KAREN DIPIETRO *v.* FARMINGTON SPORTS ARENA, LLC, ET AL.
KAREN DIPIETRO *v.* DIMENSIONAL TECHNOLOGY GROUP, LLC, ET AL.
(SC 18726)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.*

Argued April 19—officially released August 28, 2012

Kenneth J. Bartschi, with whom were *Brendon P. Levesque* and, on the brief, *Karen L. Dowd*, *Jeffrey G. Schwartz*, *Christopher M. Vossler* and *Kevin M. Tighe*, for the appellants (defendants in each case).

David G. Hill, for the appellee (plaintiff in both cases).

Robert C.E. Laney and *Peter E. DeMartini* filed a brief for the Connecticut Defense Lawyers Association as amicus curiae.

Opinion

ROGERS, C. J. The dispositive issue presented by this premises liability appeal is whether the Appellate Court correctly concluded that the plaintiff, Karen DiPietro, had established the existence of a genuine issue of material fact concerning the defendants' actual or constructive knowledge of a dangerous condition. The defendants, Farmington Sports Arena, LLC (Arena), Dimensional Technology Group, LLC (Dimensional Technology), and Paul DiTommaso, Jr.,[1] appeal, upon our grant of certification, from the judgment of the Appellate Court reversing the trial court's rendering of summary judgments in their favor. *DiPietro* v. *Farmington Sports Arena, LLC*, 123 Conn. App. 583, 619, 2 A.3d 963 (2010). The plaintiff brought these actions on behalf of her minor daughter, Michelle DiPietro (Michelle), alleging that Michelle had injured her ankle while playing soccer at the defendants' indoor soccer facility because the defendants negligently had installed a playing surface inherently dangerous for indoor soccer. The defendants claim that the Appellate Court improperly reversed the trial court's summary judgments because the plaintiff produced no evidence that the defendants knew of or should have known of the hazardous condition.[2] We agree with the defendants and, accordingly, reverse the judgment of the Appellate Court.

The pleadings and documents submitted in connection with the defendants' motions for summary judgment, and with the plaintiff's objection thereto, reveal the following undisputed facts and procedural history. On March 9, 2002, Michelle, then eleven years old, was injured while playing soccer at the defendants' facility, the Farmington Indoor Sports Arena. Michelle fell to the ground after her foot had stuck to the carpet as she was running. In her complaint, the plaintiff alleged that Michelle's fall resulted from a "dangerous and defective condition with the playing surface" and further that, as a result of the fall, Michelle had suffered a serious ankle injury that led to "difficulty walking . . . an [intermittent] inability to walk . . . severe pain and suffering . . . and accompanying mental distress and emotional anxiety."

The allegedly dangerous and defective playing surface was a commercial grade carpet selected and purchased by DiTommaso. He had selected the carpet based on his two decades of experience with indoor soccer, his knowledge that similar playing surfaces were used in other facilities in Connecticut and the recommendation of the carpet manufacturer's representative. At that time, there were two choices for indoor soccer surfaces, the carpet at issue and synthetic Astroturf. DiTommaso preferred the carpet to Astroturf because he believed that Astroturf caused rug burn injuries and soccer balls moved more slowly over the

carpet. He did not inquire with the manufacturer's representative about the safety of the carpet, compare other playing surfaces or perform any safety testing.

At the time of Michelle's injury, there were no industry or government standards regulating the use of playing surfaces for indoor soccer. The United States Indoor Soccer Association, of which Arena is a member, did not prohibit the use of carpeting for indoor soccer, and carpet commonly was used in indoor soccer facilities in Connecticut. The defendants offered testimony that the major indoor soccer league in the United States used similar carpeting.

