

PREMISES LIABILITY:

What You Need To Know



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Although prepared with due care, this paper and accompanying presentation are presented for purposes of education and discussion. They should not be construed as legal advice, particularly with respect to highly fact-dependent issues such as privilege and waiver, which are ultimately subject to abundant judicial discretion and variation among different court systems.

Introduction

Under common law, the duty of care owed by a landowner to a visitor depended on whether the visitor was a trespasser, licensee, e.g., a social guest, or invitee, i.e., someone present for the business purposes of the landowner. Today, many jurisdictions, including NY, no longer distinguish the landowner's duty based solely on the visitor's status. *See Basso v. Miller*, 40 N.Y.2d 233 (1976); *Mallet v. Pickens*, 206 W.Va. 145, 522 S.E.2d 436 (1999). However, some states continue to distinguish trespassers only, while in at least four states, the traditional distinctions are still applied to all three categories. *Shaw v. Peterson*, 169 Ariz. 559, 821 P.2d 220 (Ariz.Ct.App.1991); *Kirschner v. Louisville Gas & Elec. Co., Inc.*, 743 S.W.2d 840 (Ky.1988); *Little by Little v. Bell*, 719 So.2d 757 (Miss.1998); *Musch v. H-D Elec. Co-op.*, 460 N.W.2d 149 (S.D.1990).

New York courts no longer apply the common-law distinction, and premises liability is now measured by the single general standard of reasonable care that has traditionally been applied in the usual negligence action. *Basso v. Miller*, 40 N.Y.2d 233 (1976). To successfully maintain a premises liability action, one of the biggest hurdles a Plaintiff must overcome arises with the element of notice. Unless the plaintiff can show that the defendant created the hazard, they must prove that the defendant had "actual" notice or "constructive" notice of the hazard's existence, and failed to correct the hazard or warn of it. Although the burden of proof is on the plaintiff, if a defendant wants to successfully defend the case via motion practice, it in effect, becomes the defendant's burden to prove lack of notice.

This element of notice remains significant irrespective of whether the defendant is a

common residential landowner or a common carrier. Although common carriers, such as operators of aircraft, were once held to owe their passengers a high degree of care due to the inherent dangers that lay with rapid transportation, today, this attitude is believed to be outdated and unnecessary. The current view held by a majority of US courts is that the common carrier must only meet the ordinary standard of care expected of a reasonably prudent person under the circumstances. *Bethel v. New York City Transit Authority*, 92 N.Y.2d 348, 681 N.Y.S.2d 201, 703 N.E.2d 1214 (1998).

Warsaw Convention

When dealing with the common carrier, there is one caveat that is important to mention and keep in mind: The Convention for the Unification of Certain Rules Relating to International Transportation by Air, more commonly known as the Warsaw Convention. The Warsaw Convention governs the use of international air transportation between its signatory countries. In Article 17 it states: “The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.” *See* Convention for the Unification of Certain Rules Relating to International Transportation by Air art. 17, Oct. 12, 1929, 49 Stat. 3000 (1934), 137 L.N .T.S. 11. If the plaintiff can demonstrate that they were injured in an *accident* while on an airplane, or in the process of *disembarking* or *embarking* from an airplane, the carrier is held automatically liable under the Warsaw Convention as amended. The convention is preemptive and therefore, if applicable, the carrier will not be subject to liability under local law for the injuries covered

by the convention.

Whether this article applies often comes down to whether the plaintiff was in fact “disembarking” or “embarking” at the time of injury. Courts use two methods to make this determination: the “Location Test” and the “Tripartite Test”. The Location Test examines solely the location of the passenger at the time of the accident. The Tripartite Test, which encompasses the location test, examines 3 factors: “(1) the nature of the passenger activity, (2) the amount of carrier control, and (3) the location of the passenger at the time of the injury. *Day v. Trans World Airlines* 528 F.2d 31 (1975); See *Rajcooar v. Air India Limited* 89 F.Supp.2d 324 (E.D.N.Y 2000) (*Day* test as applied to find plaintiff, who died from a heart attack while waiting in the transit lounge to board flight to New Delhi, was within the Warsaw Convention’s definition of “embarking” even though he had not yet joined the line to re-board.) If the convention is found to be applicable, it creates a presumption of absolute liability in the carrier for an amount up to 100,000 SDRs (“Special Drawing Rights” – See www.IMF.org for conversions) for personal injuries. Above this amount, limited defenses are available to the carrier.

