THE PERILS OF FAILING TO FOLLOW YOUR OWN RULES

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The owners and operators of premises have a duty to use reasonable care for the safety of those on the premises for business purposes (i.e., the business "invitees"). As summarized by the often-cited Restatement (Second) of Torts §343 (1965), the duty is breached if the owner/operator:

a) Knows or by the exercise of reasonable care would discover a condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

b) Should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

c) Fails to exercise reasonable care to protect them against the danger.

Many stores and restaurants have developed internal practices and procedures to promote the discovery and remediation of commonly-recurring perils such as trip hazards, product breakage, spills, etc. Although these "private" measures do not substitute for the common law standard of reasonable care as embodied in the Restatement, deviations from internal policies adversely affect the defense of lawsuits arising from dangers the policies were intended to prevent.

In *Holly v. Real Estate Business Trust*, 262 F. Supp. 3d 532 (N.D. Oh. 2017), the defendant store had a procedure requiring the area of a spill to be blocked off and guarded by an employee to prevent a customer or fellow employee from coming into contact with the spill or tracking it elsewhere before it could be cleaned. *Holly* involved spilled blueberries. Contrary to store policy, the spill area was not blocked, and plaintiff slipped after (according to the involved employee) she "found the only one I had not swept up yet". Id. at 535.

In denying a defense motion for summary judgment, the Ohio court recognized that "a defendant's own procedures and policies do not *ipso facto* create the standard of care and, relatedly, that a defendant's failure to comply with its own procedures and policies does not, standing alone, establish breach". Id. at 536-537. However, "That a defendant's own practice and policies do not establish the standard of care does not preclude a jury from considering those procedures and policies, as well as defendant's failure to adhere to them". Id. at 537.

The Courts are generally willing to admit evidence of policies that codify common sense. In *Schmeelk v. King Kullen Grocery Co, Inc.*, 2012 N.Y. Misc. LEXIS 6194 (Suffolk Cty 2012), summary judgment was denied when plaintiff was struck by a "U-boat" stacked over six-feet high with merchandise being pushed by an employee, in contravention of store rule requiring that such conveyances been pulled rather than pushed. The Court made clear, however, that defendant's "…negligence is not predicated on the violation of its internal guidelines or its policies but upon the recognition of the reasonable standard of care. Williams was pushing U-boat stacked high with merchandise during business hours with customers present in the store, and was unable to see where he was going and ran over Schmeelk. This is unreasonable behavior".

On the other hand are policies and procedures that may not be solely concerned with safety or if violated may not cause or contribute to an obvious hazard. In *Hudson v. Wal-Mart Stores, East, L.P.*, 2007 U.S. Dist. LEXIS 52671 (W.D. Va.), plaintiff (who suffered from arthritis) used a store-supplied electric motor cart to bring her groceries to her car. The store had a policy against taking the motor carts into the parking lot. Plaintiff was returning the cart and driving up an inclined ramp when the cart lost power, rolled backwards, and toppled when it reached the curb. In granting summary judgment, the Court held that, "violation of company policy does not show a breach in the standard of care." Although the opinion did not dissect the underlying reasons for the policy, it is conceivably intended for purposes other than safety such as to minimize damage to the carts in the parking lot and having them available in the store for other customers.

A related issue is whether breach of a practice or protocol mandating regular inspections – sometimes referred to as "safety sweeps" – can substitute for notice of a dangerous condition. The argument frequently presented is that if a premise-wide inspection is required at a given interval – e.g., every hour – plaintiff's obligation to show actual or constructive notice is obviated. Fortunately, most Courts reject this argument, holding that periodic inspections often exceed the requirements of "reasonable care." See e.g., *Greene v. Wal-Mart Stores East, L.P.*, 2018 U.S. Dist. LEXIS 132111 (E.D. Pa.) "A self-imposed policy is not the same as a legal duty" and "to require a retail store to inspect its premises almost constantly would be unreasonable….;" *Hower v. Wal-Mart Stores, Inc.*, 2009 U.S. Dist. LEXIS 51557 (E.D. Pa.) (Defendant's policies are not the equivalent of its duty of care. For a variety of reasons, a storeowner like Defendant may adopt safety policies that exceed the duty of acre and provide greater protection to invitees. A store owner like Defendant should not be faced with a lawsuit

for negligence by failing to live up to a heightened, self-imposed duty of care".); *Hudson v. Wal-Mart Stores East, L.P.*, 2007 U.S. Dist. LEXIS 52671 (W.D. Va.).

Breach of a company's policies can undeniably place the defense in a bad position. If supported by the facts, the defense must be prepared to argue that the policies are not related to safety or establish a standard of "more-than-reasonable care," hold defendant to a higher standard than required by the law, and must be precluded. Look for language in written policies, procedures and guidelines that may overtly exalt the standards the company set. Try to obtain concessions that the policy at issue is not widely adopted by competitors, and determine from defense experts the industry standard. Failing to attain the lofty goal of preclusion, the best that can be done may be to limit the damage and prevent a plaintiff from benefitting more than entitled, by resisting elevating the policy as the standard of care in a jury charge or for substituting for an element of plaintiff's case such as notice that plaintiff must still prove.