability” dispositive, it would still be in the owners’ best interest to require patrons to sign and read the liability waiver as Courts would more than likely find that the patron “assumed the risk” of an activity.

B. Mode of Operations Doctrine

1. Treatment in the Courts

The Mode of Operations Doctrine is a common law doctrine that entitles a “business invitee who is injured on an owner’s premises to an inference of negligence.” Prioleau v. Kentucky Fried Chicken, 122 A.3d 328, 330 (Sup. NJ. 2015). This inference of negligence “relieves the invitee of the obligation to prove that the business owner had actual or constructive knowledge of the dangerous condition that caused the accident.” Id. at 334. Recently, this doctrine has been applied to premises with a “self-service” business model and is typically raised when a patron has slipped and fell. Id. at 334. While states have varying tests to determine the applicability of the doctrine, most states require that a “nexus between the self-service component of the business and the risk of injury in the area where the accident occurred.” Troupe v. Burlington Coat Factory Warehouse Corp., 129 A.3d. 1111, 1116 (Sup. NJ. 2016). Recently, New Jersey and Connecticut have expanded their interpretation of the doctrine and its application in both industries. See Prioleau, 122 A.3d at 328; Walker v. Costco Wholesale, 136 A.3d 436 (N.J. Sup. Ct. 2016); Troupe, 129 A.3d. at 1111; Romeo v. Harrah’s Atlantic City Propco, 168 F.Supp.3d 726 (D. NJ. 2016); Porto v. Petco Animal Supplies Store, 145 A.3d. 283 (Conn. App. 2016).
In New Jersey, the Supreme Court, Superior Court, and United States District Court for the District of New Jersey have examined and further defined the Mode of Operations doctrine. See Prioleau, 122 A.3d at 328; Walker, 136 A.3d at 436; Troupe, 129 A.3d at 1111; Romeo, 168 F.Supp.3d at 726. While the cases have come down differently based on each case’s given facts, the courts have specifically focused on whether there is a “nexus between the self-service component of the business and the risk of injury in the area where the accident occurred.” See id.

The Supreme Court, in its 2015 ruling of Prioleau, 122 A.3d 328, declined to extend the mode of operations doctrine. In Prioleau, a patron was injured when she slipped and fell by the restroom in a Kentucky Fried Chicken Restaurant. Id. at 330. In reaching its decision, the Court noted that the doctrine “had only been applied to a “self-service or a similar component . . . in which it is reasonably foreseeable that customers will interact directly with products or services, unassisted by the defendant or its employees.” Id. As the plaintiff fell near the bathroom, the Court affirmed the judgment of the appellate division that the doctrine was not applicable as the “plaintiff’s injuries were unrelated to any aspect of defendants’ business in which the customer foreseeably serves himself or herself, or otherwise directly engages with products or services, unsupervised by an employee” and the injury did not have a “nexus between any self-service aspect of the defendant’s business and the plaintiff’s injury.” Id. at 337. Even though the plaintiff argued that the liquid in the hallway could have been “oil and grease from the kitchen,” the court determined that the “accident was unrelated to any self-service component of the defendant’s business.” Id.

In Troupe, Annette Troupe was injured when she slipped and fell on a blueberry in the Baby Department at Burlington Coat Factory. Id. at 1113. The Court refused to apply the doctrine once again as the plaintiff failed to establish that there was a “nexus between the self-service
component of Burlington’s business, namely selling clothes and other non-food items, and the risk of a customer slipping on a berry in the aisle.” *Id.* at 1115. While the Plaintiff argued that the trial court should have applied the doctrine as there was a “lack of any periodic inspection of the floors during the business shopping day,” the Court quickly denied doing so as the plaintiff “misconstrued the holding in *Prioleau.*” *Id.* at 1114. The Court specifically declined to “expand the mode-of-operation rule” reasoning that Plaintiff’s interpretation would remove any requirement that there be a nexus, or connection, between the self-service and the particular risk.

However, a few months after *Troupe,* in the New Jersey Superior Court, the Court perhaps expanded on the Mode of Operations Doctrine in *Walker v. Costco Wholesale Warehouse,* 136 A.3d at 436. In *Walker,* Justice Sabatino remanded the claim back to the lower court for factfinding because an “inference of negligence on part of the operator would have been permissible under the Mode of Operations doctrine, if the jury found that the substance on which the customer slipped on came from the free cheesecakes samples offered to customers by demonstrators in the store.” 136 A.3d at 436. While the Plaintiff alleged that the substance that he slipped and fell in “had a white appearance like a yogurt-based product,” he “couldn’t tell the jury exactly what it was.” *Id.*