Procedural Mention

A Motion for Summary Judgment should be granted if the moving party demonstrates it is entitled to judgment as a matter of law because there is no genuine issue as to any material fact. *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 (1986). The court, in order to determine if this burden has been met, must draw all reasonable inferences and resolve any ambiguities in favor of the non-moving party. “Where the record taken as a whole could not lead to a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for

trial”” *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 590 (1986). Therefore, in order to make a successful motion for summary judgment, the moving party must demonstrate that even if all facts are as the non-moving party claims them to be, that the moving party is still entitled to judgment as a matter of law.

Hazardous Condition Present

Before the case will be heard on the issue of notice, the plaintiff must meet the first requirement of demonstrating that in fact a hazardous condition existed. The fact of an accident alone does not establish negligence. Plaintiff must demonstrate that the incident was a result of a dangerous condition of which the defendant had actual or constructive knowledge. For example, in *Guaridenex de la Cruz v. Dominicana de Aviacion*, 1989 WL 148660 (S.D.N.Y. 1989), the plaintiff alleged that he slipped and fell on some shampoo left on the floor of the hallway leading to the baggage claim in Las Americas Airport in Santo Domingo. However, the plaintiff’s case was dismissed on summary judgment because he was unable to produce any evidence that he saw the offending condition either before or after falling. Furthermore, the only evidence of the hazard that he was able to produce was that after he fell, he felt his pants were wet. The court held that absent any other evidence corroborating his case, plaintiff did not sufficiently present a triable issue regarding the existence of the slippery floor.

Requirements of Notice

As noted, it is well settled in New York (and most jurisdictions) that a party cannot be held liable for a dangerous condition unless the party either created the condition which caused the accident or had actual or constructive notice of the condition. *See Goldman v.*

Waldbaum, 746 N.Y.S.2d 44, 44 (2nd Dep't 2002); *Drillings v. Beth Israel Medical Center*, 200 A.D.2d 381, 606 N.Y.S.2d 191 (1st Dep't 1994); *Torri v. Big V of Kingston, Inc.*, 147 A.D.2d 743, 537 N.Y.S.2d 629, 630 (3d Dep't 1989); *Eddy v. Tops Friendly Markets*, 91 A.D.2d 1203, 459 N.Y.S.2d 196 (4th Dep't), *aff'd* 59 N.Y.2d 692, 463 N.Y.S.2d 437 (1983). If the defendant did not create the dangerous condition or possess actual notice, the Plaintiff must prove constructive notice to survive a summary judgment motion. *See Trujillo v. Riverbay Corp.*, 153 A.D.2d 793, 545 N.Y.S.2d 2, 4 (1st Dep't 1989). In order to establish constructive notice, alternatively the plaintiff must prove that the dangerous condition was visible and apparent, and that it existed long enough for the defendant to observe and correct it. *See Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986).

For example, in *Cammock v. Valley Stream Meat Store*, 186 A.D.2d 459, 588 N.Y.S.2d 571 (1st Dep't 1992), an employee of a store testified that he saw a child vomit on the floor and immediately called upon another employee to alert maintenance. As he turned from alerting the employee, he saw the Plaintiff lying on the floor. The Supreme Court found a triable issue of timing and notice. But the Appellate Division reversed because the eyewitness employee's affidavit indisputably indicated that the defendant had no actual or constructive notice. *See also, Russell v. Meat Farms, Inc.*, 160 A.D.2d 987, 554 N.Y.S.2d 709 (2d Dep't 1990) (evidence in negligence action failed to establish that raised molding over which plaintiff had tripped existed for sufficient period of time to afford owner opportunity to discover and correct it).

