COUNTERPOINT

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WINNING THE "SAFETY SWEEP-STAKES": THE IMPACT OF INSPECTION PROTOCOLS ON RETAILER SLIP-AND-FALL LITIGATION

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I. INTRODUCTION AND OVERVIEW

As long as there have been grocery stores, customers have been falling in them,[1] and over the last several decades, as lawsuits against retailers continue to comprise a significant percentage of tort litigation, and as retailers have become more savvy, most chain stores and outlets have established internal protocols for inspections aimed at detecting and addressing potential hazards, as well as documenting the company's efforts to maintain a safe facility. As these protocols become the norm for supermarkets and other "big box" stores, those policies – and whether or not they are properly carried out – have begun to play a role in the overall liability analysis, including the issues of notice, duty, and breach. As will be discussed herein, for the most part, the fact that a retailer has implemented maintenance and inspection guidelines is largely beneficial when litigation arises, and such policies do not tend to negatively impact the defense of slip and fall cases unless there is clear evidence of either spoliation inspection records or a deviation from actual policy.

II. PLAINTIFF'S BURDEN OF PROOF IN A RETAIL SLIP-AND-FALL CASE

Under Pennsylvania law, a plaintiff seeking to recover for personal injuries related to a slip-and-fall in a retail store must initially establish all components of a traditional negligence action, namely, the existence of a duty owed by Defendants to Plaintiff; a breach of that duty by defendant; a causal connection between the alleged breach and the resulting injury; and actual loss or damage to the plaintiff.[2] In a retail premises liability action, the owner or proprietor is liable to business invitees with respect to conditions of the premises if it:

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

(b) should expect that the invitees 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.[3]

Pennsylvania law further holds that a retailer is not an insurer of the safety of its customers.[4] As well, the "mere existence of a harmful condition in a public place of business, or the mere happening of an accident due to such a condition is neither, in and of itself, evidence of a breach of the proprietor's duty of care to his invitees, nor raises a presumption of negligence."[5] Thus, a business invitee asserting a claim for a fall in a store must demonstrate a failure to exercise reasonable care.[6] In order to show that a defendant breached its duty of care to keep its premises free from hazardous conditions, a plaintiff must show that the the landowner either caused or created the alleged hazardous condition or had actual or constructive notice thereof.[7]

Indeed, in a premises liability action, "[t]he threshold of establishing a breach of duty is notice" of a dangerous condition.[8] A plaintiff is rarely able to establish actual notice on the part of the defendant or that the defendant caused or contributed to the creation of an allegedly dangerous condition. Thus, most plaintiffs assert that a defendant had constructive notice of said condition, proof of which

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generally requires some evidence as to the duration of the alleged condition.[9] "What constitutes constructive notice must depend on the circumstances of each case, but one of the most important factors to be taken into consideration is the time elapsing between the origin of the defect or hazardous condition and the accident."[10] Thus, when a plaintiff cannot adduce evidence as to the temporal duration of an alleged dangerous condition, their case will likely be dismissed.[11]

III. HOW INSPECTION PROTOCOLS MAY AFFECT A SLIP AND FALL ACTION

A. Notice

1. Failure to conduct an inspection in accordance with company policy is generally not evidence of constructive notice and is not probative as to the duration of an alleged dangerous condition.

Because it is often difficult to establish how long a particular condition existed prior to a slip-and-fall incident, plaintiffs often attempt to use a defendant's inspection policies – including evidence that they were not followed on the day in question – as proof of a condition's duration. Thus, it is not uncommon for a plaintiff to allege that, had a retailer observed its inspection guidelines, the alleged defect would have been discovered and addressed, thereby establishing constructive notice on the part of the retailer. The court in *Hower v. Wal-Mart Stores, supra* – the seminal case on this issue – flatly rejected this argument, stating:

> [T]he argument conflates evidence of Defendant's inspection practices with evidence of the duration of the spill. Defendant's alleged failure to perform a safety sweep says nothing about how long the spill was present.