At the Superior Court, Justice Sabatino noted that “Mode of Operations liability concept specifically was applicable to situations where a proprietor has operated a cafeteria within a retail establishment in which patrons are permitted to carry food and drink freely within the confines of the premises.” *Id.* at 443. Furthermore, the Court cited to *Prioleau* and stated that the “concept of ‘self-service’ signifies that customers independently handle merchandise without the assistance of employees.” *Id.* at 444. The Court compared the case at hand to *Prioleau* and stated that this concept may have been present as “customers would walk away with the paper cups containing the samples without consuming them on the spot” and could “discard them at their own pace.” *Id.* at 445. The court reasoned
that it was “foreseeable that food fragments from those extra samples could be dropped and cause an accident.” *Id.* However, as the plaintiff had not provided sufficient evidence that the substance was cheesecake, the Court ruled that the jury must determine whether the plaintiff had “met his threshold burden of proving the necessary factual nexus to [the] defendant’s self-service activity.” *Id.* at 446.

Finally, the United States District Court for the District of New Jersey further reviewed the state’s interpretation of the doctrine in *Romeo v. Harrah’s Atlantic City Propco*, 168 F.Supp.3d 726 (D. NJ. 2016). In *Romeo*, a patron slipped and fell on liquid at a casino. *Id.* at 727-728. While *Romeo* argued that the Mode of Operations doctrine should apply, the Court ruled that the plaintiff had failed to prove that there was a “nexus between the spill on which he slipped and the casino’s alleged operation of supplying beverages in self-service.” *Id.* at 731. Even though he had fallen in a common walkway and alleged that their drink service was an “integral part of the casino’s mode of operation,” the Court ruled that they did not “need to determine whether a casino was a self-service business as the plaintiff could not demonstrate the required nexus between the spill and the defendant’s alleged self-service operation.” *Id.* The Court reasoned that there was “no proof that the liquid came from the defendant’s beverage service and the patron did not know who spilled the beverage.” *Id.* Finally, the Court relied on *Prioleau* and stated that the cases were “very similar” and held that liquids of “unknown origins” would not satisfy the doctrine. *Id.*

In Connecticut, the Appellate Court held that the doctrine was not applicable when a patron slipped on dog urine in Petco Animal Supply Store. *Porto*, 145 A.3d. at 283. While the patron tried to argue that “pet stores that allow leashed animals inside of its stores have a “pet-friendly mode of operation, and, therefore, caused her to slip and fall, the Appellate Court held that the doctrine was a “narrow exception to the
traditional notice requirement and that the plaintiff did not allege enough facts to meet “all three overarching requirements of the rule.” *Id.* at 289. Based on prior precedent the Court concluded that the patron must be able to prove that “1) the defendant has a particular mode of operation distinct from the ordinary operation of a related business; 2) the mode of operation must create a regularly occurring or inherently foreseeable harm; and 3) the injury must happen in the zone of risk.” *Id.* When assessing the facts at hand, the Court ruled that none of the factors had been met as there was not a “specific method of operation that deviated from the general operation of a similar business and that “animal messes were not inherently foreseeable hazardous conditions resulting from a pet friendly business policy.” *Id.* Because the doctrine was not applicable, the Court held that the Plaintiff was “required to prove the store’s actual or constructive knowledge of the urine to sustain a viable claim of premises liability. *Id.* at 291.

2. **Tips for Preventing Liability**

When looking to the Mode of Operations doctrine, the hospitality and retail industry can avoid “an inference of negligence” by providing further oversight in “self-service” components of their businesses. *See Prioleau*, 122 A.3d at 328; *Walker*, 136 A.3d at 436; *Troupe*, 129 A.3d. at 1111; *Romeo*, 168 F.Supp.3d at 726; *Porto*, 145 A.3d. at 283. While Connecticut and New Jersey have been cautious in finding a “nexus between the self-service component and the risk of injury in the area where the accident occurred,” businesses owners should maintain their premises in a safe manner. *See id.* While the New Jersey courts largely appear to require a nexus between the self-service component of a business and a plaintiff’s injury, the New Jersey Superior Court highlights a practical problem for premises owners and businesses – often the courts will treat this as a *factual* question to be decided by a jury.
This doctrine, if applicable, will allow patrons to avoid proving that an owner or his employee’s had knowledge of the condition. See id. To avoid liability, hospitality and retail owners should staff any areas in which they provide food or retail areas with at least one employee who can “supervise the area” and help regularly inspect the area for substances on the floor. See id. If a business needs a self-service area, the company should take care to ensure that the self-service components are in strategic areas in the store and are monitored regularly.

