SUPERIOR COURT OF NEW JERSEY

APPELATE DIVISION
DOCKET NO. A-3332-23T4

HELENE GAZZILLO and
PASQUALE GAZZILLO,

Appellants,

v.

MARSHALLS OF ELIZABETH, NJ, INC., JOHN DOES 1-100 (fictitious names) and ABC COMPANIES 1-100 (fictitious names),

Respondent.

CIVIL ACTION

ON APPEAL FROM THE COURT'S JUNE 20, 2024 and JULY 1, 2024 ORDERS OF THE SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
MID-L291-23

SAT BELOW:
HONORABLE JOSEPH L. REA, JSC

BRIEF AND APPENDIX ON BEHALF OF APPELLANTS

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PROCEDURAL HISTORY

Appellant filed a complaint against Respondent, MARSHALLS OF ELIZABETH, NJ, INC, on or about January 18, 2023. (Pa1-Pa6). An Amended Complaint was filed on February 6, 2024. (Pa7-Pa11). Appellant alleged in the amended complaint that she was caused to fall as a result of the careless, negligent and reckless maintenance of the Marshalls store by Respondent.

Respondent filed an Answer on March 8, 2023. (Pa12-Pa22). Respondent filed a motion for summary judgment. (Pa23-Pa74). Appellant opposed the motion for summary judgment. (Pa75-Pa96). Respondent filed a reply brief. (Pa97-Pa107). The motion was returnable before Honorable Joseph L. Rea on June 20, 2024 and on that day Honorable Joseph L. Rea issued an Order dismissing Appellant's complaint and found that Appellant failed to show that Respondent, Marshalls of Elizabeth, NJ, Inc., had actual or constructive notice of the alleged hazard (Pa108-Pa109).

A notice of appeal was filed on or about June 28, 2024 by Appellants, Helene and Pasquale Gazzillo. (Pa110-Pa114). An Order Amending the Order was filed on July 1, 2024. (Pa115-Pa117). An Amended Notice of Appeal was filed on July 9, 2024. (Pa118-Pa124).

STATEMENT OF FACTS

On May 1, 2024, plaintiff Helene Gazzillo was a business invitee of defendant Marshalls of Elizabeth, NJ, Inc. ("Marshalls") located at 55 Route 9 South, Manalapan, New Jersey when she slipped and fell. Pa88-Pa89 at 16:20-21; 17:25; 18-10; 19:3.

There is no evidence that Marshalls had a designated maintenance employee or department. Pa87 at 13:2-5. There is no evidence that Marshalls employed or tasked anyone to be responsible for making sure that there were no hazards inside the store that could cause injury to customers. Pa87 at 13:15-19.

There had been other instances of spills on Marshalls' floor that needed to be cleaned up and the backroom was stocked with cleaning supplies to be used to clean spills. Pa88 at 14:2; 14:12. The duties of the sales associates were to pick up clothing and help customers if they have a question. Pa87 at 11:9-12. The only specified maintenance duty of a sales associate was to pick up clothing or hangers seen on the ground in the morning and when leaving. Pa 87 at 11:15-17; 11:20-23; 12:1-4.

Marshalls did not have any employees dedicated to maintenance during store hours and relied on the salespeople to clean up spills, *if discovered*. Pa88 14:17-18.

LEGAL ARGUMENT
POINT I

a. THE MOTION JUDGE ERRONEOUSLY HELD THAT PLAITNIFF MUST SHOW ACTUAL OR CONSTRUCTIVE NOTICE OF THE HAZZARD (Pa117)

Marshalls breached a duty due and owing to the Gazzillos by failing to conduct a reasonable inspection to discover defective conditions. There is no evidence in the record that Marshalls actually exercised proper due diligence on the day of the subject incident. Further, Marshalls breached their duty due and owing to the Gazzillos by failing to take reasonable care to make the premise safe.

To establish a prima facie case of negligence, the plaintiff has the burden to show that defendant: (1) owed plaintiff a duty of care; (2) breached that duty; and (3) that proximately caused plaintiff's damages. D'Alessandro v. Hartzel, 422 N.J. Super. 575, 579, 29 A.3d 1112 (App. Div. 2011). "Under the common law of premises liability, a landowner owes increasing care depending on whether the visitor is a trespasser, licensee or social guest, or business invitee." Sussman v. Mermer, 373 N.J. Super. 501, 504, 862 A.2d 572 (2004); see also Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 43, 34 A.3d 1248 (2012) (explaining the common law classifications of invitee, licensee, and trespasser).