Id. at 19.[12] Moreover, a plaintiff must *first* establish the existence of a duty on the part of the defendant retailer before the reasonableness of its conduct becomes relevant:

> [A] genuine issue of material fact exists as to when [defendant's employee] conducted what she described as hourly protective sweeps on the date of the accident, that defendants did not record the timing of the safety sweeps, and that no spill station was located in the aisle where plaintiff fell. Nonetheless, these issues are immaterial to a finding of constructive notice (i.e., how long the spill was on the floor). Instead, these issues help establish the alleged unreasonableness of defendant's behavior in failing to protect plaintiff from a pre-existing spill. In other words, **although these factual disputes are material in showing a breach of duty, they become relevant only after plaintiff makes an evidentiary showing of the existence of such a duty (i.e., that the spill lingered for a sufficient period of time so that defendant should have discovered the spill), which plaintiff has not done.** For instance, even if [defendant's employee] or a grocery associate conducted a protective sweep one hour before the accident, and then recorded this negative finding in a log, a jury would still have no factual basis from which to infer the duration of the spill. Indeed, the spill could have happened merely seconds before plaintiffs fall, thereby making it impossible for defendant to have notice as a matter of law.[13]

Similarly, the fact that a defendant had no regular policy for the monitoring of spills is not probative to establish constructive notice: In granting summary judgment in favor of the defendant, one court reasoned:

> Plaintiff also asserts that Defendant-GMS's failure to monitor for spills is sufficient to defeat summary judgement. Specifically, Plaintiff argues that Defendant-GMS did not have a policy in place to monitor for spills at set intervals. Moreover, there was no evidence that anyone monitored for spills that day. Such evidence, according to Plaintiff, is sufficient to defeat Defendants' motions because it illustrates Defendant-GMS's failure to use reasonable care with respect to its duty to business invitees….Plaintiff's argument as to whether Defendant-GMS's actions were reasonable does not concern the Court at present.
>
> Indeed, Plaintiff's argument as to Defendant-GMS's lack of hazard monitoring skips a step within the negligence framework. In order for Defendants to fail to exercise reasonable care with respect to a duty, Defendants must owe a duty in the first place. Defendants do not owe such a duty unless there was sufficient constructive notice of the hazardous condition. Thus, the inquiry into the sufficiency of Defendant-GMS's store policy is only relevant after establishment that Defendant had notice of a hazardous condition.[14]

Although myriad other Pennsylvania courts have arrived at the same conclusion that a retailer's failure to comply with its own inspection protocols does not establish constructive notice,[15] at least one court reached a different conclusion,[16] denying the defendant's motion for summary judgment where the plaintiff fell on liquid on the floor of the defendant's supermarket that had begun

to solidify and which originated from an earlier spill that defendant's employees had not completely cleaned. The court based its decision in part upon the failure of the defendant to conduct the hourly "sweeps" required by company protocols:

> Admissions from deposed employees show that hourly sweeps are supposed to be noted on sweep logs, which are a high priority for Wegman's, and that the sweep logs reflect no hourly sweeps the entire week preceding plaintiff's fall….The defendant's policy of performing hourly sweeps in the exercise of reasonable care to discover spills, along with evidence that no such sweeps were done, indicates that store owner defendant deviated from its duty of care to look for slippery substances. These facts also demonstrate that the defendant in the exercise of reasonable care should have known of the existence of the harmful condition.[17]

In short, evidence that a retailer may have had inspection policies but did not adhere to them – or even that it did – will generally not be probative for purposes of establishing constructive notice absent other evidence as to the issue of duration.

2. <u>Spoliation of a company's inspection records may permit a finding of constructive notice</u>.

As a general rule, the fact that a retailer has established a protocol for inspecting its premises but has no evidence as to inspections does not necessarily establish that no inspections occurred.[18] Evidence that a defendant may have spoliated maintenance and inspection records, however, may provide grounds for deviating from the principles set out in *Hower* and its progeny: In *Rodriguez v. Kravco Simon Co*., 111 A.3d 1191 (Pa. Super. 2015), the plaintiff slipped and fell on a puddle of brown liquid at a shopping mall. The trial court granted summary judgment based upon the lack of evidence that defendant had constructive notice of the puddle. On appeal, the court found that there was a genuine issue of material fact as to whether defendants had constructive notice of the liquid given plaintiff's allegations of spoliation. Indeed, although the defendant produced maintenance records, including inspection records, for the month of the subject incident, it did not produce records for the day in question. Thus, the court concluded:

> [Plaintiff] has come forth with evidence that at least casts a doubt as to the existence of a question of material fact. With the open possibility that the [defendant's maintenance subcontractor] employees failed to check the floors as scheduled prior to [Plaintiff's] fall, it is not clear that Defendants' are entitled to judgment as a matter of law.[19]

Thus, where there is a *lack* of records which might be probative as to the issue of notice, and some indication of possible spoliation, the *Hower* rationale does not apply.

