Circuit Court for Cecil County
Case No. C-07-CV-17-000438

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 779

September Term, 2018

MICHAEL BENSON, ET AL.

v.

ALDI, INC.

Meredith,
Berger,
Wells,

JJ.

Opinion by Wells, J.

Filed: November 5, 2019

Michael Benson, Appellant, filed a complaint for personal injuries he allegedly sustained while shopping at a grocery store owned and operated by Appellee, ALDI, Inc. ("ALDI"), located in Elkton, Maryland. ALDI filed an answer and subsequently moved for summary judgment. After a hearing on the motion, the Circuit Court for Cecil County granted summary judgment in ALDI's favor.

Benson filed a timely appeal and asks us three questions:

1. Does the evidence in this case create a genuine issue of material fact as to whether the Defendant, as a result of the well-known and dangerous practice of customers removing the box bottoms from the display stacks, created, or allowed to exist, a dangerous condition in its store which caused the Plaintiff's injuries?
2. Does the evidence in this case create a genuine issue of material fact as to whether the Defendant had sufficient actual or constructive notice of the dangerous practice in its store and negligently failed to adequately address the practice?
3. Does the evidence in this case create a genuine issue of material fact as to whether the Defendant failed to preserve additional video of the scene before the incident in question, thus engaging in spoliation of evidence, and supporting multiple inferences unfavorable to the Defendant?

As we explain, with his first question, Benson essentially asks us to adopt the "mode of operation" theory of premises liability, which we expressly rejected in *Maans v. Giant Food of Maryland, LLC.*, 161 Md. App. 620 (2005) and *Zilichikhis v. Montgomery Cnty*, 223 Md. App. 158 (2015). We decline to reconsider our decisions based on the facts presented in this appeal. Perceiving no error otherwise, we affirm.

FACTUAL BACKGROUND

A. Incident at ALDI

On February 8, 2017, Michael Benson and his wife, Cynthia, were shopping at an ALDI grocery store in Elkton, Maryland. ALDI takes "a simple, cost-effective approach to grocery shopping that saves shoppers on their grocery bills." ALDI, *FAQs – Why do you charge for shopping bags?*, www.ALDI.com, http://www.ALDI.us/en/about-ALDI/faqs/about-ALDI (last visited Oct. 21, 2019). To that end, ALDI displays items for sale in their opened shipping boxes rather than removing the items and placing them on shelves for display. The open shipping boxes are either stacked on the floor or placed on wide shelves with other opened or unopened boxes. When the items in one box have all been taken, the empty box may be discarded, and a new box is opened on the spot.

Additionally, ALDI does not provide free grocery bags, but, rather, encourages customers "to bring their own shopping bags or to purchase a reusable, long-lasting ALDI bag." *Id.* As it happens, instead of buying a bag or using one of their own, customers sometimes remove box bottoms from display stacks to carry their purchases. Typically, the boxes these customers use contain only a few remaining items, so customers will place these loose items on top of an adjoining stack.

In this ALDI store, the check-out aisles are lined with stacked and open shipping boxes containing grocery items that customers may be interested in purchasing while waiting in line to check out. The Bensons allege that while they stood in the check-out aisle, two glass jars of curry sauce fell from a nearby, almost floor-level display, and

smashed onto the floor next to Michael Benson's feet, startling him. According to Mr. Benson, he jumped, causing him to twist his right leg and tear his quadriceps muscle. Shortly thereafter, Benson inspected the area and noticed that individual jars of sauce were placed on top of the display. The Bensons filed suit soon thereafter.

B. The Complaint, an Answer, and a Motion for Summary Judgment

In his complaint against ALDI for the injuries he allegedly sustained in the incident, Michael Benson argued that ALDI was negligent in failing to "employ reasonable and safe stacking and shelving of its products and to maintain reasonable monitoring of its aisle ways and register areas, and to take all reasonable measures to remedy, correct, and/or warn against any potentially hazardous situations . . ." Further, Benson alleged that ALDI was responsible for creating or allowing, as a matter of practice, a dangerous condition to exist. Because the condition "was created as a matter of practice," Benson contended that ALDI, its agents, and/or its employees knew or should have known that the condition presented a potentially dangerous risk to customers if a jar was to roll off a display and cause injuries similar to those Benson sustained.

ALDI filed an answer disclaiming liability. On March 14, 2018, ALDI moved for summary judgment, asserting that Benson did not possess evidence that even suggested, much less proved that ALDI knew of the condition of the jars in the curry display. Further, ALDI showed by way of Benson's deposition testimony that he probably bumped the display and may well have caused one of the jars to smash on to the floor. The deposition testimony of ALDI's store manager, Virginia Slater, was that she had inspected the

checkout area about fifteen (15) minutes before the incident and saw no loose curry jars that presented a hazard to customers.