Under the duty element, a property owner owes a business invitee "reasonable care to make the premises safe, including the duty to conduct a reasonable inspection to discover defective conditions." D'Alessandro, 422 N.J. Super. at 579. Thus, the owner owes an *affirmative duty to inspect* the premises and is "require[d] . . . to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563, 818 A.2d 314 (2003) (citing O'Shea v. K. Mart Corp., 304 N.J. Super. 489, 492-93, 701 A.2d 475 (App. Div. 1997)). [emphasis added].

In the present matter, it is clear that Plaintiff was a business invitee. As a result, Marshalls had both the duty of reasonable care to make the premises safe *and also* had the *affirmative* duty to conduct a reasonable inspection to discover conditions that would render the premises unsafe.

When a plaintiff claiming injury as a result of a dangerous condition has shown that the circumstances were such as to create the reasonable probability that the dangerous condition would occur, she need not also prove actual or constructive notice of the specific condition. Ryder v. Ocean Cty. Mall, 340 N.J. Super. 504, 506 (App. Div. 2001). In this case, it is well established that there had been prior spills because there had been other instances of spills on Marshalls' floor that needed to be cleaned up. Marshalls' backroom was explicitly stocked with cleaning supplies to be used in such instances to clean spills.

However, there is no evidence that Marshalls affirmatively conducted inspections to discover dangerous conditions once the store was open. The question herein is whether given the fact that Marshalls had prior spills, did not have any maintenance people in the store, and merely relied on the salespeople to discover and clean up spills (which was outside the scope of their maintenance duties) constitutes as a breach of the duty owed to Plaintiff? Is reliance on salespeople to clean up spills only if discovered considered a reasonable inspection? Such a dispute is ripe for submission to a jury.

This case is distinct from Carroll v. New Jersey Transit, because in Carroll, the defendant was a **public entity**, there was testimony that no one was present at the time of the accident, and the plaintiff failed to establish that the public entity had actual or constructive notice as required by N.J.S.A. § 59:4-3. Carroll v. N.J. Transit, 366 N.J. Super. 380 (App. Div. 2004). In this case, Plaintiff was a commercial business, not a

public entity, and therefore the findings of Carroll do not apply.

Further, although there is no reference to reliance in the subject Order and statement of facts, one can only surmise that the trial judge relied on the certification of an individual named Kimberly Kocses, who was not identified during discovery, but who signed a certification that she was manager of the Marshall's at the time of this incident. However, Kocses's certification blatantly contradicts the testimony of Jess Dakhno, the Marshall's employee working on the actual date of the subject incident. Dakhno, a sales associate testified that the only specified maintenance duty of a sales associate was to pick up clothing or hangers seen on the ground in the morning and when leaving. This testimony conflicts with the certification of Kocses, which states that after the store opened, the Manager-On-Duty and sales associates continuously walked the store throughout the day to make sure the store was in order. This included inspecting the floors to make sure they were clean, dry, free of spills and free of hazards. Regardless, there is no evidence or statement in Kocses's certification that on the actual day of this incident *anyone* continuously walked the store throughout the day to make sure the store was in order or inspected the floors to make sure they were clean, dry, free of spills and free of hazards. There is no evidence that Kocses was even there the day of the subject incident. This alone creates an issue to be determined by a finder of fact.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the trial court erroneously granted Marshalls motion for summary judgment. Accordingly, the trial court's June 20, 2024, orders should be reversed and remanded.

Respectfully submitted,

Lauren Papaleo, Esq.

Date: 9-23-24

HELENE GAZZILLO and PASQUALE GAZZILLO **Plaintiffs/Appellant,** **vs.** **MARSHALLS OF ELIZABETH, NJ, INC., JOHN DOES 1-100 (fictitious names) and ABC COMPANIES 1-100 (fictitious names)** **Defendants/ Respondents.**	**THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION** **DOCKET NO: A-003332-23** **Civil Action** **On Appeal from the Superior Court of New Jersey, Law Division, Middlesex County** **Docket No.: MID-L-291-23** **Sat Below:** **The HONORABLE JOSEPH L. REA, J.S.C.**

RESPONDENT'S RESPONSIVE BRIEF

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Cases

STATEMENT OF FACTS

1. The Appellant, Helene Gazzillo, filed suit asserting bodily injury negligence claims against the Respondent, Marshalls of MA, Inc. i/p/a Marshalls of Elizabeth, NJ, Inc. ("Marshalls"), as a result of an alleged May 1, 2021 accident. Pa7-11.