A contractor installed the carpet over a flat concrete floor in November, 2001, and the facility was inspected and approved shortly thereafter by the Connecticut Junior Soccer Association, which sanctions commercial indoor soccer facilities. A site inspection found the playing surface to be flat and even, firmly secured to the underlying concrete surface and free of visible defects. Mike J. Brown, Michelle's soccer coach, who had prior experience with similar playing surfaces at other indoor soccer facilities, attested in an uncontroverted affidavit that the carpet was " 'normal,' " "in good condition," and without "damaged areas, lumps, rolls, cuts, tears, or any other foreign objects" at the time of Michelle's injury. DiTommaso testified in his deposition that he had not received any complaints about the carpet other than the one from the plaintiff. The plaintiff does not dispute that the carpet was not defective in the sense of improper installation or maintenance.

The defendants filed motions for summary judgment in both actions, claiming that they were entitled to judgment because, inter alia, there was no evidence as to the applicable standard of care and of notice to the defendants of any defect in the playing surface. In support of her opposition to summary judgment, the plaintiff submitted the deposition and affidavit of Benno M. Nigg, a professor of biomechanics and the director of the human performance laboratory in the faculty of kinesiology at the University of Calgary. Nigg's testimony concerned a report he had prepared after conducting scientific tests on the playing surface. Nigg had conducted a series of experiments using the actual shoe worn by Michelle at the time of her injury and samples of the carpet at the defendants' facility, as well as other synthetic sports surfaces, that were intended to measure the resistance between the shoe sole and the surface in the performance of various common athletic movements. The tests showed higher resistance on the carpeted surface than the synthetic surface. Nigg concluded that "[t]he flooring surface provided by the defendants was unreasonably dangerous and unfit for use at an indoor soccer arena . . . (a) [because] it produced excessive translational and rotational traction forces, which typically result in high injury frequencies,

(b) because it showed significantly higher loading than synthetic sports surfaces found more frequently in sports arenas, and (c) because it created excessive forces on the foot, which can lead to ankle injuries such as the one sustained by [Michelle]. Based on the mechanism of injury described by the plaintiff, my results indicate that the surface was a substantial factor in causing [Michelle's] injuries."

When deposed by the defendants' counsel, Nigg conceded that he knew of no industry or government standards governing indoor soccer playing surfaces. He also stated that he never had managed or administered a youth indoor soccer program or indoor soccer facility. Nigg confirmed further that he had not contacted or worked with any groups or organizations that promoted indoor soccer, such as the United States Indoor Soccer Association. Despite the lack of industry standards, Nigg testified that, in his view, "what one should do when one puts a surface in is do some testing, including material testing, including subjects, and based on that testing decide on the appropriate surface." He acknowledged, however, that "[t]hat is not done typically."

The trial court granted the defendants' motions for summary judgment on two principal bases. First, the court held that expert testimony was required to establish the standard of care applicable to an indoor soccer facility, and second, that the plaintiff had not produced evidence that the defendants had notice of the alleged hazardous condition. Noting that "only the defendants have provided evidence of the standard of care and the lack of notice about the alleged, dangerous defect," the court concluded that the plaintiff had failed to establish genuine issues of material fact on essential elements of her premises liability claims. The plaintiff thereafter appealed to the Appellate Court.

The Appellate Court reversed the trial court's summary judgments rendered in favor of the defendants. Reasoning that the plaintiff's claims "[rest] on the rules of law applicable to premises liability in which the law itself imposes the standard of care, namely, the duty to provide and to maintain premises in a reasonably safe condition," the Appellate Court concluded that expert testimony was not necessary on that issue. *DiPietro* v. *Farmington Sports Arena, LLC*, supra, 123 Conn. App. 619. In regard to notice, the Appellate Court reasoned that "there was no need for the plaintiff to prove notice of the unsafe condition because the defendants were responsible for creating the unsafe condition." Id., 621. This appeal followed.

The defendants claim on appeal that the Appellate Court improperly reversed the trial court's summary judgments in their favor. They contend that the Appellate Court improperly concluded that the plaintiff was not required to produce evidence that they were on notice of the dangerous condition. We agree that the

plaintiff failed to produce evidence demonstrating a genuine issue of material fact as to the essential element of notice.[3]

We begin by setting forth the applicable standard of review. "The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *H.O.R.S.E. of Connecticut, Inc.* v. *Washington*, 258 Conn. 553, 558–60, 783 A.2d 993 (2001).