C. The Hearing on the Motion for Summary Judgment

On May 10, 2018, the court convened a hearing on ALDI's motion for summary judgment. At that time, the court heard argument from counsel for Benson and for ALDI. ALDI's counsel argued, essentially, that Benson could not refute the fact that ALDI's store manager had been in the checkout area where the incident occurred not less than a quarter of an hour before Benson allegedly sustained his injury and did not observe a hazardous condition. ALDI's counsel alerted the court that Benson was going to argue that ALDI's practice of open box displays, coupled with customers' penchant for occasionally using boxes to transport their groceries, was tantamount to a mode of operation rule, which in ALDI's opinion, "is the functional equivalent of doing away with the requirement that the plaintiff prove that the defendant's negligence was the proximate cause of the plaintiff's injuries."

Further, ALDI's counsel argued that ALDI had not committed spoliation, as Benson alleged. ALDI's counsel noted that, contrary to Benson's assertion, there was no video evidence showing the area before the incident occurred. ALDI's manager did in fact make a video recording of the security footage, but only after the incident. ALDI's trial counsel argued that even if ALDI had not preserved video footage of the scene before the incident, that fact would not give rise to an adverse inference of negligence.

Benson's counsel argued that the court's focus should be on the loose jars of curry stacked on other jars. After the incident, Benson noticed that there was no "box space" where these loose jars could have been placed, creating a "dangerous" situation. To support his contention, Benson's attorney produced photographs that Benson took three (3) days after the incident. Counsel argued that these photographs fairly and accurately depicted what the curry jars looked like on the date Benson was injured.

Further, according to Benson, the evidence gleaned from discovery revealed that ALDI realized that it was "a dangerous condition for products to be loosely put on top of these displays." Benson's counsel maintained that ALDI had

> a problem that's running rampant in that store . . . of individuals removing these box bottoms to use them; and when they remove the box bottoms they put the loose merchandise on top of the stacks, and they agree over and over again that's dangerous, that can roll off, that can fall off.

Counsel acknowledged that the photographs taken days after the incident, which purported to show how the loose items were stacked, were used for illustration only.

Additionally, Benson's attorney quoted deposition testimony from ALDI's store manager, Slater, who confirmed that she and her staff were aware that customers were taking boxes and placing remaining items on displays. Counsel quoted Slater's deposition testimony to drive home the point that the customers' practice in this regard was tantamount to notice to ALDI of an ongoing dangerous condition.

> That is notice. That is notice, your Honor, of a process or practice within the store that is happening on a regular basis. And when we boil it down to what we said before, the absence of a box bottom on this particular display tells us that it was their employees who set this or allowed it to be . . . they admit [the practice] is dangerous . . . . There is no other possibility there.

In rebuttal, ALDI's counsel quoted from Benson's deposition testimony, which revealed that ALDI had no notice of a dangerous condition. As a result, ALDI maintained that Benson wanted the court to find ALDI was still liable because its mode of operation placed Benson at risk. Specifically, ALDI's counsel noted that Benson admitted that he: (1) did not know if anyone complained to ALDI about falling display items before Benson was injured; (2) did not know if any of the store employees had knowledge about the loose items lying on the display prior to Benson's injury; (3) had no idea when the area was inspected before the incident; (4) did not see the jars fall; (5) did not know how long the jars might have been lying on the display before they fell; and (6) did not know "if somebody had taken a box from those jars . . . three minutes before" the incident. ALDI's counsel argued, "This [Benson's] whole argument is mode of operation. That's exactly what he's trying to argue."

In his oral ruling, the judge determined the first question to be one of ALDI's "actual knowledge of the condition." He noted that the testimony from ALDI's manager was that she inspected the area "maybe fifteen to twenty minutes prior" to the incident. The judge found that Benson presented no evidence that showed that ALDI had actual knowledge of a dangerous condition prior to Benson being injured.

Turning to ALDI's business practices, the judge acknowledged that ALDI knew that its customers sometimes took boxes to transport their purchases, but did not find that ALDI's knowledge of that practice was the same as ALDI's knowledge of a specific dangerous condition. Citing the holding in *Zilichikhis* ("the Montgomery Garage" case) as

persuasive, the court found that a defendant's "actual knowledge" of a dangerous condition is still required under Maryland's premises liability law. Because Benson could not prove that ALDI had knowledge of a dangerous condition prior to his alleged injury, the court granted summary judgment in ALDI's favor. This appeal soon followed.

DISCUSSION

I.