In order for courts to infer that a condition existed for sufficient period of time to

afford a property owner, in the exercise of reasonable care, an opportunity to discovery and correct it, record evidence must exist indicating how long a hazardous condition was present. *See Giambrone v. New York Yankees*, 181 A.D.2d 547, 581 N.Y.S.2d 756 (1st Dep't 1992). The mere existence of a dangerous condition alone is insufficient to establish constructive notice; without more, notice would be based on pure speculation. For example, in *Salty v. Altamont Associates* 198 A.D.2d 591, 603 N.Y.S.2d 352 (3d Dep't 1993), the Plaintiff failed to meet her burden when she acknowledged she had no idea how long broken eggs had been on the floor of a store. In addition, there was no description of the appearance of the hazard that would create an inference as to the duration of the condition. *See, e.g., George v. Ponderosa Steak House*, 632 N.Y.S.2d 893, 221 A.D.2d 710 (2d Dep't 1995) (plaintiff failed to offer any proof of how long a chair had been missing its plastic slide and finding that the slide had been missing for any appreciable length of time would be based on pure speculation); *Batiancela v. Staten Island Mall*, 189 A.D.2d 743, 592 N.Y.S.2d 66, 67 (2d Dep't 1993) (existence of melted ice cream on floor is insufficient to establish notice); *Browne v. Big V. Supermarkets, Inc.*, 188 A.D.2d 798, 591 N.Y.S.2d 223, 224 (3d Dep't 1992) (notice was not established by evidence that lettuce on floor was wilted).

A general awareness of the possibility of a problem is not enough to impute liability either. In *Seneglia v. FPL Foods*, 273 A.D.2d 221, 709 N.Y.S.2d 842 (2000), plaintiff argued that the deposition testimony of the defendants' employees established that the defendants had a general awareness that water might be tracked into the vestibule when it rained. The court held that "such a general awareness is insufficient to impute constructive notice of a particular dangerous condition to the defendants" *Id.* *See also Piacquadio v. Recine Realty*

Corp., 84 N.Y.2d 967, 969, 622 N.Y.S.2d 493, 646 N.E.2d 795; *Gloria v. MGM Emerald Enters.*, 298 A.D.2d 355, 356, 751 N.Y.S.2d 213; *McDuffie v. Fleet Fin. Group*, 269 A.D.2d 575, 703 N.Y.S.2d 510.

The defendant must have notice of the particular condition that caused the injury; a general awareness that a dangerous condition exists is insufficient. For example, in *Richardson-Dorn v. Golub Corporation, d/b/a Price Chopper*, 252 A.D.2d 790, 676 N.Y.S.2d 260 (3D Dept 1998), a patron was injured in a fall at a supermarket entrance, when she allegedly tripped as a result of her foot becoming entangled in a rug that had become “bunched up”. Although the Defendants acknowledged that on occasion, the rug at the store’s entrance had a tendency to bunch up, they had therefore made it a practice to check the rug on a regular basis to make sure that it was safely placed on the floor. The Defendant further testified that approximately fifteen minutes prior to the time the Plaintiff fell, he had checked the rug and area where Plaintiff fell, noting it was dry and the rug was in place. Meanwhile, in her deposition, the Plaintiff testified that she did not notice any problem with the rug prior to the accident and only saw it bunched up after she was already lying on the floor. Ultimately the Supreme Court granted the owner’s motion for summary judgment and the Third Department Appellate Division affirmed based on the conclusion that “from this proof, it was just as likely that the rug was in a safe condition prior to her fall and became bunched only as a result of the fall.” Where an accident is one that might naturally occur from causes other than defendant’s negligence, the inference of negligence is also not fair or reasonable. *See generally Cole v. Swagler*, 308 N.Y. 325, 125 N.E.2d 592 (1955); *Meizlik v. Benerson Development Co.*, 378 N.Y.S.2d 533 (4th Dep’t 1976) (where the evidence shows

that it is just as likely that an accident might have occurred from causes other than defendant's negligence, the inference that such negligence was the proximate cause may not be drawn).

Recurring Conditions

The concept of a "recurring condition" is not widely known. Unlike a defect that is continually present, the typical recurring condition involves a hazard that periodically appears, i.e., garbage in stairwell. It is a theory often used when the plaintiff cannot prove actual or constructive notice of the dangerous condition that caused their injuries. "Where the dangerous condition is not an isolated one...but is foreseeable because part of a pattern of conduct, a recurring incident, a general condition, or a continuing condition, then... absent a showing of due care, plaintiff need not prove that defendant had actual or constructive knowledge of the specific item forming part of that pattern of conduct, recurring incident, etc" *Mahoney v. J.C. Penney Company*, 71 N.M. 244, at 260, 377 P.2d 663 (1963). To each set of circumstances, foreseeability is a key factor in the determination of the landowner's liability due to a recurring condition. If the landowner should have foreseen the danger because the condition causing it was recurring, liability will be imposed. *See Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564.