2. The Appellant's husband, Pasquale Gazzillo, has asserted claims for loss of consortium. Id.

3. The Appellant claims that the subject accident occurred at the Marshalls' store in Manalapan, New Jersey. Pa49, at 34:18-22.

4. The Appellant was walking in between the housewares and clothes section when the accident occurred. Pa50-51, at 36:20-37:15.

5. The Appellant was walking when she felt her feet moving back and forth and fell backwards onto the ground. Pa52-53, at 39:19-40:15.

6. Before the Appellant fell while walking through the store for 10 minutes, she did not see anything on the ground such as any liquids. Pa54-55, at 41:24-42:12.

7. After the Appellant fell, a person from Marshalls came to the accident location and cleaned something up off the floor with paper towels. Pa56, at 44:3-13.

8. The Appellant did not actually see anything on the floor. Pa56, at 44:3-5.

9. The Appellant did not know what the substance was that the person from the store may have been cleaning up after the fall. Pa57, at 46:1-4.

10. The Appellant does not know where the substance came from. Pa57, at 46:10-12.

11. The Appellant does not know how the substance came to be on the floor. Pa57, at 46:13-15.

12. The Appellant does not know how long the substance was on the floor before she fell. Pa57, at 46:16-18.

13. Store employee Jessica Dakhno observed the Appellant on the floor just after she had fallen. Pa76, at 18:2-10.

14. Ms. Dakhno observed a small spill consisting of a clear odorless liquid that was not that viscous or thick, but which Ms. Dakhno described as oily because of its texture. Pa76, at 19:10-20:3.

15. The area of the liquid was about the size of a baseball. Pa76, at 21:17-20.

16. Ms. Dakhno was not able to ascertain the source of the liquid. Pa77, at 22:9-11.

17. She did not know how long the spill had been present prior to the fall. Pa77, at 22:12-14.

18. No one had reported to Ms. Dakhno or anyone else at the store that the spill existed before the Appellant's fall. Pa77, at 22:15-18.

19. To Ms. Dakhno's knowledge, no one else had fallen in the same area of the store on that day. Pa78, at 26:20-25.

20. The store had a maintenance contractor who cleaned the store each day including the floors before the store opened. Pa86, at ¶2; Pa75, at 15:2-7.

21. Ms. Dakhno was not asked during her deposition if Marshalls "employed or tasked anyone to be responsible for making sure that there were no hazards inside the store that could cause injury to customers." Pa71-78.

22. The Appellant's attorney asked solely about Ms. Dakhno's "maintenance responsibilities." Pa74, at 11:12-13:1.

23. Ms. Dakhno testified that if she worked the morning shift, she would make sure there was nothing on the floor. Pa74, at 11:12-12:10.

24. If she worked closing, she would have to clean her entire department including making sure there was nothing on the floor. Id.

25. During her shift, as she would walk along the department, if she saw something on the floor, she would have to pick it up. She had to be "always aware, … always vigilant." Id.

26. Ms. Dakhno further testified that during shift hours, when customers are inside the store, any person who saw a spill on the floor was responsible for cleaning it up. Pa74-75, at 13:24-14:6.

27. The store had a back room with cleaning supplies for this purpose. Pa75, at 13:24-14:13.

28. The manager and the employees were responsible for cleaning up spills. Pa75, at 14:25-15:1.

29. As further detailed by Manager Kimberly Kocses, at all relevant times including the time period of the subject accident, Marshalls had a maintenance company that would clean the store each morning before the store opened for business including all of the floors in the store. Pa86, at ¶2.

30. Before the store opened for business each morning, the Manager responsible for opening the store also walked the store to make sure the store was in order, which included inspecting the floors to make sure there were clean, dry, free of spills and free of hazards. Pa86, at ¶3.

31. Before the store opened for business each morning, the Sales Associates assigned to each department also checked their departments to make sure everything was in order. Pa87, at ¶4.

32. This included inspecting the floors to make sure they were clean, dry, free of spills and free of hazards. Id.

33. After the store opened, the Manager-On-Duty continuously walked the store throughout the day to make sure the store was in order. Pa87, at ¶5.