Relying upon *Rodriguez,* the court in *Falcone v. Speedway LLC*, 2017 U.S. Dist. LEXIS 7324 (E.D. Pa. January 19, 2017) came to a similar conclusion. In that case, the court denied the motion for summary judgment of the defendant gas station in a case in which the plaintiff claimed to have fallen on spilled diesel fuel while filling his tank. First, it determined that there was a genuine issue of material fact as to the issue of actual notice based on, *inter alia,* evidence that defendant's employees were required to complete a "Monthly Site Safety Checklists" that noted the incidence of gasoline spills and to check fuel pumps and the parking lot for gas spills at the beginning of and throughout each shift. The court thus concluded that a jury could infer that the defendant was on notice of and failed to address the fuel spill which caused the plaintiff's accident. In so finding, the court stated:

> Defendant's emphasis on [its] inspection procedures hurts—not helps—its argument. This is because defendant has conceded that Mr. Falcone slipped and fell on diesel fuel in its parking lot. Therefore, a jury is entitled to decide whether or not defendant's parking-lot inspection procedures were properly followed the day of Mr. Falcone's incident. One could fairly conclude they were not since—if they had been followed—then Mr. Falcone would not have slipped and fallen on a diesel fuel spill.[20]

The court next considered whether defendant had demonstrated the lack of any genuine issue of material fact with respect to the issue of constructive notice and rejected defendant's contention that plaintiff had failed to establish the duration of the gas spill. Keeping in mind that employees were required to check for gas spills at the beginning of their shifts and considering evidence as to when employees clocked in on the day in question, the court concluded that there was a "coherent timeline from which both parties could argue how long the spill was on the ground." *Id*. at *13. Relying instead on *Rodriguez,* the court declined to follow *Hower* because of the possibility of spoliation of evidence which might be probative as to the issue of notice. Thus, the court concluded that "even without actual or constructive notice, there was still a disputed question as to whether the defendant acted affirmatively to inspect the premises to ensure invitees' safety." *Falcone* at *15 - *16.

B. <u>Duty</u>

Initially, although a retailer's internal inspection policies may have no bearing on the issue of notice, once notice is established, those protocols may impact the issue of reasonableness, or breach. Such policies, however, do not establish the applicable duty of care:

> Defendant's policies are not the equivalent of its duty of care. For a variety of reasons, a store owner like Defendant may adopt safety policies that exceed the duty of care 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.[21]

Similarly, maintenance and inspection guidelines do not by their very existence give rise to a separate duty independent of the provisions of Section Section 343 of the Restatement (Second) of Torts[22] or establish a breach of duty when a patron

slips and falls absent evidence of a deviation from such guidelines.[23]

1. Evidence that a Defendant *did* Comply with Company Inspection Protocols May Defeat a Finding of Negligence.

While not dispositive, a defendant retailer may be able to avoid liability where there is evidence that it complied with its internal policies governing safety inspections. One court granted summary judgment in favor of the defendant shopping mall where the plaintiff fell on an unknown substance at mall entrance because the defendant was able to establish that that area of the premises was inspected by mall employees every 20 minutes.[24] In *McCarthy v. Target Corp*., 2006 Pa. Dist. & Cnty. Dec. LEXIS 534 (Monroe C.P. November 8, 2006), moreover, the plaintiff claimed to have fallen on a "sticky patch" which she believed formed from a spilled liquid. The defendant sought summary judgment based upon lack of notice; in response, the plaintiff argued that the defendant was on constructive notice of the alleged hazard but failed to exercise reasonable care to discover and address it. The court found no evidence of notice on the part of the defendant and further determined that there was no evidence that Target had not acted reasonably in identifying potential defects, stating:

> [Plaintiffs] presented no evidence of the store's failure to exercise reasonable care in discovering spills. Mrs. McCarthy had no knowledge regarding the store's inspections of its aisles. Target took the deposition of its clerk, Edward A. Achiron, who testified that he had inspected the aisle where Mrs. McCarthy fell "approximately 20 to 26 minutes previously." At that time he saw no evidence of a spill. Plaintiffs did not offer any evidence on this point to support their claim of negligence.[25]

2. Evidence that a defendant *did not* comply with company inspection protocols does not necessarily establish negligence.