Simply stated, a recurring condition exists when a property owner has actual or constructive knowledge that a particular dangerous condition tends to occur on a regular basis. In these situations, the defendant may be charged with constructive notice of each specific recurrence of that condition. *See Columbo v. James River II*, 197 A.D.2d 760, 761, 602 N.Y.S.2d 959 (3d Dep't 1993). Although the plaintiff need not prove that the defendant

actually knew that the particular substance or object was present at the time of the accident, the plaintiff may avoid summary judgment by showing that the defendant was aware of an ongoing and recurring unsafe condition that regularly went unaddressed. *Weisenthal v. Pickman*, 153 A.D.2d 849, 850-851, 545 N.Y.S.2d 369 (2d Dep't 1989) (emphasis added).

In *Weisenthal v. Pickman*, 153 A.D.2d 849, 545 N.Y.S.2d 369 (2d Dep't 1989), the court examined the claim of a plaintiff who alleged that he was caused to fall by litter strewn on defendant's stairway, which routinely became littered by the end of each week. The court reasoned:

If, for example, a plaintiff were to prove that a defendant landowner negligently allowed the floor of his premises to become dangerous as the result of an accumulation, over the course of several days, of hundreds of cigarette butts, it would be illogical to hold that the plaintiff's case must be dismissed, simply because of a failure to prove that the one particular cigarette butt which caused the accident had been on the floor for a long enough period of time to warrant a finding of constructive notice of its existence.

Weisenthal v. Pickman, 153 A.D.2d 849, at 851, 545 N.Y.S.2d 369 (2d Dep't 1989). Similarly, in *Hirschman v. City of New York*, 193 A.D.2d 581, 597 N.Y.S.2d 154 (2d Dept 1993), plaintiff fell on a brown paper bag in a school yard, the court held that in light of evidence that debris in the yard was a recurring problem of which defendant had notice, the jury could conclude that the defendant had constructive notice of the condition which injured the plaintiff.

But, as stated above, the general awareness of a potential condition alone does not result in liability. See *Piacquadio v. Racine Realty Corp.*, 84 N.Y.2d 967, 622 N.Y.S.2d 493. Rather, a recurring condition can form the basis for liability only when the origin of the hazard and the continuation of the hazard exist on a regular basis. Courts require evidence

that a premises owner's possessed actual knowledge of the recurring condition and an opportunity to rectify the particular hazard. See *Weisnethal v. Pickman*, 545 N.Y.S.2d 369, 371, 153 A.D.2d 849 (2d Dept 1989).

The court examined whether a defendant could be charged with actual or constructive notice of a wet floor condition in *Padula v. Big V Supermarkets, Inc.*, 173 A.D.2d 1094, 570 N.Y.S.2d 850 (3d Dept 1991). The *Padula* court noted that the water accumulating on the floor of the supermarket dripped from shopping carts brought in from a snowy, slushy parking lot, was a recurrent condition in times of inclement weather. The court held that a reasonable inference could be drawn that the water accumulated gradually and that the process took long enough for defendant to be charged with constructive notice. Accordingly, when the hazard continues on a regular basis, a reasonable jury might conclude that the premise owner had constructive notice of this continuing hazard.

A plethora of cases exist dealing with recurring hazardous conditions in stairways where the defendant failed to maintain an adequate clean-up schedule. For example, in *Lopez v. New York City Hous. Auth.*, 255 A.D.2d 160, 679 N.Y.S.2d 398 (1st Dep't 1998), the appellate court upheld a trial court's decision denying the defendant's motion for summary judgment in a case where the plaintiff alleged that she slipped in a stairwell on garbage that had accumulated over the weekend. The court found that the deposition testimony of the plaintiff and her mother regarding the frequent accumulations of garbage on the staircase over weekends raised a triable issue of fact regarding constructive notice of a recurrent dangerous condition. The court also found a gap in scheduled cleanings between mid-Sunday afternoon and mid-Monday morning noting that a single janitor responsible for two

14-story buildings containing some 112 apartments and their common areas. The court held that the plaintiff's proof tended to show that the defendant "negligently maintained the staircase by failing to have in effect a clean-up schedule sufficiently frequent to avoid the creation of a dangerous condition of which it had constructive notice." *Lopez v. New York City Hous. Auth.*, 255 A.D.2d 160, 679 N.Y.S.2d 398 (1st Dep't 1998). See also *O'Grady v. New York City Housing Authority*, 259 A.D.2d 442 (1st Dep't 1999); *Carlos v. New Rochelle Municipal Housing Authority* 262 A.D.2d 515, 692 N.Y.S.2d 428 (2d Dep't 1999).