34. This included inspecting the floors to make sure there were clean, dry, free of spills and free of hazards. Id.

35. After the store opened, the Sales Associates assigned to each department continually checked their departments to make sure they were in order. Pa87, at ¶6.

36. This included inspecting the floors to make sure there were clean, dry, free of spills and free of hazards. Id.

37. All employees were instructed to be vigilant for hazardous conditions as they worked in the store. Pa87, at ¶7.

38. This included being vigilant for hazards on the floor such as liquids. Id.

39. All employees were instructed to immediately address any hazardous conditions they discovered including liquids on the floor. Pa87, at ¶7.

40. After the store closed, the Manager responsible for closing the store walked the store to make sure everything was in order. Pa87, at ¶8.

41. This included again inspecting the floors to make sure there were clean, dry, free of spills and free of hazards. Id.

42. The Sales Associates assigned to each department would also check their departments before leaving for the day to make sure everything was in order. Pa87, at ¶9.

43. This included again inspecting the floors to make sure there were clean, dry, free of spills and free of hazards. Id.

PROCEDURAL HISTORY

On January 18, 2023, Appellants, Helene and Pasquale Gazzillo, filed suit against The TJX Companies, Inc. d/b/a Marshalls asserting bodily injury negligence claims as a result of an alleged fall on May 1, 2021 at a Marshalls store located in Manalapan, New Jersey. Pa1-6. On February 6, 2023, Appellant filed an amended complaint naming Marshalls of Elizabeth, NJ, Inc. as the Defendant. Pa7-11. Appellant claims to have slipped and fallen on a clear liquid on the floor of the subject Marshalls' store. On March 8, 2023, Respondent, Marshalls of MA, Inc. i/p/a Marshalls of Elizabeth, NJ, Inc., filed a responsive pleading to the amended complaint. Pa12-22. The discovery period ended on April 17, 2024. On April 17, 2024, the Court scheduled personal injury arbitration for June 19, 2024. On May 10, 2024, Respondent filed a motion for summary judgment based on the Appellant's inability to prove the Respondent's actual or constructive notice of the alleged hazard. Pa23-66. Appellant filed opposition to the motion on May 24, 2024. Pa67-83. Appellant did not request oral argument in her opposition.

Respondent filed a reply brief on June 3, 2024. Pa84-87. The Trial Court entered an order on June 20, 2024 granting the motion for summary judgment. Pa88-89. On July 1, 2024, the Trial Court entered an amended order providing an additional statement of reasons for summary judgment. Pa95-96. On June 28, 2024, Appellant filed the present notice of appeal. Pa90-94. On July 1, 2024, Appellant filed an amended notice of appeal. Pa 98-104.

STANDARD OF REVIEW

An Appellate Court reviews an order granting summary judgment in accordance with the same standard as the motion judge. Bhagat v. Bhagat, 217 N.J. 22, 38 (2014); W.J.A. v. D.A., 210 N.J. 229, 237–38 (2012); Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010).

The purpose of summary judgment is to avoid needless trials and afford deserving litigants immediate relief. See Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Rule 4:46-2 provides that summary judgment "shall be rendered forthwith" when "there is no genuine issue as to any material fact challenged and … the party is entitled to a judgment or order as a matter of law."

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any show that there is no genuine issue as to any material fact challenged and that the party is entitled to a judgment or order as a matter of law.

R. 4:46-2(c).

A court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged." Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995).

In Brill, the New Jersey Supreme Court adopted the federal standard for evaluating summary judgment motions. Our state courts are now guided by the same evidentiary standard of proof that would apply at a trial on the merits when deciding whether there exists a "genuine issue" of material fact. Id. at 534. A dispute of fact is genuine if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with legitimate inferences therefrom, could sustain a judgment in favor of the non-moving party. Id. at 530.

Accordingly, a court must decide after weighing the evidence adduced in light of the burden of persuasion, "whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533. The trial judge's function is not to determine the truth of the matter, but to determine whether there is a genuine issue for trial. Id. at 536. Thus, facts raised by a non-moving party of an unsubstantial nature cannot defeat a motion for summary judgment, and under proper circumstances, trial courts should be encouraged to grant summary judgment. Id. at 540.

The right to summary judgment is a:

> [S]ubstantial one … and is more than a token procedural remedy under our rules, for it not only affords protection against groundless claims and frivolous defenses, saving the antagonists the time and expense of protracted litigation, but it also reserves judicial manpower and facilities to cases which meritoriously command attention.