The seminal case involving a failure to comply guidelines concerning maintenance and inspection may be found in *Estate of Swift v. Northeastern Hospital of Philadelphia,* 690 A.2d 719 (Pa. Super. 1997). In that case, the plaintiff slipped on a puddle of water while being treated in the defendant hospital's emergency department. The plaintiff filed suit alleging, *inter alia,* negligence sounding in premises liability, but the court granted the defendant's motion for summary judgment due to a lack of notice. In affirming the trial court, the Superior Court stated:

> [A]lthough Appellants have presented evidence in the form of multiple admissible medical reports which contain Decedent's statements that her fall was caused by water on the floor, Appellants have failed to show in the record that Appellee had notice of the condition. Appellants present no evidence as to how the water arrived on the floor. Nor is there evidence as to how long the condition existed. Instead, Appellants cite Appellee's janitorial maintenance records which indicate that the person charged with maintaining the area where Decedent fell had left the hospital property four hours prior to the accident. From this fact, Appellants infer that Appellee was negligent in not replacing the missing maintenance person and, therefore, caused the condition to exist. **However, there is no evidence that the area was not monitored or maintained by other members of Appellee's staff.** Without such proof, Appellants cannot establish a breach of the legal duty owed to Decedent by Appellee which is a condition precedent to a finding of negligence.[26]

The argument that compliance with a store's inspection protocols would have prevented a slip-and-fall incident has been rejected as too speculative and too dependent upon "split second timing,"[27] but where a plaintiff can establish the element of notice *and* that a company's maintenance directives were not followed, however, a breach of duty *may* be found.[28]

IV. CONCLUSION

A robust store inspection protocol can go a long way to minimizing potential hazards and therefore reducing claims based upon slip-and-falls. Strict adherence to those policies, together with a formal record-keeping and retention protocol, can be persuasive when claims do arise, and such practices will not only assist in developing defense strategy when there is litigation but may also provide the basis for case-dispositive relief at an early stage.

ENDNOTES

[1]*See, e.g., Gorman v. Simon Brahm's Sons, Inc*., 148 A. 40 (Pa. Super. 1929)(plaintiff falls on spinach while entering defendant's store).

[2]*Krentz v. Consol. Rail Corp.,* 910 A.2d 20, 27 (Pa. 2006); *R. W. v. Manzek,* 888 A.2d 740 (Pa. 2005).

[3]*Carrender v. Fitterer,* 469 A.2d 120, 123 (Pa. 1983)(citing Section 343 of the Restatement (Second) of Torts).

[4]*See Moultrey v. Great Atl. & Pac. Tea Co.,* 422 A.2d 593, 596 (Pa. Super. 1980).

[5]*Myers v. Penn Traffic Co.,* 606 A.2d 926, 928 (Pa. Super. 1992).

[6]*Neve v. Insalaco's, 771* A.2d 786, 790 - 791 (Pa. Super. 2001).

[7]*Pace v. Wal-Mart Stores E., LP*, 337 F. Supp. 3d 513, 519 (E.D. Pa. 2018).

[8]*Hower v. Wal-Mart Stores, Inc., 2009 U.S. Dist. LEXIS 51557 at *3* (E.D. Pa. June 16, 2009)(*quoting Scruggs v. Retail Ventures, Inc.,* No. 06-1148, 2008 U.S. Dist. LEXIS 52130 (W.D. Pa. July 8, 2008)). *And see Loeb v. Allegheny County,* 147 A.2d 336, 338 (Pa. 1959).

[9]*See, e.g., Cox v. Wal-Mart Stores E., L.P*., 2008 U.S. Dist. LEXIS 66035 at *4 (E.D. Pa. Aug. 26, 2008).

[10]*Neve v. Insalaco's*, 2001 PA Super 71, 771 A.2d 786, 791 (Pa.Super. 2001).