In order to successfully assert a negligence claim, a claimant "must prove: '(1) that the defendant was under a duty to protect the [claimant] from injury, (2) that the defendant breached that duty, (3) that the [claimant] suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty.'" *Rybas v. Riverview Hotel Corp.*, 20 F. Supp. 3d 548, 560 (D. Md. 2014) (quoting *100 Inv. Ltd. P'ship v. Columbia Town Ctr. Title Co.*, 430 Md. 197, 212-13 (2013) (internal citations omitted)). In this case, our primary focus is on the fourth prong - whether Benson's loss is the proximate result of a breach of the duty of care ALDI owed to its customers.

A. Premises Liability and ALDI

The duty owed by an owner or occupier of land "'depends upon the status of the plaintiffs at the time of the accident.'" *Tennant v. Shoppers Food Warehouse Md. Corp.*, 115 Md. App. 381, 388 (1997) (quoting *Casper v. Chas. F. Smith & Son, Inc.*, 316 Md. 573, 578 (1989)). Landowners owe the highest duty to business invitees, defined as persons "invited or permitted to enter another's property for purposes related to the landowner's business." *Id.* (internal citations omitted). Here, there is no question that

Benson, as a customer, was ALDI's business invitee. As part of their duties, businesses such as ALDI have an "obligation to warn invitees of known hidden dangers, a duty to inspect, and a duty to take reasonable precautions against foreseeable dangers." *Maans v. Giant of Maryland, LLC*, 161 Md. App. 620, 628 (2005) (citing *Tennant*, 115 Md. App. at 388). This duty applies not only to any danger, defect, or unsafe condition on the property as a direct result of the invitor's actions or negligence, but also to dangers that "may be caused by the negligent acts of [the business invitor's] employees or customers where [the business invitor], as a reasonably prudent person, should have anticipated the possible occurrence and probable results of those acts." *Giant Food, Inc. v. Mitchell*, 334 Md. 633, 636-37 (1994) (citing *Eyerly v. Baker*, 168 Md. 599, 607 (1935) (holding that a store owner is not liable in the absence of evidence that attempts to detain a shoplifter presented unreasonable risk of harm to customers)).

The Court of Appeals, in *Deering Woods Condo. Ass'n v. Spoon*, 377 Md. 250, 263 (2003), *accord Maans*, 161 Md. App. at 626, adopted Section 343 of the Restatement (Second) of Torts (Am. Law Inst. 1965), which provides that a landowner is liable for physical injury caused to a business invitee by a condition on the premises "if, but only if," the landowner:

> (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 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.

To recover as the party claiming injury, Benson is required to prove that ALDI had constructive or actual knowledge of a defective condition on its premises; that the knowledge was gained within a sufficient period of time before the incident to correct it or warn Benson; and that ALDI failed to protect Benson from the dangerous condition. *See Zilichikhis*, 223 Md. App. at 187 (internal citations omitted).

B. Summary Judgment

ALDI would be "entitled to summary judgment in its favor if it neither created nor actually knew of the hazard, and if there is no evidence showing that the hazardous condition existed long enough for that party to remedy the hazard or warn of its existence." *Zilichikhis*, 223 Md. App. at 187 (citing *Joseph v. Bozzuto Management Co.*, 173 Md. App. 305, 315-19 (2007); *Rehn v. Westfield America*, 153 Md. App. 586, 599-600 (2003)).

Summary judgment is proper where the trial court determines that there are no genuine disputes of material fact and that the moving party is entitled to judgment as a matter of law. Md. Rule 2-501. Appellate review of an order granting summary judgment is a two-step process. *First*, we decide whether there was a dispute of material fact before the circuit court. "'Before turning to the questions of law, we must first decide whether the circuit court properly determined that no genuine dispute of material fact exists.'" *Zilichikhis*, 223 Md. App. at 176 (citing *O'Connor v. Baltimore Cnty*, 382 Md. 102, 110-11 (2004)) (cleaned up). We perform this review *de novo*. *Koste v. Town of Oxford*, 431 Md. 14, 24-25 (2013).

"A material fact is a fact the resolution of which will somehow affect the outcome of the case." *Carter v. Aramark Sports and Entm't Servs., Inc.*, 153 Md. App. 210, 224 (2003) (internal citations omitted). ALDI, as the moving party, "bears the burden of establishing the absence of a genuine issue of material fact," *id.* (citations omitted), however, Benson, as the party opposing the motion for summary judgment, "must demonstrate the existence of a genuine dispute as to a material fact by producing factual assertions, under oath, based on the personal knowledge of the one swearing out an affidavit, giving a deposition, or answering interrogatories." *Zilichikhis*, 223 Md. App. at 176. (citations omitted) (cleaned up). "This requires more than general allegations which do not show facts in detail and with precision." *Carter*, 153 Md. App. at 225 (citing *Rite Aid Corp. v. Hadley*, 374 Md. 665, 684 (2003)) (cleaned up). "A party's interrogatory answers are insufficient to generate a genuine issue of fact if those answers are made to the best of the witness' information, knowledge, and belief, rather than on the basis of personal knowledge." *Zilichikhis*, 223 Md. App. at 180 (citations omitted).