The relevant principles of premises liability are well established. A business owner owes its invitees a duty to "keep its premises in a reasonably safe condition." *Baptiste* v. *Better Val-U Supermarket, Inc.*, 262 Conn. 135, 140, 811 A.2d 687 (2002). "In addition, the possessor of land must warn an invitee of dangers that the invitee could not reasonably be expected to discover." (Internal quotation marks omitted.) *Considine* v. *Waterbury*, 279 Conn. 830, 859, 905 A.2d 70 (2006). Nevertheless, "[f]or [a] plaintiff to recover for the breach of a duty owed to [him] as [a business] invitee, it [is] incumbent upon [him] to allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused [his injury] or constructive notice of it. . . . [T]he notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it. . . . In the absence of allegations and proof of any facts that would give rise to an enhanced duty . . . [a] defendant is held to the duty of protecting its business invitees from known, foreseeable dangers." (Citations omitted; internal quotation marks omitted.) *Baptiste* v. *Better Val-U Supermarket, Inc.*, supra, 140.

Accordingly, business owners do not breach their duty to invitees by failing to remedy a danger unless

they had actual or constructive notice of that danger. To defeat a motion for summary judgment in a case based on allegedly defective conditions, the plaintiff has the burden of offering evidence from which a jury reasonably could conclude that the defendant had notice of the condition and failed to take reasonable steps to remedy the condition after such notice. See *Riccio* v. *Harbour Village Condominium Assn., Inc.*, 281 Conn. 160, 164, 914 A.2d 529 (2007) (standard on directed verdict).

In this case, it is undisputed that the defendants did not have actual notice of the carpet's allegedly dangerous characteristics. Rather, the plaintiff claims, the defendants had constructive notice of the dangerous condition of the carpet because it had been installed for approximately four months at the time of Michelle's injury. As further evidence of constructive notice, the plaintiff cites Nigg's testimony that an owner or operator of an indoor soccer arena should perform testing before installing a playing surface and claims that the defendants, had they done so, would have discovered the hazardous condition. We are not persuaded.

Business owners are chargeable with constructive notice of a dangerous condition when, had they exercised reasonable care, they would have discovered the condition. 2 Restatement (Second), Torts § 343 (1965). Constructive notice is triggered by a general duty of inspection or, when the dangerous condition is not apparent to the human eye, some other factor that would alert a reasonable person to the hazard.[4] In the present case, the plaintiff produced no evidence "from which [a] jury could reasonably conclude that the defendant[s] had notice of [the allegedly dangerous] condition and failed to take reasonable steps to remedy it after such notice"; *Riccio* v. *Harbour Village Condominium Assn., Inc.*, supra, 281 Conn. 164; and the defendants produced substantial evidence to the contrary. Although, at the time of Michelle's injury, the carpet had been installed for four months, the plaintiff does not allege that the carpet was defectively installed, or that it had lumps, tears, holes, or cuts, or that it lay unevenly at the time of the injury.[5] Brown, Michelle's soccer coach, testified that the carpet "appeared to be in good condition" at the time of Michelle's injury and was a normal surface for indoor soccer. There was no evidence of previous complaints about the surface, or any history of soccer injuries due to the playing surface at the Farmington Indoor Sports Arena or similar surfaces installed at other indoor soccer facilities in Connecticut. See *Claveloux* v. *Downtown Raquet Club Associates*, 246 Conn. 626, 630–31, 717 A.2d 1205 (1998) (substantially similar accident admissible for purposes of proving notice of danger or defect).[6]

Under the uncontested facts of this case, a visual inspection would not have revealed the carpet's inher-

ent dangerousness for indoor soccer. Unlike visible conditions such as floor debris; *Morris* v. *King Cole Stores, Inc.*, 132 Conn. 489, 492, 45 A.2d 710 (1946); or deteriorated railings; *Kirby* v. *Zlotnik*, 160 Conn. 341, 345, 278 A.2d 822 (1971); which put a premises owner with enough time to discover and remedy the condition on constructive notice of that condition, the alleged defect in the carpet here could not have been detected by a reasonable inspection.