[11]*See, e.g., Larkin v. Super Fresh Food Markets, Inc*., 291 Fed. Appx. 483, 485 (3d Cir. 2008)("without evidence about when the mat became buckled, a fact-finder could only speculate about whether Super Fresh should have discovered and corrected the problem"); *Hower, supra* (summary judgment granted where plaintiff could not establish how long spill of bubble bath in Wal-Mart store had existed, where there was no tracking, footprints, or shopping cart marks in or near spill); *Murray v. Dollar Tree Stores, Inc.,* 2009 WL 2902323 (E.D. Pa. Sept. 10, 2009)(summary judgment granted where plaintiff had no evidence as to length of time liquid was on floor; testimony that she had been in the store for 15 minutes prior to spill was not sufficient evidence of duration, especially where there was no evidence of tracking of the liquid or accumulation of dirt near the spill); *Craig v. Franklin Mills Assocs., L.P*., 555 F. Supp. 2d 547 (E.D. Pa. 2008), aff'd, 350 Fed. Appx. 714 (3d Cir. 2009)(finding that defendant was entitled to summary judgment where the plaintiff failed to prove constructive notice because she was unable to establish how long the hazardous condition caused by the soda spill existed before she slipped on it); *Viccharelli v. The Home Depot USA, Inc*., 2007 U.S. Dist LEXIS 89344 (E.D. Pa. 2007)(plaintiff could not prove constructive notice where there was no evidence as to the duration of the wet substance on the floor); *Read v. Sam's Club,* 2005 U.S.

Dist. LEXIS 37579 (E.D. Pa. September 23, 2005) (summary judgment granted where a plaintiff fails to establish duration of spill on small puddle of clear liquid in frozen foods aisle); *Flocco v. Super Fresh Markets, Inc.,* 1998 U.S. Dist. LEXIS 20266, 1998 WL 961971, at *2-3 (E.D. Pa. Dec. 29, 1998) (granting summary judgment for defendant in slip and fall case because plaintiff failed to produce evidence as to length of time gravy was on floor, despite plaintiffs' testimony that they did not hear sound of breaking glass during half-hour they spent shopping in store and observed no one in the aisle at time of fall); *Clark v. Fuchs,* 1994 U.S. Dist. LEXIS 406, 1994 WL 13847, at *3 (E.D. Pa. Jan. 14, 1994)(granting summary judgment for defendant in slip and fall case because plaintiff failed to present evidence to indicate how long the paper on which plaintiff slipped was on the stairs); *Estate of Swift v. Northeastern Hosp.,* 690 A.2d 719 (Pa. Super. 1997)(constructive notice not found, and summary judgment properly granted, where plaintiff presents no evidence as to how water arrived on floor or how long condition existed, even where maintenance records indicate that person charged with maintaining area left four hours prior to accident); *Myers v. Perm Traffic Co*., 606 A.2d 926, 928 (Pa. Super. 1992), *appeal denied*, 620 A.2d 491 (Pa. 1993)(the presence of a grape on the floor of the produce section due to an unknown cause for an unknown period of time was not sufficient to establish constructive notice); *Moultrey, supra* (affirming grant of compulsory non-suit to defendant in slip and fall case because plaintiff failed to present any evidence of how long cherry on which plaintiff slipped had been on floor); *Rogers v. Horn & Hardart Baking Co*., 127 A.2d 762 (Pa. Super. 1956)(plaintiff unable to establish constructive notice where he fell near the cashier of a restaurant and, at that time, did not see any stew on the floor, but later found it on the coat he was wearing at the time of the fall); *Loeb v. Allegheny County*, 147 A.2d 336 (Pa. 1959)(finding that plaintiff failed to prove constructive notice where he slipped on a spot of liquid on the defendant's steps, but failed to establish how long the liquid was present there); *Lanni v. Pennsylvania R.R. Co*., 88 A.2d 887 (Pa. 1952)(finding that the plaintiff failed to present sufficient proof of constructive notice where there was no evidence as to how long the grease spot was on the driveway prior to plaintiff's slip and fall); *Kovnat v. Shop Rite Supermarket*, 2007 Phila. Ct. Com. Pl. LEXIS 144 (C.P. Phila. Cty.), *aff'd without op*., 943 A.2d 329 (Pa. Super. 2007)(plaintiff did not establish constructive notice where she could not establish how long the floor had been slippery before she fell).

[12]Note, however, that records of routine inspections *may* be probative to establish a lack of *actual notice*. *Slater v. Genuardi's Family Mkts*., 2014 U.S. Dist. LEXIS 135052 (E.D. Pa. September 24, 2014)("There is no evidence of actual notice here. Indeed, a report of sweeps of the store fails to note any ice or water on the ground prior to the incident"); *Ketchum v. Giant Food Stores LLC*, 2014 Pa. Super. Unpub. LEXIS 2873 (Pa. Super. September 30, 2014)(same).

[13]*Read v. Sam's Club, supra,* at 9 (emphasis added).

[14]*Felix v. GMS Zallie Holdings, Inc*., 827 F. Supp. 2d 430 (E.D. Pa. 2011), *aff'd*, 2012 U.S. App. LEXIS 21075 (3d Cir. Oct. 11, 2012).