Second, we determine whether the circuit court properly found that the moving party, ALDI, was entitled to summary judgment as a matter of law. Our appellate courts have addressed the evidentiary requirements to sustain (or overcome) summary judgment for premises liability. In general, liability attaches if the owner of the premises knew of a dangerous condition to which the invitee was exposed, and the premises owner did nothing to prevent the invitee's subsequent injury. For example, in *Rehn v. Westfield America*, we held that summary judgment was proper where the only evidence to prove the premises

owner's (Westfield) knowledge of the dangerous condition, or "time on the floor," was testimony from Westfield's employee who confirmed that a spill had been on the floor for "less than four minutes." 153 Md. App. at 600. Despite the appellant's argument that "a reasonable jury could find that [Westfield], in the course of carrying out their assigned duties . . . and by the exercise of due diligence" should have discovered the spill, this Court "disagree[d] that such equivocal testimony could form the basis for a jury verdict against Westfield . . . ." *Id.*

Likewise, in *Joseph v. Bozzuto Management Co.*, we affirmed the circuit court's grant of summary judgment in favor of Bozzuto, where Bozzuto's building superintendent testified that he did not know how long an oily substance had been on a staircase landing, how the substance got there, nor if anybody reported the spill to appellee, the building management company. 173 Md. App. at 317-18. Summary judgment was therefore proper, as the appellant "proffered no evidence to show that the appellees had actual or constructive knowledge of a dangerous condition," and "did not even allege such knowledge in his complaint." *Id*. at 319.

Benson argues that *Tennant, supra*, and *Troxel v. Iguana Cantina, LLC*, 201 Md. App. 776 (2011) should control. We disagree and explain. In *Tennant*, we reversed summary judgment in finding that there existed genuine issues of material fact as to whether a grocery store owner negligently created a dangerous condition by placing a pile of produce or a box in the middle of a produce aisle and, if the jury so found, whether the customer negligently failed to appreciate the dangerous condition. *Tennant*, however, is

distinguishable from this case. Significantly, notice was expressly "not at issue" in *Tennant*. 115 Md. App. at 394. There, we reasoned that, in "[v]iewing the factual assertions in light most favorable to the appellant," the grocery store had actual or constructive knowledge of the dangerous condition created by an employee sweeping vegetable leaves into a neat pile and leaving a box under the produce display. *Id*. "It follows, at least by inference, that the appellee's own employee(s) knew what had been done in sweeping the refuse into a pile and leaving it, and in placing the empty box under the display case." *Id*.

Here, the evidence and testimony presented at the motions hearing could not reasonably establish an inference that an employee or third party knowingly created the condition or, more importantly, that ALDI had notice of the condition with enough time to resolve the issue. The uncontradicted testimony at the hearing was that Virginia Slater, the ALDI store manager, specified that she was at the scene *before* the incident occurred "not that long ago before, probably about 15 or 20 minutes . . . but I did not see [loose jars on top of the stack]." She went on to explain, "that's the first thing we check. We use our time from the walks always to watch things as we go through." From this uncontradicted testimony, we conclude that it is likely that had Slater or any other employee seen the condition of the curry jar in question, they would have immediately secured it so as to prevent a dangerous condition from existing.

Moreover, the dangerous condition in *Tennant* was directly placed in the middle of a shopping aisle, presumably by an employee, and was "permitt[ed] to remain there." 115 Md. App. at 393 (internal citation omitted). Here, Benson testified that it was only after

he looked down to see from where the jar could have possibly rolled did he see the "dangerous condition." In *Tennant*, we specifically stated that if an employee or third party unknowingly created the condition, "the focus may shift to the owner's duty to [reasonably] inspect." *Id*. at 394. Here, Benson provided no direct evidence to suggest that ALDI failed to abide by its duty to take reasonable steps to avoid exposing its customers to hazards. We agree with ALDI that the undisputed evidence showed that ALDI's store manager, Slater, inspected the area minutes before the incident and saw no hazards.

In *Troxel*, we again reversed a grant of summary judgment in favor of a night club patron who was physically assaulted on the appellee's premises. We concluded that, based on the evidence presented at the hearing, "a fact finder could reasonably infer . . . that [the night club] knew or should have known about a dangerous condition within its premises" *i.e.* hosting a "college night" because there had been a history of violence during these events at the night club. 201 Md. App. at 498-99.