In addition to obvious or discoverable dangers, constructive notice may arise from the existence of industry standards or government regulations. For example, a building code and a federal regulation prohibiting the use of annealed glass in new construction was sufficient to charge a business owner with constructive notice that such glass was dangerous, even though the preexisting structure at issue was exempted from the code and the regulation, when the code and the regulation had been in place for thirty-two and twenty-two years, respectively, and, further, there was evidence that an inspection would have identified the danger. *Considine* v. *Waterbury*, supra, 279 Conn. 870–72. In the present case, however, no government or industry standards prohibited the use of the carpet for indoor soccer. The defendants introduced uncontested evidence that the United States Soccer Association had no standards prohibiting the use of similar carpet, and that other indoor soccer facilities used a similar surface at the time of Michelle's injury. Indeed, the defendants' facility had passed an inspection performed by the Connecticut Junior Soccer Association months before the injury. Thus, there was no evidence from which a reasonable fact finder could conclude that industry standards or government regulations put the defendants on constructive notice of the carpet's allegedly dangerous nature.

The opinion of the plaintiff's expert witness does not contradict this conclusion. Nigg's testimony was based on his expertise in the fields of biomechanics, engineering, medicine, and kinesiology.[7] Utilizing his experience in the these fields, and the results of scientific tests he conducted on samples of the carpet and the shoe Michelle was wearing at the time of her injury, Nigg concluded that "[t]he flooring surface provided by the defendants was unreasonably dangerous and unfit for use at an indoor soccer arena." Although this testimony is relevant to the cause of the injury, it does not provide a basis for charging the defendants with constructive notice of the inherent dangerousness of the surface. Because Nigg had no experience or expertise in operating an indoor soccer facility, his belief that playing surfaces should be scientifically tested is not a reason to impute knowledge of a latent defect, which purportedly would be uncovered by such testing, to the defendants. Indeed, Nigg conceded that such testing was not typically done. Moreover, it is difficult to discern a reason to conduct tests when, in the absence of

any industry standards, the results would not trigger a particular course of action.[8] Construing Nigg's testimony in the light most favorable to the plaintiff, the evidence fails to provide a basis from which a jury could conclude that a "reasonable inspection" would have alerted defendants to the inherent dangerousness of the carpet. *Considine* v. *Waterbury*, supra, 279 Conn. 871 n.23; *Kirby* v. *Zlotnik*, supra, 160 Conn. 344.

The plaintiff's constructive notice claim amounts to the assertion that the defendants' duty to "use reasonable care to maintain [their] premises in a reasonably safe condition"; *Warren* v. *Stancliff*, 157 Conn. 216, 218, 251 A.2d 74 (1968); included submitting the playing surface to empirical safety testing. Business owners, however, are not insurers of their customers' safety. *Kelly* v. *Stop & Shop, Inc.*, 281 Conn. 768, 790, 918 A.2d 249 (2007). In the absence of visually discoverable hazards, previous indications of danger, or industry and government standards, the defendants' duty did not extend to the type of scientific testing required to uncover the carpet's alleged inherent defects.[9] Because the plaintiff failed to establish a genuine issue of material fact as to the defendants' actual or constructive notice of the dangerousness of the carpet, the defendants were entitled to summary judgment unless some exception to the notice requirement applied.

The plaintiff contends alternatively that her premises liability claim is exempt from the usual notice requirements because the defendants affirmatively created the allegedly dangerous condition by their choice of the carpet as a playing surface. Under an affirmative act theory of negligence, if the plaintiff alleges "that the defendant's conduct created the unsafe condition [on the premises], proof of notice is not necessary. . . . That is because when a defendant itself has created a hazardous condition, it safely may be inferred that [the defendant] had knowledge thereof." (Internal quotation marks omitted.) Id., 777.[10] On the particular facts of this case, we disagree that the defendants' choice of the carpet was an affirmative act of negligence from which knowledge of the carpet's inherent dangerousness can be inferred.