[15]*And see Boukassi v. Wal-Mart Stores, Inc*., 2019 Pa. Super. Unpub. LEXIS 2917 (Pa. Super. August 1, 2019)("Appellant's reference to the existence of the 'Slip, Trip and Fall Guidelines' does not raise an issue of fact that precluded the entry of summary judgment in favor of Appellees. As stated above, the record lacked any evidence to show how long the spill was in existence"); *Thomas v. Family Dollar Stores of Pa., LLC,* 2018 U.S. Dist. LEXIS 196569 (E.D. Pa. Nov, 19, 2018) ("without any evidence regarding the length of time the spill existed, it is immaterial when Family Dollar conducted an inspection"); *Pace v. Wal-Mart Stores E., LP*, 337 F. Supp. 3d 513 (E.D. Pa. 2018)("While the fact that employees overlooked the piece of white debris may suggest that Defendant's policies regarding safety sweeps were not honored, it does not in any way show how long the grape or grapes were on the floor. This evidence cannot charge Defendant with constructive knowledge of the grape or grapes that caused Plaintiff's fall"); *Harrell v. Pathmark*, 2015 U.S. Dist. LEXIS 23154 (E.D. Pa. February 26, 2015)("The mere fact in this case that there was not a set schedule for routine inspections or documentation of them is not sufficient evidence that Pathmark had constructive notice of the condition"); *Regaolo v. Save-A-Lot*, 2014 U.S. Dist. LEXIS 114216 (E.D. Pa. August 14, 2014)(Sweep Log showing inspection two hours and twenty minutes prior to incident too speculative to permit jury to determine duration of presence of grapes on floor); *Sheil v. Regal Entertainment Group*, 2013 U.S. Dist. LEXIS 70847 (E.D. Pa. May 20, 2013), *vacated and remanded on other grounds*, 2014 U.S. App. LEXIS 6980 (3d Cir. Pa., Apr. 15, 2014)(evidence as to lack of proper inspections of movie theatre bathroom potentially relevant to issue of reasonableness of conduct but did not establish constructive notice to trigger a finding of duty); *Lal v. Target Corp*., 2013 U.S. Dist. LEXIS 47380 (E.D. Pa. April 2, 2013)("Plaintiff appears to claim that because Target employees regularly patrolled the aisles and the store was equipped with "spill stations," Target should have known about the spill that caused her fall. This is simply incorrect. Such evidence might well relate to whether Target acted reasonably, but does not show that Target knew or should have known of the spill"); *Katz v. Genuardi's Family Mkts., Inc*., 2010 U.S. Dist. LEXIS 67976 (E.D. Pa. July 8, 2010)("Defendants' allegedly deficient safety inspection system says nothing about how long the spill was present"); *Murray v. Dollar Tree Stores, Inc*., 2009 U.S. Dist. LEXIS 82487 (E.D. Pa. September 10, 2009)(rejecting argument that lack of evidence as to defendant's inspection policies has bearing upon issue of contructive notice because "inspection and maintenance issues are 'immaterial to a finding of constructive notice,'" especially where plaintiff did not conduct any discovery as to this issue); *Henderson v. J.C. Penney, Corp., Inc.,* No. 08-177, 2009 WL 426180, at *5 (E.D. Pa. Feb. 20, 2009)(finding that business invitees must demonstrate actual or constructive notice of a transitory hazard regardless of whether inspections were performed); *Kujawski v. Wal-Mart Stores, Inc*., 2007 U.S. Dist LEXIS 71261 (E.D. Pa. 2007)("[t]he evidence that store employees were under a responsibility to constantly monitor their departments for potential hazards or that a specific maintenance associate is responsible for constantly cleaning the floors throughout the store is not adequate to establish constructive notice . . . A jury would be asked to engage in pure speculation if this case were allowed to go forward"); *Toro v. Fitness Int'l LLC*, 150 A.3d 968 (Pa. Super. 2016)(affirming trial court grant of summary judgment where there were no reports from fitness facility staff as to how long floor was wet prior to incident and rejecting as speculative plaintiff's argument that facility's failure to maintain accurate inspection logs established that "condition could have existed for a long period of time"); *Davis v. Target Corp*., 2013 Pa. Super. Unpub. LEXIS 1219 (Pa. Super. March 19, 2013)(denial of defendant's motion for JNOV reversed where constructive notice of beanbags in store aisle was not established despite fact that company protocols requiring an assigned employee to conduct inspections of store were not followed); *Newell v. Giant Food Stores*, 49 Pa. D. & C.4th 429 (C.P. Lehigh Cty. 2000)(finding that it would be improper to apply the "missing witness rule" to establish notice of a hazardous condition where there was no support for same in the record). *But see Johnson v. Gabriel Bros., Inc*., 2017 Pa. Super. Unpub. LEXIS 3920 (Pa. Super. October 20, 2017)("[Defendant's] policy was to conduct inspections, and Johnson did not present sufficient evidence to create a genuine issue of material fact that those inspections did not occur or were insufficient such that Gabriel would otherwise have had constructive notice of the hanger").