Snow and Ice Conditions

The guiding principles of actual or constructive notice have always been applied to such claims as they relate to precipitation cases. Thus, "a party in possession or control of real property is afforded a reasonable time after the cessation of the storm or temperature fluctuations which created a dangerous condition to exercise due care in order to correct the situation." *Porcari v. S.E.M. Management Corp.*, 184 A.D.2d 556, 584 N.Y.S.2d 331 (2d Dep't 1992); *Trujillo v. Riverbay Corp.*, 153 A.D.2d 793, 545 N.Y.S.2d 2 (1st Dep't 1989). Once again, the important task of establishing how long a condition had been present prior to the incident in issue cannot be abandoned to speculation and conjecture if plaintiff is to sustain an action. For example, a failure to demonstrate beyond mere speculation "the origin of the patch of ice on which plaintiff allegedly slipped and whether defendant had sufficient time to remedy the dangerous condition" will be fatal to the action. *Simmons v. Metropolitan Life*, 84 N.Y.2d at 974, 622 N.Y.S.2d at 497.

Storm in Progress Defense

There are two general approaches to injuries incurred during a storm. In the majority of jurisdictions, including New York, when the court is faced with a tort action involving a plaintiff's fall on snow or ice, the storm in progress defense may apply. *See Olejniczak v. E.I. DuPont de Nemours & Co.*, 79 F.Supp.2d 209, 216 (W.D.N.Y.1999) (“*Olejniczak II*”). The defense states that the landowner is not liable for a failure to remove the offending snow or ice for a reasonable time after the storm producing the snow or ice has passed. “[I]n the absence of unusual circumstances, a property owner, in fulfilling the duty owed to invitees upon his property to exercise diligence in removing dangerous accumulations of snow and ice, may await the end of a storm and a reasonable time thereafter before removing ice and snow...” *Kraus v. Newton* 211 Conn. 191, 558 A.2d 240 (1989); *See also Powell v. Volunteers of America-Greater New York, Inc.* 2008 WL 2332332 (N.Y.Sup.2008). Evidence of a storm in progress in most jurisdictions will present a *prima facie* case for dismissal, and is especially persuasive when based upon the analysis of a licensed meteorologist. *See Tillman v. DeBenedictis & Sons Bldg. Corp.*, 237 A.D.2d 593, 655 N.Y.S.2d 1022 (2nd Dept 1997).

The storm in progress defense is based on the principle that there is no liability for injuries related to falling on accumulated snow and ice until after the storm has ceased, so that workers have a reasonable period of time to clean the walkways. *See Grau v. Taxter Park Assocs.*, 283 A.D.2d 551, 724 N.Y.S.2d 497 (2nd Dept), *lv. denied*, 96 N.Y.2d 721, 733 N.Y.S.2d 373 (2001). “The [storm in progress] rule is designed to relieve the worker(s) of any obligation to shovel snow while continuing precipitation or high winds are simply recovering the walkways as fast as they are cleaned, thus rendering the effort fruitless.” *Powell*

v. MLG Hillside Assocs., 290 A.D.2d 345, 345, 737 N.Y.S.2d 27 (1st Dep't 2002). Therefore, in order for the defendant to successfully employ this defense and win the motion for summary judgment in these jurisdictions, he must prove that the storm had not yet ended at the time of the injury or that an insufficient amount of time had passed since ending that the landowner was unable to rectify the hazard.

In the minority of jurisdictions, including Massachusetts, the rule is that a landlord has no duty to remove any *natural* accumulation of snow or ice. Unless the landlord has taken affirmative steps to 'enhance in quantity or distribute dangerously the natural precipitation,' no liability may be imposed. *Reardon v. Parisi* 63 Mass.App.Ct. 39, 822 N.E. 2d 748 (2005). An example of precipitation that has unnaturally accumulated would be if the landowner has shoveled the snow into the middle of a public way in such a manner that it creates a public nuisance. But if the plaintiff's injuries were caused by snow or ice that naturally accumulated he would likely lose a summary judgment motion on the grounds that the landlord owed him no duty in the first place. Therefore, in the minority jurisdictions, a plaintiff may defeat a defendant's motion for summary judgment by demonstrating that the condition causing their injury resulted from unnatural accumulation.