The affirmative act rule creates the inference of knowledge when defendants are responsible for creating the allegedly dangerous condition. The plaintiff argues that the mere assertion that the defendants were responsible for installing an allegedly defective carpet obviates the notice requirement. We disagree. Analysis of the affirmative act rule as it has been applied shows that it permits the inference of actual notice only when the defendant or its employees created an obviously hazardous condition. For example, notice of the unsafe condition has been inferred in slip and fall cases when employees left water in an aisle after watering plants; *Tuite* v. *Stop & Shop Cos.*, 45 Conn. App. 305, 308, 696

A.2d 363 (1997); or left pricing stickers on a floor; *Fuller* v. *First National Supermarkets, Inc.*, 38 Conn. App. 299, 301–303, 661 A.2d 110 (1995); or when an employer allowed the unstable stacking of boxes of aluminum folding tables. *Meek* v. *Wal-Mart Stores, Inc.*, 72 Conn. App. 467, 474, 806 A.2d 546, cert. denied, 262 Conn. 912, 810 A.2d 278 (2002).

This reading of the affirmative act rule is consistent with decisions in other states. The Appellate Court's analysis in *Meek*, which we adopted in *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 785–86, cited three cases for the proposition that, "when a defendant itself has created a hazardous condition, it safely may be inferred that it had knowledge thereof." *Meek* v. *Wal-Mart Stores, Inc.*, supra, 72 Conn. App. 474. Upon closer examination, each of those cases involved factual scenarios in which the defendant was on notice of a dangerous condition, through constructive notice, actual notice, or a foreseeably hazardous mode of operation, respectively.[11] Rather than acting as an alternative to notice, the affirmative act rule allows an inference of notice when circumstantial evidence shows that the defendant knew or should have known of the dangerous condition because it was a foreseeably hazardous one that the defendant itself created.

In sum, we conclude that the affirmative act rule is not applicable in the present case and the plaintiffs needed to provide an evidentiary foundation from which a reasonable jury could have found that the defendants or their employees had notice of the potential dangerousness of the carpet. In the present case, the defendants produced uncontroverted evidence that they were not on notice of the carpet's alleged dangerousness, and indeed, could not have foreseen that it was inherently defective in the absence of scientific testing. Furthermore, even when viewed in the light most favorable to the plaintiff, Nigg's expert testimony did not create a disputed fact on the issue of notice because it addressed only the cause of Michelle's injury. Thus, there was no evidence that the dangerous condition was or could have been foreseeable to the defendants without extensive scientific testing, or that the scope of the duties to maintain and inspect the indoor soccer facility in a reasonably safe manner extended to such testing. Because the plaintiff did not establish a disputed issue of fact on the element of notice, the defendants were entitled to summary judgment.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgments of the trial court.

In this opinion the other justices concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] Arena managed and operated the Farmington Indoor Sports Arena, the facility at issue in this appeal. Dimensional Technology owned the property. DiTommaso, along with other family members, controlled these entities.

The plaintiff also named DiTommaso Associates, LLC (Associates), as a defendant in the second case. The Appellate Court held that the trial court properly had dismissed the action against Associates on the alternate ground of res judicata. *DiPietro* v. *Farmington Sports Arena, LLC*, 123 Conn. App. 583, 591, 2 A.3d 963 (2010). The Appellate Court's holding as to Associates is not a subject of this appeal, and Associates is not a party to the appeal.

[2] We granted the defendants' petition for certification to appeal, limited to the following questions: "(1) Did the Appellate Court properly rule that expert testimony was not required in a negligence case wherein the plaintiff claimed that the defendants had installed an inherently dangerous carpet in its indoor soccer arena, and where there was no evidence that the defendants had notice of the danger?

"(2) Did the Appellate Court properly rule that plenary review applied to the trial court's decision concerning the admissibility of expert testimony in a summary judgment motion?" *DiPietro* v. *Farmington Sports Arena, LLC*, 299 Conn. 920, 921, 10 A.3d 1053 (2010).