State v. South Amboy Trust Co., 46 N.J. Super. 497, 500 (Law Div. 1957).

Thus, the summary judgment procedure is "designed to cut through sham and frivolity in a [complaint or] answer and lay the case before the trial court in its true light." Monmouth Lumber v. Indemnity Ins. Co., 21 N.J. 439, 448 (1956). It has been said that the "summary judgment procedure pierces the allegations of the pleadings to show that the facts are otherwise than as alleged." Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954); Eisen v. Kostkos, 116 N.J. Super. 358, 371 (App. Div. 1971).

On a motion for summary judgment, although entitled to all favorable inferences, the non-moving party must do more than simply show there is "some metaphysical doubt as to the material facts." O'Loughlin v. National Community Bank, 338 N.J. Super. 592 (App. Div. 2001). Our courts have routinely held that "conclusory and self-serving assertions … without explanatory or supporting facts will not defeat a meritorious motion for summary judgment." Hoffman v. Asseenonty. Com, Inc., 404 N.J. Super. 415, 425-26 (App. Div. 2009). Indeed, "bare conclusions lacking factual support" and "self-serving assertions" alone will not

create a question of material fact sufficient to defeat a summary judgment motion. Heyert v. Taddese, 431 N.J. Super. 388, 413-14 (App. Div. 2013); Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002). This is because "[i]t is evidence that must be relied upon to establish a genuine issue of fact. Competent opposition requires competent evidential material beyond mere speculation and fanciful arguments." Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014).

In this case, the Appellant is unable to establish a prima facia case of negligence against the Respondent based on her inability to establish the critical element of notice. As succinctly set forth by The Honorable Joseph L. Rea, J.S.C., the Appellant is unable to establish the Respondent's actual or constructive notice of the alleged hazard, namely the unidentified clear liquid on the floor. Judge Rea's ruling was not erroneous. Summary judgment was appropriate and, respectfully, encouraged under Brill.

I. SUMMARY JUDGMENT WAS APPROPRIATELY GRANTED BASED ON THE APPELLANT'S INABILITY TO ESTABLISH NOTICE OF THE ALLEGED HAZARD.

To maintain a *prima facie* case of negligence, a plaintiff must prove four elements by competent admissible evidence: (1) defendant owed plaintiff a duty of care; (2) defendant breached that duty; (3) this breach proximately caused plaintiff's injuries; and (4) plaintiff suffered actual damages. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014); Buckelew v. Grossbard, 87 N.J. 512, 525 (1981);

Filipowicz v. Diletto, 350 N.J. Super. 552, 558 (App. Div. 2002); Albright v. Burns, 206 N.J. Super. 265, 632 (App. Div. 1982).

The burden of proof lies with the plaintiff to establish all elements of a cause of action for negligence. Lieberman v. Employee Ins. of Wausau, 84 N.J. 325, 342 (1980). Negligence may not be presumed from the mere fact of an accident or injury. Hansbury v. Hudson & M.Ry. Co., 124 N.J.L. 502, 506 (N.J. 1940); see also Rivera v. Columbus Cadet Corps. of America, 59 N.J. Super. 445, 449 (App. Div. 1960) ("Negligence is never presumed, and the mere occurrence of an accident causing injuries is not alone sufficient to justify an inference of negligence."); Crisciotti v. Greatrex, 9 N.J. Super. 26, 28 (App. Div. 1950) ("Negligence is never presumed and the mere happening of an accident, standing alone, will not support an inference of negligence.").

In a premises liability case, an injured plaintiff asserting a breach of duty must ordinarily prove, as an element of the cause of action, that the defendant had actual or constructive knowledge of the dangerous condition that caused the accident. Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003). When a plaintiff is unable to prove actual notice, he or she must prove a defendant's constructive notice. See, e.g., Carroll v. New Jersey Transit, 366 N.J. Super. 380, 388 (App. Div. 2004).

A "defendant has constructive notice when the condition existed for such a length of time as reasonably to have resulted in knowledge and correction had the defendant been reasonably diligent." Troupe v. Burlington Coat Factory Warehouse Corp., 443 N.J. Super. 596, 602 (App. Div. 2016). To ascertain if the defendant had sufficient time to discover and address the claimed hazard through the exercise of reasonable care, a plaintiff must provide proof to establish how long the hazard was present. See Model Civil Jury Charge 5.20(F)(8); see, e.g., Grzanka v. Pfeifer, 301 N.J. Super. 563, 573 (App. Div. 1997) (Absent evidence as to when the hazardous condition first arose, whether "hours, minutes or seconds before the accident," the plaintiff could not prove constructive notice and summary judgment was warranted.); Carroll, supra ("There was no evidence of how long the [hazardous condition] was on the steps [and] [t]herefore, plaintiff could not even meet the fundamental requirement of constructive notice.").