C. Duty to Warn

1. Treatment in the Courts

Business owners have a duty to warn their invitees while they are on their premises. While business owners are not strictly liable for all injuries that occur, they owe “business invitees the duty to keep their premises reasonably safe and when not reasonably safe, to warn them of ... danger or peril that is not in plain and open view.” Vivians v. Baptist HealthPlex, 2017 Miss. LEXIS 264, ___ (2017). There are many exceptions to the general rule, such as an open and obvious danger or knowledge of the known defect, which make this a frequently contentious aspect of litigation. Beckwith v. Wal-Mart Stores East, L.P., 112 F.Supp.3d 724, 730 (Tn. 2015). Recently, Mississippi and Tennessee examined dangerous hazards and how to establish the owner’s “knowledge” of such conditions. See Vivians, 200 So.3d at 485; Beckwith, 112 F.Supp.3d at 724; OIC-Lula, Inc. v. Smartt, 198 So.3d 455 (Miss. 2016).
In *Vivians v. Baptist HealthPlex*, 2017 Miss. LEXIS 264 (2017), Timothy Vivians tore his rotator cuff when he slipped and fell backwards upon entering Baptist’s therapy pool. As he was severely injured, he sued the company on the grounds that it had a duty of reasonable care to warn him of the danger of being left unattended in the therapy pool and to keep its premises in a safe condition. The Mississippi Supreme Court found that genuine issues of material fact existed with regard to whether the steps leading into the therapy pool constituted an unreasonably dangerous condition and that genuine issues of material fact existed with regard to whether defendants negligently failed to repair the steps leading into the therapy pool. The Court of Appeals held that the health club was not liable as the danger was “open and obvious” and, therefore, there was no duty to warn. *Vivians v. Baptist Healthplex*, 200 So.3d 485 (2016). It reasoned, while the Plaintiff offered evidence of “several accident reports involving the pool,” only one involved “slipping and falling while walking down the therapy-pool steps” and was insufficient to show negligence on the part of the proprietor. *Id.* at 488. Additionally, the Court noted that “Baptist had signs posted around the pool area prior to the incident to warn that the pool surfaces were slippery when wet” and “added abrasive yellow “caution” wrapping on the handrails to try to bring more attention to that area.” *Id.* at 489-490. Furthermore, the Court emphasized that an “invitee is required to use a degree of care and prudence that a normal person of normal intelligence would exercise under the same or similar circumstances.” *Id.* at 490. However, the Missouri Supreme Court disagreed, finding that just because a particular hazard may be open and obvious, “does not serve as a complete bar to recovery.” *Vivians*, 2017 Miss. LEXIS 264 at *10. Thus, as the Court reasoned, there was a genuine issue as to whether the steps were *unreasonably* dangerous.
In a similar vein, Reuben Smartt filed a premises liability action against IOC-Lula, Inc. (“Lula”) when he slipped and fell in a casino that “failed to provide him with an adequate warning of the wet floor conditions at the casino’s buffet.” IOC-Lula, Inc. v. Smartt, 198 So.3d 455 (2016). The only warning sign present before Smartt was a “wet floor” sign, which had been put out twenty minutes before the buffet area was mopped, was not located directly in the wet area, and was a sign he had passed multiple times before the floor was actually mopped (i.e. while the floor was dry). The Court of Appeals affirmed the jury’s verdict for Plaintiff and reasoned that the jurors “could have reasonably concluded that the placing of the first sign twenty minutes before the hazardous condition was created undercut the value of the sign. A patron, such as Smartt, might well have concluded that the mopping was finished and the hazardous condition resolved.” Id. at 461. Furthermore, the Court noted that the jury “could have reasonably concluded that [Lula] failed to place adequate signs as it did not place one at the buffet’s entrance.” Id.

In Beckwith v. Wal-Mart Stores East, L.P., the Plaintiff brought a premises liability claim against the defendant on the grounds that “they had failed to warn the plaintiff of the dangerous condition” when the plaintiff “slipped and fell on a clear piece of plastic in the store.” Beckwith, 112 F.Supp.3d at 727. In its opinion, the Court ruled that the Plaintiff “failed to establish that the defendant “caused or created the allegedly dangerous condition” or had “notice of alleged condition” and, therefore, did not have a duty to warn the Plaintiff of the piece of clear plastic on the floor. Id. at 733. While the Plaintiff argued that “two employees appeared to be performing stocking duties in the immediate area,” there was no evidence in the record that anything packaged in the boxes contained the type of plastic that caused the Plaintiff’s fall (i.e., there was no evidentiary link between the plastic that caused the Plaintiff to trip and the employee’s activity nearby). Id. at 732. Furthermore, the Court noted that there was “no proof that the employees knew of the piece of plastic or when it fell,
and, therefore, “Wal-Mart did not have actual or constructive knowledge of it.” Id. at 733.

2. Tips for Preventing Liability

When looking to a premises owner’s “Duty to Warn,” the hospitality and retail industry can avoid breaching their duty by informing patrons of dangers that are not “open and obvious” to the public so long as the open and obvious nature is not an unreasonable danger. See Vivians, 2017 Miss. LEXIS 264; Beckwith, 112 F.Supp.3d at 724; IOC-Lula, Inc. v. Smartt, 198 So.3d at 455. Consequently, the hospitality and retail industry should be wary of potential plaintiff’s arguments that an open and obvious danger was nevertheless unreasonable — ways to protect against this are to ensure that all open and obvious dangers are marked as such.