We decline to apply *Troxel*'s holding to this case. The injured party in *Troxel* presented evidence at the summary judgment hearing that recounted a lengthy history of violence that occurred whenever the establishment hosted "college night." *Id.* With this evidence, we determined that a reasonable jury could conclude that the night club had knowledge of the dangers of "college night" and had a responsibility to protect its patrons from those dangers. *Id*. Here, however, Benson did not present any evidence at the hearing as to the foreseeable danger unsecure items would pose to shoppers, such as testimony of other shoppers, incident reports, or the like.

We reaffirm that a business invitor such as ALDI need exercise only *reasonable* care "to protect a business invitee from injury caused by an *unreasonable risk* that the invitee would be likely to perceive in the exercise of ordinary care for his/her own safety, and about which the owner knows or could have discovered in the exercise of *reasonable* care." *Maans*, 161 Md. App. at 628 (emphasis added) (internal citations omitted). "No presumption of negligence arises merely because an injury was sustained on a storekeeper's premises." *Giant Food, Inc. v. Mitchell*, 334 Md. at 636. As such, while a business invitor ought to be proactive in securing its premises, "it is not the insurer of the invitee's safety." *Maans*, 161 Md. App. at 628. (citing *Rawls v. Hochschild, Kohn, & Co.*, 207 Md. 113 (1995)). It is therefore difficult to impute knowledge to ALDI that a falling jar of curry sauce foreseeably could have led to Benson's injuries absent evidence as to how and, more importantly, when it was placed there.

C. The "Mode of Operation" Rule

Benson advances the argument that because ALDI knew of its customers' practice of using box bottoms and loosely placing remaining items on adjacent stacks, ALDI should have known that such a practice would foreseeably result in the injuries he sustained. In Benson's view, ALDI "is chargeable with the knowledge of the pervasive problem" presented by the loose items placed on top of displays and shelves throughout the store. Accordingly, it was unnecessary for ALDI to have actual or constructive knowledge that a particular jar of curry sauce was poised to cause his injuries; ALDI's mere knowledge of the practice is sufficient.

ALDI contends that Benson is essentially asking this Court to adopt the "mode-of-operation" rule, which we previously declined to adopt in *Maans*. Benson contests ALDI's claim by asserting that his argument differs from that of the appellant in *Maans* because here, "the question of notice concerns [ALDI]'s notice of a dangerous practice which was constantly occurring in the store, and which guaranteed that the jars would eventually be placed in the exact position from where they fell," as opposed to a "random spill[] with no knowledge at all of an event or an ongoing practice which caused the spills or the presence of dangerous conditions." Benson argues that it was not necessary for ALDI to have notice of the condition of the particular jar that fell from the shelf; rather, it is sufficient that ALDI knew of and implicitly promoted a practice which resulted in Benson's injuries. We fail to observe any meaningful distinction between Benson's argument and the mode-of-operation theory of liability.

The mode-of-operation rule, used by several of our sister states,[1] holds that an invitee "'is not required to prove notice if the proprietor could reasonably anticipate that hazardous conditions would regularly arise,' based on the manner the owner/occupier regularly does business." *Maans*, 161 Md. App. at 637 (citing *Chiara v. Fry's Food Stores of Arizona, Inc.*, 152 Ariz. 398, 733 P.2d 283, 285-87 (1987)). Rather than looking to the "events surrounding the plaintiff's accident," the rule examines a business' particular mode

[1] *Maans* lists fifteen cases from as many states throughout the country that, as of 2005, adopted the mode-of-operation rule for premises liability. *See* 161 Md. App. at 636-37. It should be noted that none of the fifteen listed falls within the jurisdiction of the Court of Appeals for the Fourth Circuit. *See id.*

of operation. *Id*. at 637-38. If a business operator "could reasonably anticipate the hazardous conditions" that would arise from the way in which it conducts its business, the plaintiff is not required to prove notice, actual or otherwise. *Id*. at 638. "The key to [the rule] is the reasonable anticipation of the patron's carelessness under the circumstances." *Id.* at 637 (internal citation omitted). Proof of a business owner's particular mode of operation "simply substitutes for the traditional elements of a prima facie case – the existence of a dangerous condition and notice of a dangerous condition." *Id*. at 638 (emphasis omitted).

The appellant in *Maans* asked us to apply the mode-of-operation rule after she suffered a slip-and-fall injury in a Giant grocery store. 161 Md. App. at 623-24. Eschewing traditional Maryland premises liability law, the appellant urged this Court to reject the proof-of-notice requirement in favor of, essentially, strict liability. *Id.* at 636. Under the rule, the appellant averred that she presented sufficient evidence that Giant "could have reasonably anticipated that customers 'might drop items when placing them on the conveyor belt in the checkout line.'" *Id.* at 639 (footnote omitted).