[16]*Thakrar v. Wegman's Food Mkt*., 75 Pa. D. & C. 4th 437 (C.P. Northampton Cty. November 19, 2004).

[17]*Id*. at 442 – 43. *And see Johnson v. Gabriel Bros., Inc*., 2017 Pa. Super. Unpub. LEXIS 3920 (Pa. Super. October 20, 2017)("[Defendant's] policy was to conduct inspections, and Johnson did not present sufficient evidence to create a genuine issue of material fact that those inspections did not occur or were insufficient such that Gabriel would otherwise have had constructive notice of the hanger").

[18]*Hower, supra* ("[T]he argument incorrectly equates a *lack of evidence* that Defendant inspected the aisle with proffer that Defendant did not inspect the aisle. Plaintiff bears the burden of proof and must point to evidence to show a genuine issue of material fact for trial"). *And see Thomas v. Family Dollar Stores of Pa., LLC,* 2018 U.S. Dist. LEXIS 196569 (E.D. Pa. Nov, 19, 2018)(rejecting plaintiff's argument that "'lack of evidence' that Family Dollar inspected the aisle is proof that Family dollar did not inspect the aisle," especially in light of testimony by the retailer's employee detailing inspection protocols.)

[19]*Id.* at 1196 – 1197.

[20]*Id*. at *9 - *10.

[21]*Hower, supra at* *18. *And see Greene v. Wal-Mart Stores East, LP,* 2018 U.S. Dist. LEXIS 132111 (E.D. Pa. August 6, 2018)("[A] a retail store's self-imposed policy is not the same as a legal duty nor does a failure to follow that policy creates a breach of a legal duty").

[22]*Rodgers v. Supervalu, Inc*., 2017 U.S. Dist. LEXIS 31907 (E.D. Pa. March 6, 2017), *aff'd*, 2018 U.S. App. LEXIS 10545 (3d Cir. Pa., Apr. 26, 2018)("[E]vidence that defendant violated its own policy of cleaning the store every two hours does not support a finding that defendant owed plaintiff a duty to protect her from the spill).

[23]*Boukassi v. Wal-Mart Stores, Inc*., *supra.*

[24]*Pearsall v. Plymouth Meeting Prop., LLC*, 2007 Phila. Ct. Com. Pl. LEXIS 32 (C.P. Phila. Cty. January 24, 2007).

[25]*Id*. at *8 - *9. *And see Breen v. Millard Group, Inc.,* 2016 U.S. Dist. LEXIS 156045 (E.D. Pa. November 9, 2016)(where defendant mall produced records showing inspections at half-hour intervals throughout the day of plaintiff's fall, in accordance with company protocols, the fact that records did not indicate a finding of liquid in the area of the subject incident did not constitute evidence that no inspections were actually performed); *Hessman v. Super Fresh Food Mkts., Inc*., 2007 Phila. Ct. Com. Pl. LEXIS 333 (C.P. Phila. Cty. December 17, 2007)(jury's conclusion that defendant store

owned did not breach duty to plaintiff who fell on water in store supported by evidence, including defendant's policy requiring workers to continuously walk around store to ensure premises were safe).

[26]*Id.* at 722 (emphasis added).

[27]*Id.* at *7 - *8. *And see Dimino v. Wal-mart Stores*, 83 Pa. D. & C. 4th 169, 175-76 (C.P. Monroe Cty. 2007)(refusing to find negligence where there was no evidence presented that routine inspections would have turned up the defect in question).