Like Vivians, IOC-Lula, Inc., and Beckwith, hospitality and retail industry owners must warn customers of any “danger or peril” of which the owner or its employees have knowledge. See id. Importantly, as we saw in IOC-Lula, Inc. v. Smartt, 198 So.3d 455 (2016), placing up warning signs is not always sufficient to protect against liability — warnings should be placed up at the appropriate time and in the appropriate place. See IOC-Lula, Inc, 198 So.3d at 461.

D. Duty to Inspect

1. Treatment in the Courts

The “Duty to Inspect” in a premises liability claim is attributable to the owner’s knowledge of dangerous conditions on their premises. All American Quality Foods v. Smith, 797 S.E.2d 259, 261 (Ga. App. 2017). “In a Premises liability action, the plaintiff must plead and prove that 1) the defendant had actual or constructive knowledge of the hazard and 2) the plaintiff, despite exercising ordinary care for his or her personal safety,
lacked knowledge of the hazard due to the defendant’s action or to conditions under the defendant’s control.” *Johnson v. All American Quality Food*, 798 S.E.2d 340, 342-243. (Ga. App. 2017). When evaluating whether a company has constructive knowledge, Courts tend to look to the business’ inspection procedures and protocols to determine if the owner failed to meet his duty. *Id*. Recently, Georgia and Kentucky have specifically looked the industries’ inspection polices and considered the time frame between the accident and the last inspection. *Smith*, 797 S.E.2d at 259; *Johnson*, 798 S.E.2d at 340; *Ingles Markets v. Rhodes*, 798 S.E.2d 340 (Ga. App. 2017); *Johnson v. Wal-Mart Stores East, LP.*, 169 F.Supp.3d 700 (E.D. Ky. 2016) (referred to hereinafter as “Wal-Mart”). While the cases came down differently based on the given facts, the Court specifically focused on the time period between the accident and the premises’ last inspection. See *id*.

In *Smith*, a customer slipped and fell while he was walking down an isle in a Food Depot on pink liquid spread on the floor. *Smith*, 797 S.E.2d at 261. The grocery store produced evidence that they conducted a regular inspection of the premises for twelve minutes, and surveillance showed two boys with drink cans bumping into each other and then glancing at the floor on this grocery store aisle only thirteen minutes after the store inspection. *Id*. Seven minutes after that, Smith walked into the aisle, slipped, and fell. The court rejected plaintiff’s argument that the store had constructive knowledge of the spill because the proprietor failed to exercise reasonable care in inspecting the premises. *Id* at 262. The Court stated that “in order for a proprietor to be liable, the hazardous condition must have been in place “on the premises for a sufficient time such that he or she should have discovered and removed the hazard.” *Id* at 262-263. When looking at the time of the accident in comparison with the last inspection, the Court ruled that the “limited period of time that the substance was on the floor is insufficient as a matter of law to hold that [the defendant grocery store] should have discovered and removed the
liquid prior to Smith’s fall. *Id.* at 262. To support their ruling, the Court looked at precedent which stated that a “premises owner is under no duty to continuously patrol the premises in absence of facts showing that the premises is unusually dangerous” and, that “a period of six or seven minutes between the spilling of the liquid and the fall was insufficient to establish constructive knowledge of the dangerous hazard.” *Id.* at 259.

Similarly in *Rhodes*, a patron slipped and fell in an Ingles Grocery Store’ aisle on oil. 798 S.E.2d at 342. While he brought suit against the store and alleged that they had “superior knowledge of the oil,” the Court of Appeals denied his claim. *Id.* at 340. The Court of Appeals opined that a premises owner is deemed to have “constructive knowledge” of the spill if the plaintiff can demonstrate that “the substance was on the floor for such a time that it would have been discovered and removed had the proprietor exercised reasonable care in inspecting the premises.” *Id.* at 343. When assessing the evidence, the Court found that the patron was only able to vaguely assert that the oil “appeared to be trying to dry and looked ashy before ultimately stating that she did not know.” *Id.* Furthermore, the owner stated that she “paid particular to the isle on a regular basis as sugar spills on the floor were very slippery and more difficult to see than other types of spills.” *Id.* Interestingly, the Court found that “when a proprietor has shown that an inspection occurred within a brief period prior to an invitee’s fall, the inspection procedure will be adequate as a matter of law and inspections conducted fifteen minutes prior to a fall generally meet this standard.” *Id.*

