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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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“Storekeeper’s Liability” Claim Does Not Avoid the Open and Obvious Defense

By Caroline Grech-Clapper

In *Bruder v Home Depot USA, Inc*, an unpublished decision of the Court of Appeals, the Court upheld the trial court’s summary dismissal based on the open and obvious defense. The Court held that “the [open and obvious] doctrine applies to a premises liability case whether the plaintiff has plead the claim as a failure to warn of a dangerous condition or as a breach of duty in allowing the dangerous condition to exist.”

Plaintiff was shopping at The Home Depot with her husband. Plaintiff tripped over a store merchandise cart while she was stepping backwards to avoid another customer approaching with a shopping cart. Plaintiff described the merchandise cart as a sizeable, gray metal deck with no cross-hatching which stood about three to four inches above the floor with no upright bars.

The Court held that an item with the characteristics described by Plaintiff would be readily discoverable by an average user with ordinary intelligence upon a casual observation. Even if the cart and the floor had similar colors, the Court concluded that it was still discoverable upon a casual inspection because it stood three to four inches above the floor. The Court was persuaded by the fact that Plaintiff did not look behind her before she stepped backwards. The Court held that the only reason that the merchandise cart presented a hazard to Plaintiff was because she did not discover the cart by looking where she was stepping.

Plaintiff attempted to avoid the open and obvious defense in this case by pleading “storekeeper liability.” Plaintiff argued that the open and obvious defense did not apply to ordinary negligence claims based on conditions inside store, such as trip hazards in aisles. She also argued that because customers’ attention was directed to the merchandise inside the store, the

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Plaintiffs’ attorneys have recently begun to add storekeeper liability claims to lawsuits in an effort to avoid the open and obvious defense. Just because the incident occurs in a store does not defeat the open and obvious defense. Courts look beyond attempts to mischaracterize premises liability claims as something else.

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storekeeper had a duty to keep the aisles clear and to warn customers of trip hazards on the floor. The Court rejected these arguments and held that simply because a plaintiff pleads ordinary negligence, the case is not transformed into an ordinary negligence claim. The Court held that the open and obvious doctrine applies to a premises liability case whether the plaintiff has plead the claim as a failure to warn of a dangerous condition or as a breach of duty in allowing the dangerous condition to exist.

Because Plaintiff alleged that an employee failed to warn her of the trip hazard and did not allege that the employee engaged in an independent act of negligence, the trial court properly treated plaintiff's claim as a premises liability claim. Therefore, the application of the open and obvious defense was appropriate.

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