The mere "[e]xistence of an alleged dangerous condition is not constructive notice of it." Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990). The absence of such notice is fatal to plaintiff's claims of premises liability. Id.; see also Brown v. Racquet Club of Bricktown, 95 N.J. 280, 291 (1984); Carroll, supra, at 388.

In this case, the Appellant is unable to establish the Respondent's notice of the alleged hazardous condition, the clear liquid on the floor. There is no evidence of the

Respondent's actual notice of the condition. To establish a prima facia case of negligence, the Appellant must thus show the Respondent's constructive notice of the condition, namely that the condition existed long enough so that the Respondent had sufficient time to discover and address the claimed hazard through the exercise of reasonable care. Troupe, supra, at 602: see also Model Civil Jury Charge 5.2(F)(8). To establish such constructive notice, the Appellant would have to show how long the condition existed. Grzanka, Supra, at 573; Carroll, supra, at 388.

In this case, as detailed in the Statement of Facts, all the Appellant knows is that she slipped and fell on a liquid. The Appellant is unable to say how long the condition was present before her fall. The Appellant does not know what the liquid was. She does not know the source of the liquid. She does not know how the liquid got to the floor.

Store employee Jessica Dakhno came to the Appellant after she fell. She observed a clear liquid on the floor that had a diameter of about a baseball. She did not know what the liquid was, how long it was present or its source. There had been no complaints about the liquid before the fall. No one else had fallen in the area before the Appellant's fall.

Again, the burden of proof lies with the Appellant to establish all elements of a cause of action for negligence including notice. Lieberman, supra, at 342. The mere existence of an alleged dangerous condition is not constructive notice of it. Sims,

supra, at 42. The absence of such notice is fatal to the Appellant's claim of premises liability. Id.; Brown, supra, at 291; Carroll, supra, at 388. Negligence is never presumed, and the mere occurrence of an accident causing injuries is not alone sufficient to justify an inference of negligence. Rivera, supra, at 449; Hansbury, supra, at 506; Crisciotti, supra, at 28.

The Appellant is unable to establish the Respondent's notice of the alleged hazardous condition. Summary judgment is warranted in this case.

II. THE APPELLANT'S CONTENTION THAT SHE HAS NO OBLIGATION TO PROVE NOTICE IS ERRONEOUS.

The Appellant argues that she had no obligation to prove notice. The sole authority relied upon is Ryder v. Ocean Cnty. Mall, 340 N.J. Super. 504 (App. Div. 2001). That case involved the Mode of Operation Doctrine. The Appellant slipped in the common area of the Ocean County Mall on an orange drink (an "Orange Julius"). The drink had been purchased in the food court. After purchasing food and drink in the food court, customers were free to walk with their food and drink through the common areas of the mall, which resulted in frequent spills of food and drink. There was a planter area in the location of the accident, where customers would sit to eat and drink. The Court concluded that the Mode of Operation Doctrine applied to the mall as the mall was the equivalent of a self-serve cafeteria. Id. at 509.

This case is entirely distinguishable. The Appellant fell at a Marshalls store not in the common area of a retail mall. There was no self-service food court or

cafeteria in the Marshalls. Patrons did not walk through the store with food and drink, resulting in frequent spills of food and drink on the floor. Neither the Appellant nor store employee Dakhno could identify what the clear liquid was or its source. Ms. Dakhno testified that the liquid was oily because of its texture. Under these circumstances, the Mode of Operation Doctrine does not apply. The Appellant was obligated to prove notice in this case.

Under the mode-of-operation doctrine, a business invitee who is injured is entitled to an inference of negligence and is relieved from the obligation to prove that the business owner had actual or constructive notice of the dangerous condition that caused the accident. Prioleau v. Kentucky Fried Chicken, Inc., 223 N.J. 245, 248 (2015). The doctrine is not a general rule of premises liability, but a special application of foreseeability principles in recognition of the extraordinary risks that arise when a defendant chooses a customer self-service business model. Id. at 262. The "rule is a **very limited exception** to the traditional rules of business premises liability. Carroll v. New Jersey Transit, 366 N.J. Super. 380, 389 (App. Div. 2004)(emphasis supplied).