In *Johnson*, a patron slipped and fell “in a puddle of liquid from packaged meat” in a Food Depot isle. 798 S.E.2d at 275-76. At trial, the grocery store was awarded summary judgment as the trial court held that the “inspection was reasonable as a matter of law” when an employee completed an inspection of the aisle approximately thirty-eight minutes prior to the incident.” *Id.* On appeal, the Court of Appeals overturned the
lower court’s ruling as they ruled that “a fact-finder could infer that the grocery store had constructive knowledge of the hazard” and, therefore, would not be subject to summary judgment. *Id.* While the Court agreed the store had no “actual knowledge of the liquid,” they disagreed with whether they had *constructive knowledge* of it. *Id.* The Court noted that “although the time-stamped list of inspections supposedly performed that day was appended to [the owner’s] affidavit, the record shows that [the owner] did not perform the inspections and thus could not swear that they were performed as noted on the printout.” *Id.* at 277. Furthermore, the Court stated that it is a “question of fact based on the reasonableness of an inspection procedure. *Id.* Even though the inspection occurred as little as fifteen to twenty minutes prior to the fall, inspections were only conducted every two hours. *Id.* They reasoned that “the nature of a supermarket’s . . . business creates conditions which cause slip and falls to occur with some frequency. Under those circumstances, we have held that premises owners have a duty to inspect with greater frequency.” *Id.*

In Kentucky, the United States District Court for the Eastern District of Kentucky held that that Wal-Mart’s Motion for Summary Judgment could not be granted as there was an “issue of fact” as to whether or not Wal-Mart’s inspection was reasonable under the circumstances. *Wal-Mart,* 169 F.Supp.3d at 701. Michael Johnson, plaintiff, was injured when he slipped and fell on hair gel in the health and beauty department.” *Id.* at 702. While Wal-Mart tried to argue that they did not have actual or constructive knowledge of the potential hazard or have sufficient time to clean up the spill or warn other customers about it,” the Court ruled that the issue of whether their “inspection procedures were reasonable” was a question of the jury. *Id.* at 705. They reasoned that “Wal-mart had to prove that the gel had been there for an "insufficient length of time to have been discovered and removed or warned of and, therefore, had not shown that they "exercised reasonable care" in keeping their premises safe. *Id.* at 706.
2. Tips for Preventing Liability

When looking to the Owner’s “Duty to Inspect,” the hospitality and retail industry can avoid breaching their duty by implementing and performing regular inspections of their premises. See Smith, 797 S.E.2d at 259; Johnson, 798 S.E.2d at 340; Rhodes, 798 S.E.2d at 340; Wal-Mart, 169 F.Supp.3d at 700. While Courts do not require business owners to “continuously patrol the premise in absence of facts showing that the premises is unusually dangerous” hospitality and retail premises owners can avoid the liability by creating a policy that allows its employees to find and clean up spills in a reasonable manner. The frequency of the inspections should depend on the “nature of the business;” as a guide, the hospitality and retail industry should inspect their premises at least every fifteen to twenty minutes in order to ensure that there are no hazards in which patrons could slip and fall. See id. Unlike Johnson, owners should not inspect in “two hour intervals” because this could be insufficient. Furthermore, owners should pay “particular attention to areas they know are prone to spills.” See Smith, 797 S.E.2d at 259; Johnson, 798 S.E.2d at 340; Rhodes, 798 S.E.2d at 340; Wal-Mart, 169 F.Supp.3d at 700.

E. Spoliation

1. Treatment in the Courts

Spoliation of Evidence can be an independent cause of action that a plaintiff can bring against the defendant when the plaintiff has reason to believe that evidence has been destroyed or property has not been preserved for another’s use as evidence in pending or reasonably foreseeable litigation. See Heimberger v. Zeal Hotel Grp. Ltd., 42 N.E.3d 323 (Ohio App. 2015) (noting that in Ohio, spoliation is recognized as an independent cause of action); Mullins v. Ethicon, Inc., 2016 U.S. Dist. LEXIS 159944 (W.V. S.D.C 2016) (noting that intentional spoliation of
evidence is a stand-alone tort in West Virginia). In Ohio, to prove that there was spoliation of evidence, the plaintiff must show:

“(1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of the defendant that litigation exists or is probable, (3) willful destruction of evidence by the defendant designed to disrupt the plaintiff’s case, (4) disruption of the plaintiff’s case, and (5) damages proximately caused by the defendant's acts.”