We rejected the appellant's argument and concluded that the mode-of-operation rule conflicted with Maryland precedent that requires an invitee to prove that the landowner had actual or constructive knowledge of the defective condition in sufficient time to remedy or warn the invitee of the condition before injury. *Id.* We reasoned that the mode-of-operation rule eliminates the requirement of showing "time on the floor": where a plaintiff must prove how long the condition existed before the injury occurred. *Id.* at 640. Relieving

a plaintiff of this burden "is the functional equivalent of doing away with the requirement that the plaintiff prove that defendant's negligence was the proximate cause of the plaintiff's injury." *Id.* at 640. Absent any evidence as to "time on the floor," "the storekeeper would be potentially liable even though there is no way of telling whether there was anything Giant could have done that would have avoided the injury." *Id.*

This Court recently revisited the *Maans* holding in *Zilichikhis, supra*. Dr. Rafail Zilichikhis, age 82, claimed he suffered a traumatic brain injury from a slip-and-fall in a Bethesda public parking garage in an area between the front driver's side of his vehicle and a nearby railing. *Zilichikhis*, 223 Md. App. at 164. After the fall, Dr. Zilichikhis noticed on the ground a "wet and greasy substance" that he had not previously seen, and in fact, fell for a second time on this substance while trying to get back to his feet. *Id.* He filed a complaint asserting claims against multiple defendants, including Montgomery County as the owner of the garage. *Id.* at 165. The County denied any liability and moved for dismissal and summary judgment, asserting that it was protected via governmental immunity and that it lacked any actual or constructive knowledge of the dangerous condition. *Id.* at 165-66. The lower court granted summary judgment for the County, finding that Dr. Zilichikhis presented no evidence that the hazardous condition existed for any appreciable amount of time before the fall. *Id.* at 170. Despite Dr. Zilichikhis' argument that he fell in a public walkway where governmental immunity would be inapplicable, the court found that deposition testimony established only that he slipped and fell in a parking space. *Id.* at 171.

On appeal, Dr. Zilichikhis argued that the circuit court "improperly resolved a disputed factual issue when 'the trial court found that Dr. Zilichikhis fell in a parking spot, as opposed to on a walking path within the garage.'" 223 Md. App. at 696. Dr. Zilichikhis maintained that the testimony provided in the interrogatories provided a basis to conclude that he fell on a walking path (liability) rather than in a parking spot (no liability) *Id.* at 697. We concluded that the answers provided in the interrogatories were defective and the document was thus insufficient to create any genuine dispute of material fact, considering Zilichikhis himself did not affirm that his answers were true. *Id.* at 698 (citing *Cottman v. Cottman*, 56 Md. App. 413, 430 (1983) for the notion that factual assertions in interrogatories do not create genuine issues of fact).

Dr. Zilichikhis further averred that Maryland law did not require him to prove "time on the floor" as to the motor oil spill. *Id.* at 703. Instead, he argued that the deposition testimony and affidavits from residents evinced that the parking garage was "perpetually dirty with many oil stains, slicks, and puddles throughout [the garage]" and that the garage operator "failed to perform mandatory daily inspections of [the garage] to locate hazards." *Id*. For support, Dr. Zilichikhis relied on dicta from *Smith v. City of Baltimore*, 156 Md. App. 377 (2004), wherein we cited *Keen v. City of Havre de Grace*, 93 Md. 34 (1901) for the proposition that landowners "cannot fold their arms and shut their eyes and say they have no notice." As such, Dr. Zilichikhis reasoned that the garage owner and operator had a duty to exercise due care in inspecting the garage for dangerous conditions. 223 Md. App. at 703. Our past reading of *Keen*, in Dr. Zilichikhis' view, would also necessarily mean

that an inference of constructive notice arises even in the absence of a landowner actually finding the dangerous condition. *Id.* at 703-04. We, however, rejected that argument outright, as in *Smith* where we rejected the proposition that Baltimore "was deemed to have constructive knowledge of dangerous conditions because of an alleged failure to conduct routine inspections." *Id.* at 704 (internal citation omitted). The *Zilichikhis* court also reaffirmed our reasoning in *Smith* and *Maans* in so rejecting Dr. Zilichikhis' argument that a "jury can infer constructive notice from an alleged failure to conduct reasonable inspections." *Id.* at 704 (citing *Maans*, 161 Md. App. at 632).