Note that in Michigan, the storm in progress doctrine is not an absolute defense. Even if the plaintiff was injured during a storm, the landowner's liability will depend on the reasonableness of their failure to remove the offensive snow or ice as it accumulates. *Lundy v. Grotz*, 141 Mich.App. 757, 367 N.W.2d 448 (1985). Thus, in this one jurisdiction, to defeat a summary judgment motion, the plaintiff would only have to demonstrate that the landowner failed to remove the snow or ice within a reasonable time of its accumulation.

That the storm is still in progress will not be a defense.

In the majority jurisdictions, Plaintiff's assertion that no snow was falling at the time of the accident is insufficient to raise a triable issue of fact. "Even if there was a lull or break in the storm around the time of plaintiffs' accident, this does not establish that defendant[s] had a reasonable time after the cessation of the storm to correct hazardous snow or ice-related conditions." *Krutz v. Betz Funeral Home, Inc.*, 236 A.D.2d 704, 705, 653 N.Y.S.2d 212 (3rd Dept), lv denied, 90 N.Y.2d 803, 661 N.Y.S.2d 179 (1997); citing *Jensen v. Roohan*, 233 A.D.2d at 588. In some instances, a period of as much as 30 or 48 hours between the time a storm ends and an accident could be viewed as insufficient to establish negligence. *See Valentine v. City of New York*, 86 A.D.2d 381, 449 N.Y.S.2d 991 (1st Dep't), affd., 57 N.Y.2d 932, 457 N.Y.S.2d 240 (1982) (30 hours). *Sing Ping Cheung v. City of New York*, 234 A.D.2d 91, 650 N.Y.S.2d 687 (1st Dept 1996) (48 hours).

Tips for the Defendant

In order for a defendant to defeat a premises liability claim via motion for summary judgment, it must submit admissible evidence demonstrating that they neither created the allegedly dangerous condition, nor had actual or constructive notice of the condition. *See Goldman*, 746 N.Y.S.2d at 44. But, defendants are not required "[to] definitively deny actual or constructive notice of the dangerous condition." Such a requirement would, in effect, require a defendant to prove a negative on an issue as to which he does not bear the burden of proof.

In order to show a lack of notice, defendants must submit admissible evidence that the premises were maintained adequately. Specifically, evidence that a person or party is

responsible for maintaining the premises and that inspections of the area are performed at appropriate intervals on a routine basis. In addition, a procedure to report to a responsible party should be in place when such a condition is found. In addition, defendants must submit testimony or proof that the area in question was inspected on the day of the accident and that neither an adverse report nor a complaint was generated. *See Wimbush v. City of Albany*, 285 A.D.2d 706, 707, 727 N.Y.S.2d 745, 747 (3d Dept. 2001). Thorough record keeping is particularly critical in cases like this.

The plaintiff's threshold for liability will be met, if it shows that the premises owner negligently maintained the premises by failing to adhere to a clean-up schedule sufficient to prevent the creation of a dangerous condition. In *Edwards v. Wal-Mart Stores, Inc.*, 243 A.D.2d 803, 662 N.Y.S.2d 855 (3d Dept 1997), the Defendant failed to meet the requisite burden. In support of the motion for summary judgment, the Defendant's co-manager who testified that although there was no set schedule, the "general practice" of the store was to inspect the area every half hour to hour. But, in its discovery responses, Defendant admitted that it was unknown when the inspection was done on the day of Plaintiff's accident. Accordingly, for purposes of the motion, the court only accounted for the area being inspected the previous night (as that was the last time defendant's had actual proof of such inspection) and denied the motion outright without reaching the sufficiency of Plaintiff's proof in opposition to the motion. *See also Mancini v. Quality Markets, Inc.*, 684 N.Y.S.2d 391 (4th Dep't 1998).

Also, as discussed above, in the majority of jurisdictions including New York, evidence of a storm in progress presents a *prima facie* case for dismissal. Accordingly, defendants must submit proof that a storm was in progress at the time of the accident. Of

course, an admission from the plaintiff via notice to admit or deposition testimony is excellent proof of this, but a licensed meteorological report of the area will likely suffice.