*Heimberger v. Zeal Hotel Grp. Ltd.*, 42 N.E.3d 323, 334. This requires the act to have been “willful” and be an "intentional and wrongful commission of the Act." *Id.*

In *Heimberger*, the Court of Appeals for Ohio held that the plaintiff was “unable to establish a claim for spoliation when her handbag was stolen from the hotel’s lobby by a complete stranger.” *Id.* at 335. In the case, the Plaintiff alleged that the surveillance video, the hotel’s database, and a sign that indicated when the doors were closed were subject to a claim of spoliation as the surveillance tape and database were made unavailable and the sign was altered by the hotel. *Id.* at 334. The Court, however found that the plaintiff was unable to establish that “the evidence would have altered the outcome of this case.” *Id.* When looking to the evidence, the Court found that even if the “surveillance video did show the future thief casing the hotel, the evidence of suspicious behavior would not have been sufficient to give rise to a duty to protect or warn [the patron].” *Id.*

Spoliation can still be an issue for business owners in other jurisdictions in which spoliation is *not* a separate cause of action (*e.g.* Virginia and New Jersey), as it can result in an adverse inference at trial. The party claiming that evidence to support their case was destroyed may be entitled to instruct the jury that it can conclude that the evidence
destroyed was favorable to the plaintiff. See, e.g. Beaven v. U.S. Dept. of Justice, 622 F.3d 540, 553 (6th Cir. 2010) (finding that an adverse inference for evidence spoliation is appropriate if the defendants knew the evidence was relevant to some issue at trial and their culpable conduct resulted in its loss or destruction). Allowing a jury to make this inference could prove fatal to a case. The good news is that spoliation claims are preventable by taking action long before litigation commences.

2. **Tips for Preventing Liability**

When looking to spoliation, the hospitality and retail industry can avoid being subject to this cause of action by not “willfully destroying, altering, or concealing documents or recordings” that pertain to injuries sustained on their premises. See Heimberger, 42 N.E.3d at 334. Practically, avoiding destruction of documents or records can be difficult for businesses of all sizes; having policies and procedures in place aimed at preserving evidence is an important first step. Keeping those policies clear, specific, and straightforward will minimize human error. In addition to having well-crafted policies, the business owner should take steps to ensure that its policies are being followed.

F. **Accidents involving Third Parties**

1. **Treatment in the Courts**

Accidents involving third parties, criminal and non-criminal, in the retail and hospitality industry have become a major issue around the country. While premises owners have a “duty to protect their invitees,” they are not general insurers of patrons’ safety and are not “strictly liable for all accidents that occur on their property.” Heimberger v. Zeal Hotel Group, Ltd., 42 N.E.3d 323, 330 (Oh. 2015). When looking to the opinions at large, business owners only owe “invitees a duty to warn and protect
when they know or should know that there is a substantial risk of harm.” *Heimberger*, 42 N.E.3d at 323; *Barbour-Amir v. Comcast of Georgia/Florida, Inc*, 772 S.E.2d 231 (Ga. App. 2015); *Hartford v. Beau Rivage Resorts, Inc.*, 179 So.3d 89 (Miss. App. 2015); *Piazza v. Kellim*, 377 P.3d 492 (Or. 2016); *Aziz v. Jack in the Box*, 477 S.W.3d 98 (Mo. 2015); *McKown v. Simon Property Group, Inc.* 344 P.3d 661 (Wash. 2015).

In *Heimberger*, 42 N.E.3d 323, Debra Heimberger was the subject of a robbery when her handbag was stolen from the hotel’s lobby by a complete stranger who was not staying at the hotel. While she had four different theories that she believed supported a finding that the “criminal act was foreseeable,” the Court disagreed. *Id.* at 330. The Court of Appeals held that the hotel was not liable under premises liability as the criminal incident was “not foreseeable” and did not trigger a duty. *Heimberger*, 42 N.E.3d at 330. The Court reiterated the rule that business owners only have a “duty to warn or protect its business invitees from criminal acts of third parties where the business owner knows or should have known that there is a substantial risk or harm to its invitees.” *Id.* When looking to foreseeability, the Court noted that they must determine “whether a reasonably prudent person would have anticipated an injury was likely to occur, based upon the totality of the circumstances.” *Id.* They listed the three factors in which the courts look at: “1) spatial separation between previous crimes and the crime at issue; 2) difference in degree and form between previous crimes and the crime at issue; and 3) lack of evidence revealing defendant’s actual knowledge of violence.” The court also noted that the totality of these three factors must be “somewhat overwhelming” in order to create a duty. *Id.* While the patron noted that police reports had been filed in the past, the Court ruled that those reports did not give rise to a heightened duty as they were simply unsubstantiated reports. *Id.* at 331.
In Barbour-Amir v. Comcast of Georgia/Florida, Inc., a patron tripped and fell over a child who was sitting on the floor behind her at a teller window inside of a Comcast store. While the injured patron brought a claim of premises liability, the Court held that Comcast was not liable as the store “did not have actual or constructive knowledge of the child” and, therefore, did not owe the plaintiff a duty. Id. at 235. The court noted that “a proprietor cannot be held liable for injuries caused to an invitee by a third party whose conduct occurred without warning and was unforeseeable.” Id. at 234. Because the plaintiff was unable to establish that the store had “actual knowledge of the child who was sitting on the ground,” Bour-Amir focused on whether the store had “constructive knowledge of the third party.” Id. at 235. While she tried to argue that “an employee was working in the immediate area of the alleged hazard,” the Court ruled that this was not enough to hold the owner liable as the “employee must have been in a position to have easily seen the hazard and intervened to correct it before the accident occurred.” Id. Furthermore, the Court noted that there had been “no evidence of how long the child had been seated behind the patron, any complaints about children or similar incidents at the store, and neither the store representatives nor the guard who was on premises could have easily seen the child prior to the fall.” Id. at 235-236.