[28]*Boukassi v. Wal-Mart Stores, Inc, supra* ("Appellant's reference to the existence of the 'Slip, Trip and Fall Guidelines' does not raise an issue of fact that precluded the entry of summary judgment in favor of Appellees. As stated above, the record lacked any evidence to show how long the spill was in existence. Without further circumstantial evidence to infer that Appellees' employees deviated from the Guidelines, the mere existence of the spill did not establish a breach of Appellees' standard of care.")

Pennsylvania Courts Continue to Grapple with the Extent to Which Damages Arising Out of Faulty Work Constitute an "Occurrence" Under CGL Policies

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In the seminal decision in *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006), the Supreme Court of Pennsylvania held that damages arising out of an insured's faulty or defective workmanship are not covered under a commercial general liability insurance policy because they do not constitute an "occurrence," i.e., "an accident." Subsequent decisions have extended the reasoning of *Kvaerner* to hold that damages that are a reasonably foreseeable result of faulty or defective workmanship are also not a covered "occurrence." *See, e.g.*, *Millers Capital Ins. Co. v. Gambone Bros. Devel. Co., Inc.*, 941 A.2d 706 (Pa. Super. 2007); *Nationwide Mut. Ins. Co. v. CPB Int'l, Inc.*, 562 F.3d 591 (3d Cir. 2009); *Specialty Surfaces Int'l, Inc. v. Continental Ins. Co.*, 609 F.3d 223 (3d Cir. 2010). Despite repeated attempts to erode the reach of *Kvaerner* and its progeny, Pennsylvania courts have generally continued to apply *Kvaerner* to preclude coverage for claims premised on claims of defective or faulty workmanship, even where the faulty workmanship results in foreseeable damage to property other than the insured's work product. In 2019, the Superior Court of Pennsylvania and the United States Court of Appeals for the Third Circuit each addressed the range of *Kvaerner's* reach.

Pottstown: Not All Property Damage Is Equal

In *Pennsylvania Mfr. Indem. Co. v. Pottstown Industrial Complex LP*, 215 A.3d 1010 (Pa. Super. July 22, 2019), the Superior Court of Pennsylvania considered whether *Kvaerner* and its progeny applied to preclude coverage for a suit by a tenant against an insured-landlord for damage to the tenant's inventory stored at the premises caused by flooding resulting from the insured-landlord's alleged failure to properly maintain and repair a roof.

The Pride Group, Inc. ("Pride Group") filed suit against its landlord, Pottstown Industrial Complex LP ("Pottstown"), alleging that the leased premises was flooded during rainstorms on multiple occasions and that the floods caused over $700,000 in damage to inventory that Pride Group stored on the premises. Pride Group alleged that the water entered the premises due to roof leaks caused by poor caulking of the roof, gaps and separations in the roofing membrane, undersized drain openings and accumulated debris and clogged drains. Pride Group asserted a single cause of action for breach of contract against Pottstown asserting that the insured was responsible under the lease for maintaining and repairing the roof. However, the complaint also specifically pled that Pottstown was negligent in its maintenance of and repairs to the roof.

Pennsylvania Manufacturers Indemnity Company ("PMA") insured Pottstown under a commercial general liability ("CGL") policy which was in effect during the period in which one of the flooding events occurred. The CGL policy covered "property damage" caused by an "occurrence." The CGL policy contained the standard ISO "Occurrence" definition—i.e., "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

PMA filed a declaratory judgment action seeking a declaration that it had no duty to indemnify the insured-landlord on the ground that the underlying lawsuit did not allege an "occurrence." The trial court agreed with PMA and held that the allegations of inadequate roof repairs are claims for faulty workmanship which do not constitute an occurrence under *Kvaerner* and *Gambone Bros*.

On appeal, the Superior Court reversed. In doing so, it recognized that pursuant to *Kvaerner* and its progeny, "faulty workmanship itself does not constitute an 'occurrence,'" nor does "a claim for damages from the insured's improper performance of contractual obligations … where the only property damaged is the product or property that the insured supplied or on which it worked or where the damages sought are for the insured's failure to deliver the product or perform the service it contracted to provide." However, the Court held that *Kvaerner* and its progeny do not hold that there is no "occurrence" where "the claim is for damage to property not supplied by the insured and unrelated to what the insured contracted to provide." Because the underlying complaint alleged damage to something other than what the insured supplied and unrelated to what the insured contracted to provide (that is, Pride Group's inventory stored on the premises) and was caused by a distinct event (flooding) rather than damage for the cost of repairing or replacing the defective item that the insured supplied (i.e., the inadequate roof), the court