Despite his assertions to the contrary, we perceive that Benson is asking us to adopt the mode-of-operation rule in this case. Instead of asking us to find that there was sufficient evidence of notice of the dangerous condition itself, Benson wants us to find that there was sufficient evidence of notice of the store's *practice* that allowed a jar of curry sauce to fall from the display. The only difference between Benson's argument and that of the appellant in *Maans* is a matter of semantics. Instead of arguing for adoption outright, Benson suggests we hold ALDI liable for any reasonably foreseeable injury its in-store practices may yield as a result of the negligence of ALDI or its customers. To affirm this position would necessarily mean that any premises owner such as ALDI is always on notice of any loose items that could potentially fall in the store at any time. We agree with the Arizona Supreme Court when in *Chiara* it stated that, to apply this reasoning "wherever customer interference was conceivable, [such a] rule would engulf the remainder of negligence law." 733 P.2d at 285-86. Under our precedent, ALDI should not be held liable simply because

a business practice could potentially lead to a hazardous situation. To be liable for a customer's on-site injury, a business invitor like ALDI must have notice of a potentially dangerous condition and be given adequate time to correct the condition. If we were to hold otherwise, it would encompass the rest of premises liability law. *Maans*, 161 Md. App. at 638 (citing *Chiara*, 733 P.2d at 285-86). For this reason, we decline to adopt a mode-of-operation theory of liability as Benson urges.

II.

Benson also alleges that the evidence presented at the motions hearing was sufficient for a jury to conclude that the jar that fell from the display "had either been placed there, or allowed to exist by [ALDI]'s employees" or that the jar was placed in that location as a result of ALDI's "well-known and dangerous practice of customers removing the box bottoms from the display stacks." In Benson's view, his immediate inspection of the area post-injury, which revealed "several additional jars lying loosely on their side on top of the display and . . . no empty spaces in the existing box bottoms," combined with the photographs submitted into evidence, would be enough for a jury to find that Benson "did nothing that would have caused the jars to fall if they had been properly secured in the boxes."

At the hearing, Benson submitted into evidence several photographs taken at the store that purportedly depict "the way in which the display and the jars existed and were situated at the time of the incident" despite having been taken days after the incident occurred. Benson contends that the photographs "represent a fair and accurate depiction

of the way in which the display and the jars existed and were situated at the time of the incident." He also reasons that a three-day time difference does not negate the photographs' relevance or admissibility in trial, as Maryland law permits the foundation for a photograph to be admitted into evidence so long as it is "laid by anyone testifying to its correctness as a representation."

ALDI, on the other hand, contends that the photographs are not relevant to the court's grant of summary judgment. The store claims that "random photographs of soup and ranch dressing" do not tend to show whether ALDI itself knew or should have known of the dangerous condition that Benson alleges, nor do they tend to show whether ALDI had notice of the dangerous condition that Benson claims caused his injuries. In ALDI's view, Benson's testimony "makes it extremely clear that [Benson] had no idea what the jars looked like, or even [where they] were located . . .," particularly considering the pictures were taken three days after the incident.

As previously stated, when reviewing a motion for summary judgment, we must look to the record to determine whether the parties properly generated a dispute of material fact. Md. Rule 2-501. "Ordinarily, an appellate court should review a grant of summary judgment only on the grounds relied upon by the trial court." *Troxel*, 201 Md. App. at 511 (citing *Blades v. Woods*, 338 Md. 475, 478 (1995)). Similarly, appellate courts may exercise their discretion to consider issues not raised in the circuit court, even though such issues generally cannot be raised on appeal. Md. Rule 8-131(a); *Troxel*, 201 Md. App. at 511.

In *Troxel*, we denied the appellee's request to ignore certain documents in the record when the appellees "failed to object to specific exhibits in the record or provide specific reasons for their objections." 201 Md. App. at 511. We based our conclusion on the fact that the trial court "did not rule on the admissibility or relevancy of the documents, *nor did it base any portion of its decision, oral or written, on a finding that the documents could not be considered*." *Id.* (emphasis supplied). Although Benson and the appellee in *Troxel* argue from reverse sides of the coin, they both come to the same erroneous conclusion. Like the trial court in *Troxel*, the circuit court here did not rule on the admissibility or relevancy of the photographs. In fact, nothing in the circuit court's decision implies that it based any portion of its ruling on a finding that the photographs should not have been considered. Indeed, in announcing his findings, the circuit court judge did not refer explicitly to the photographs at all. Rather, the circuit court announced that its decision to grant summary judgment came after the judge "reviewed the pleadings, [and] listened to the argument." We may reasonably infer that the circuit court considered the photographs when it made its findings and decided that, together with pleadings, case law, and available testimony, there was no material dispute to bring to a jury.