In Mississippi, the Court of Appeals held that a patron was unable to establish a claim of premises liability as the casino was not at fault for the act of a third party. Hartford, 179 So.3d 89. Rudy Hartford was injured when she tripped and fell over another patron’s walker while going to play the slot machines. Id. at 91. As the fall caused her to need a knee replacement, Hartford brought an action against the Beau Ravage Casino. Id. On appeal, the Court of Appeals held that the District Court was correct in granting the casino’s motion for summary judgment. Id. at 92. As Hartford was “an invitee,” the Court ruled that the “dangerous condition was not readily apparent to the casino” and did not meet any of the tests
required to prove that the premises’ owner breached his duty of care. *Id.* at 91. For dangerous conditions in Mississippi, the defendant will only be liable if “1) a negligent act by the defendant caused the dangerous condition, 2) the defendant had actual knowledge of the dangerous condition but failed to warn the plaintiff, or 3) the dangerous condition remained long enough to provide the defendant with constructive knowledge.” *Id.* at 91-92. To support their holding, the Court stated that “mere proof that a slip and fall occurred is insufficient to show negligence on part of the proprietor” and noted that Hartford “candidly admitted she was neither paying attention nor watching where she was going before falling and had no idea how long the walker had been beside the [patron].” *Id.* at 92. In contrast, in *Stephens v. Kmart Corp.*, 336 Ga. App. 332, 334 (2016), a patron who walked off the edge of a curb at a Kmart while looking at an outdoor display of clothing racks was not barred as a matter of law from bringing a premises liability claim against Kmart even though there was evidence that she was not looking where she was going. The court found that

> [A]n invitee’s failure to exercise ordinary care is not established as a matter of law by the invitee’s admission that he did not look at the site on which he placed his foot or that he could have seen the hazard had he visually examined the floor before taking the step which led to his downfall. Rather, the issue is whether, taking into account all the circumstances existing at the time and place of the fall, the invitee exercised the prudence the ordinarily careful person would use in a like situation . . . .

In Oregon, the Supreme Court held that “the issue of whether the third-party assailant’s shooting attack on the nightclub was foreseeable was a question for the jury.” *Piazza*, 377 P.3d at 492. A patron, Martha Delgado, was shot and killed at Zone Nightclub. Zone Nightclub was an underage nightclub in the downtown entertainment district that contained several streets where nightclubs and bars were located. Based on the shooting, the estate of the deceased brought an action against the club on the basis that the owner owed Delgado “a duty of care as he was a business invitee.” *Id.* at 497. They argued that the nightclub “should have exercised reasonable care to make the premises safe for her, which included protection from criminal acts of third parties.” *Id.* Even though the case was appealed all the way to the Oregon Supreme Court, the justices affirmed the lower court’s opinion that the question of whether or not the shooting was foreseeable was “a question of the jury.” *Id.* at 492. The Court noted that “foreseeability embodies a prospective judgment about a course of events” and, therefore, depends on the facts of a concrete situation. *Id.* at 499. Furthermore, they stated the “two over-lapping common law negligence determinations that play a role in determining foreseeability.” The two theories were “1) whether the defendant’s conduct unreasonably created a foreseeable risk of harm to a protected interest of the plaintiff such that the defendant may be held liable for the conduct and 2) whether, because of the risk of harm was reasonably foreseeable, the defendant may be held liable to the plaintiff for the particular harm that befell the plaintiff.” *Id.* at 499-500. As the club had a “history of fights and assaults, the Court ruled that the jury needed to be determined whether it was “within the range of risks of harms that a reasonable fact finder could find was reasonably foreseeable in the circumstances alleged by the plaintiff.” *Id.* at 513.
In Missouri, the Court of Appeals held that a Jack in the Box restaurant owed a patron a “duty of care under the special facts and circumstances exception.” *Aziz*, 477 S.W.3d at 105. Ali Aziz was severely wounded when he was assaulted and robbed by a group of individuals in the restaurant’s parking lot. *Id.* at 101. While the Court acknowledged that, “[g]enerally, business owners do not have a duty to protect business invitees from the criminal acts of third parties,” an exception may be triggered based on the facts and circumstances of the case. *Id.* at 104. The Courted noted that the “special facts and circumstances” exception may apply when a “third party who is known to be violent or behaves in a way indicating danger is on the business owner’s premises and a sufficient time exists to prevent the injury to the invitee.” *Id.* When looking to the particular facts of the case, Judge Clayton took specific notice of the fact that the “defendants own policies recognized the treatment of crime and danger that could result from late night disruptive conduct, which would render it foreseeable.” *Id.* at 105. The patron noted Jack in the Box’s loitering policies stated that “loitering and disruptive activity required that action be taken ‘immediately’ because such activity leads to ‘fighting,’ ‘injury,’ or other danger to people on the premises.” *Id.* Additionally, the Court stated that they had “retained Westec [a security group] to electronically monitor the premises and be available for emergency responses.” *Id.* Finally, the Court reasoned that the exception applied as the “defendant had actual notice of the potential assailants immediately before the assault” as the manger “admitted in his brief that the group was loud, disruptive and violating the loitering and disruptive guest policies.” *Id.* The Court reasoned that the defendant could have encouraged them to leave or called the police before the plaintiff had arrived.” *Id.*