The doctrine is limited to businesses which provide a "self-service environment," meaning one in which customers independently handle and/or come in direct contact with merchandise that may pose an "increased risk" of injury. Prioleau, supra, at 262. The doctrine applies only when, "**as a matter of probability,**

a dangerous condition is likely to occur as the result of the nature of the business, the property's condition, or a demonstrable pattern of conduct or incidents." Id. at 260 (emphasis supplied); Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003). There must be a "nexus" between the self-service components and risk of injury in the area of the accident. Prioleau, supra, at 262. The doctrine only applies to accidents that occur in areas affected by the "self-service operations." Id.

Examples of situations where the mode of operation doctrine has applied include Bozza v. Vornado, Inc., 42 N.J. 355, 358 (1964), where customers were permitted to carry food and beverages without lids, tops, or trays around a self-service cafeteria, resulting in multiple spills of food and beverages; Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 565 (2003), where customers handled grapes packaged in open-top, vented plastic bags, causing loose grapes to fall to the ground; and Wollerman v. Grand Union Stores, Inc., 47 N.J. 426, 429 (1966), where customers scooped string beans from open bins into bags, inviting spillage of the beans onto the floor.

The sole argument the Appellant makes for application of the Mode of Operation Doctrine is that there had been some prior spills and the store had cleaning supplies. These facts do not support application of the Mode of Operation doctrine. Put simply, our case does not involve the type of self-service operation where the Mode of Operation Doctrine has been held to apply. No self-service component of

the business was involved. There was no increased risk of injury from a self-service component of the business. There was no "nexus" between a self-service component of the business and risk of injury in the area of the accident. The fall did not occur in areas affected by the self-service operations. The Mode of Operation Doctrine does not apply.

The Appellant argues that the Respondent did not conduct inspections, did not have maintenance people and relied upon sales personnel to discover and clean up spills, which was outside the scope of their maintenance duties. The Appellant's recitation of the facts is not accurate. As detailed in the Statement of Facts above, the Appellant did conduct inspections, did have maintenance personnel, did not solely rely upon sales personnel to discover and clean up spills, and the discovery and clean-up of spills was within the duties of the sales personnel.[1] Regardless, the

[1] The Appellant argues that Ms. Dakhno's testimony contradicts the certification of Manager Kimberly Kocses. The Appellant argues that Ms. Dakhno testified that her sole maintenance duties were to pick up clothes and hangers. This is not accurate. As detailed in the Statement of Facts above, Ms. Dakhno was not asked during her deposition if Marshalls "employed or tasked anyone to be responsible for making sure that there were no hazards inside the store that could cause injury to customers." The Appellant's attorney vaguely asked only about Ms. Dakhno's "maintenance responsibilities." Pa74, at 11:12-13:1. Regardless, Ms. Dakhno testified that if she worked the morning shift, she would make sure there was nothing on the floor. Pa74, at 11:12-12:10. If she worked closing, she would have to clean her entire department including making sure there was nothing on the floor. Id. During her shift, as she would walk along the department, if she saw something on the floor, she would have to pick it up. She had to be "always aware, … always vigilant." Id. Ms. Dakhno further testified that during shift hours, when customers are inside the store, any person who saw a spill on the floor was responsible for cleaning it up. Pa74-75, at

issue in the summary judgment motion was not whether Marshalls had adequate procedures in place to address hazards such as adequate procedures for inspecting for and cleaning up spills. Instead, the issue was whether the Appellant was able to establish the Respondent's notice of the alleged hazard, namely the liquid on the floor. The Appellant has put the cart before the horse. Before even addressing whether the Respondent's inspection procedures were adequate, the Appellant would have to prove that the condition existed long enough such that the condition could have been discovered and addressed through reasonable inspection. Because the Appellant is unable to establish notice, summary judgment was properly granted.

CONCLUSION

For the reasons set forth above, we respectfully submit that this appeal should be denied and the lower Court's ruling granting summary judgment affirmed. We appreciate the Court's consideration.

Respectfully yours,

ANDREW L. STERN, ESQ.

13:24-14:6. The store had a back room with cleaning supplies for this purpose. Pa75, at 13:24-14:13. The manager and the employees were responsible for cleaning up spills. Pa75, at 14:25-15:1.