Even with the requisite *de novo* standard we afford to review of summary judgment dispositions, we agree with the circuit court's findings. Benson did not submit evidence related to the timing of store inspections; if or when employees had notice or knowledge of the condition of the shelf or the curry jar itself; or even if ALDI had similar incidents in the past. We may have concluded differently had Benson produced any evidence to that

effect. Nevertheless, given Benson's unfounded reliance on certain appellate decisions, vague testimony as to the events leading up to the fall, and photographs taken after the incident, as we see it, the only way a jury could infer that ALDI had notice or knowledge of the state of this particular jar of curry "would be if the jury engaged in raw speculation or conjecture, which is forbidden." *Maans*, 161 Md. App. at 636 (citing *Moulden v. Greenbelt Consumer Services, Inc.*, 239 Md. 229, 232 (1965) for the assertion that "evidence is legally sufficient to warrant submission of a case to the jury if it rises above speculation or conjecture"). Benson requests that we reverse the circuit court's grant of summary judgment based on a theory of liability predicated on ALDI's on-going business practices. We have unequivocally rejected this idea. Additionally, we conclude from Benson's brief and oral argument that he raises the photographic evidence issue as a means of proving the same theory. For these reasons, we hold that the circuit court did not err in granting summary judgment in favor of ALDI.

III.

Lastly, Benson argues that ALDI's failure to preserve video footage of the area during the incident constitutes spoliation, "which should have produced numerous adverse inferences [at the hearing], further creating factual issues and preventing summary judgment in this matter." To prove his point, Benson turns to the events immediately following the incident. At that time, a store manager and the Bensons filled out an incident report. That report was prepared and sent to ALDI's district manager and Benson's insurance company. The store manager then called the district manager to inform him of

the incident and resulting report. Benson claims that ALDI, given this sequence of events, knew or should have known that any video footage of the incident, if it existed, "would have revealed significant relevant and material evidence" and "would have been extremely important" to this case. In Benson's view, ALDI had a responsibility to maintain this supposed video footage.

As Benson sees it, because ALDI should have known to retain any video footage of the incident and failed to do so, ALDI negligently or actively engaged in spoliation. Benson urges us to consider that the video evidence of the scene before the incident occurred would have been "one of the most effective . . . methods for showing how long the dangerous condition existed." Benson contends that he was deprived of presenting such evidence at the motions hearing and, as a consequence, ALDI must face sanctions, "including an inference that the evidence, if preserved, would have been unfavorable to [ALDI]." Benson, relying on our decision in *Cumberland Ins. Grp. V. Delmarva Power*, 226 Md. App. 691 (2016), asserts that the circuit court should have denied summary judgment as an appropriate sanction for spoliation.

ALDI counters that any failure on its part to preserve video footage that might have existed of the incident is a result of: (1) company policy and (2) Benson's failure to timely notify the store to preserve such evidence. ALDI's manager explained that the video system for this store keeps video footage for approximately six calendar weeks. At the end of each six-week period, the system records over the previously captured footage for the next six-week period, and so on. This incident occurred on February 8, 2017. By ALDI's

account, the video footage would have been preserved, at the latest, until March 22, 2017. Benson's attorney sent a preservation letter, requesting the footage be saved, on March 30, 2017, over a week outside of the six-week retention period. According to ALDI, by that time, the footage would have already been recorded over. Thus, ALDI maintains it did not commit spoliation.

Additionally, an ALDI district manager reviewed video footage following the incident and, per an affidavit, stated that the only video evidence of the scene was taken from an angle that did not capture the incident. So, ALDI argues, even if the video footage had been preserved, it would not have provided any substantive evidence for Benson's use in pressing his negligence claim.

While it is true that a party's unexplained or intentional destruction of evidence, *i.e.* spoliation, "gives rise to an inference that the evidence would have been unfavorable to his cause," spoliation itself does not amount to "substantive proof of a fact essential to his opponent's cause." *Anderson v. Litzenberg*, 115 Md. App. 549, 560 (1997) (internal citations omitted). Based on the evidence and testimony presented, we discern no evidence in the record that ALDI or its employees intentionally destroyed the video footage. Benson's request that ALDI preserve any video footage of the incident is dated March 30, 2017, which, as was explained, fell outside of the video system's six-week preservation period. Nor, in our estimation, has Benson shown that ALDI or its employees had a duty to preserve the video footage outside this time frame.

We conclude that if Benson submitted evidence of ALDI's intentional destruction of the camera footage or of negligence on ALDI's part as to preservation, we might render a different decision. But, given the lack of any such evidence, we cannot hold that there is a genuine issue of material fact as to whether ALDI participated in spoliation. The circuit court was correct to have granted summary judgment, as spoliation played no part in the analysis.

JUDGMENT OF THE CIRCUIT COURT FOR CECIL COUNTY IS AFFIRMED. APPELLANT TO PAY THE COSTS.