In Washington, the Supreme Court held in *McKown v. Simon Property Group, Inc.* that the shopping mall owner was not liable under the “prior similar incidents test.” 344 P.3d at 661. Brendan McKown, “an employee of one of the retail stores,” was “shot and wounded when an
erratic man entered the mall and “opened fire on shoppers and mall employees.” *Id.* at 662. In response, the employee brought a premises liability claim against the shopping center owner on the theory that “Simon failed to exercise reasonable care to protect him from foreseeable criminal harm.” *Id.* The Supreme Court, in their opinion, stated that “foreseeability determines the scope of the duty owed and is a question of the jury.” The Court noted that “the prior similar incidents test” was a “way to prove that a landowner owed a business invitee an obligation to protect business invitees from third party conduct.” *Id.* at 663. To meet this test, the Court stated that the “plaintiff must generally show a history of prior similar incidents on the business premises within the prior experience of the possessor of the land.” *Id.* When looking to these acts, the “prior acts of violence on the business premises must have been sufficiently similar in the nature and location to the criminal act that injured the plaintiff, sufficiently close in time to the act in question, and sufficiently numerous to have put the business on notice that such act was likely to occur.” *Id.* As the focus on the questions was “limited,” the court “did not decide the circumstances under which a duty would arise when the duty was based solely on the business’s character.” *Id.* at 671.

### 2. Tips for Preventing Liability

When looking to accidents involving third parties, the hospitality and retail industry can avoid liability by taking “extra precaution when they are on notice of a potential incident involving a patron.” *Heimberger*, 42 N.E.3d at 323; *Barbour-Amir*, 772 S.E.2d at 231; *Hartford*, 179 So.3d at 89; *Piazza*, 377 P.3d at 492; *Aziz*, 477 S.E.3d at 98; *McKown*, 344 P.3d at 661. While “business owners generally do not have a duty to protect business invitees from the criminal acts of third parties,” the court may find that a “duty” existed if the owner had “knowledge of the hazard or if the “accident was foreseeable.” *See id.* For example, if a hospitality and retail premises owner is aware that “prior incidents involving third parties” have
occurred on their premises, like the owners in *Piazza* and *Aziz*, he or she should take “extra precautions to ensure that the premises is safe for all its patrons.” See *Piazza*, 377 P.3d at 513; *Aziz*, 477 S.E.3d at 105. While most states have held that the incidents “must be of a similar nature to the accident at issue,” the hospitality and retail industry can instill polices to help employees respond effectively in the situation. See *Heimberger*, 42 N.E.3d at 323; *Barbour-Amir*, 772 S.E.2d at 231; *Hartford*, 179 So.3d at 89; *Piazza*, 377 P.3d at 492; *Aziz*, 477 S.E.3d at 98; *McKown*, 344 P.3d at 661. Furthermore, unlike the employees in *Aziz*, owners should make sure their employers are in fact implementing these polices to secure the premises.” See *Aziz*, 477 S.E.3d at 105.

III. CONCLUSION

In sum, premises liability lawsuits are not going anywhere. As patrons continue to injure themselves and bring lawsuits against business owners in the hospitality and retail industry, the law surrounding premises liability will continue to change and adapt to the plaintiff’s newest “theories.” In response to the changing landscape, our industry must consistently evaluate its policies and procedures to ensure that they continue to satisfy the fact-specific requirements that courts place on business and premises owners. By taking notice of the hot topics around the country, business owners can avoid potential lawsuits and deter liability. When businesses inevitably find themselves facing a lawsuit, they should be proactive in assigning cases to attorneys who are familiar with the courts and judges in their particular jurisdiction. These attorneys can quickly identify the risks that you might face and help mitigate any exposure.