Upon closer review of the briefs and the record, we have reformulated the first certified question to reflect more accurately the issue presented. See *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 191–92, 884 A.2d 981 (2005) ("this court may modify certified questions to render them more accurate in framing issues presented"), citing *Stamford Hospital* v. *Vega*, 236 Conn. 646, 648 n.1, 674 A.2d 821 (1996). Furthermore, we do not reach the second certified question because, upon review of the trial court's memorandum of decision, we conclude that, despite the trial court's stated concerns as to the admissibility of the expert's opinion, the court did consider it in ruling on the defendants' motions for summary judgment but found it to be substantively insufficient.

[3] Intertwined with the defendants' argument that notice is lacking is a claim that the Appellate Court improperly reversed the trial court's summary judgments because the case required expert testimony on the standard of care as to indoor soccer surfaces, and the plaintiff's expert could offer no opinion in this regard, but only as to the cause of Michelle's injury. We agree with the Appellate Court that the standard of care in any premises liability action is defined generally by law as the duty "to keep [the] premises in a reasonably safe condition"; *Baptiste* v. *Better Val-U Supermarket, Inc.*, 262 Conn. 135, 140, 811 A.2d 687 (2002); and, therefore, that expert testimony is not required to establish it. This duty is bounded, however, by the traditional requirement that a defendant must have actual or constructive notice of a dangerous condition on its premises before being required to remedy it. Notice can be proven in a number of ways, including by expert testimony as to what the defendant ought to have known. As we explain hereinafter, because the plaintiff did not produce *any* evidence on the essential element of notice, expert testimony or otherwise, her premises liability actions cannot survive summary judgment in the defendants' favor.

[4] The Restatement (Second) provides the following definition relevant to constructive notice: "The words 'reason to know' . . . denote the fact that the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists." 1 Restatement (Second), supra, § 12 (1).

[5] Because the plaintiff claims that the carpet was inherently dangerous for use as a playing surface, the usual constructive notice inquiry, "whether the condition had existed for such a length of time that the [defendant's] employees should, in the exercise of due care, have discovered it in time to have remedied it"; (internal quotation marks omitted) *Kelly* v. *Stop & Shop, Inc.*, 281 Conn. 768, 777, 918 A.2d 249 (2007); does not apply. Longer periods of time create the inference of constructive knowledge only when the defect is discoverable by reasonable care. In the present case, the allegedly negligent act occurred in the process of selecting and installing the flooring.

[6] In *Claveloux* v. *Downtown Racquet Club Associates*, supra, 246 Conn. 626, we noted the argument for relaxed admissibility requirements "for cases in which evidence of other accidents is offered only to prove notice of a defect or danger"; id., 630–31; under which "for the purpose of establishing notice of a defect or danger, prior accidents need only be such as [would] call [the] defendant's attention to the dangerous situation that resulted in the litigated accident . . . ." (Internal quotation marks omitted.) Id., 631. We, however, declined to decide the issue on that record.

[7] For the purposes of summary judgment, we assume that both Nigg's deposition testimony and his affidavit properly were considered by the trial

court. See footnote 2 of this opinion.

[8] Industry standards provide a basis against which to measure conditions and impute constructive notice of an unreasonably unsafe condition. *Considine* v. *Waterbury*, supra, 279 Conn. 864–65. Standards reflect the "collective experience and expertise" of the regulating body. Id., 868. Safety standards for sports facilities will include consideration of the available alternatives and the level of risk tolerance inherent in any sports activity. This balance mirrors "the public policy of encouraging continued vigorous participation in recreational sporting activities while weighing the safety of the participants . . . ." *Jaworski* v. *Kiernan*, 241 Conn. 399, 407, 696 A.2d 332 (1997).

In the absence of industry standards, experts can be expected to disagree about the appropriate playing surface for indoor soccer. Because "[c]onstructive notice is premised on the policy determination that under certain circumstances a person should be treated as if he had actual knowledge so that one should not be permitted to deny knowledge when he is acting so as to keep himself ignorant"; *Hall* v. *Burns*, 213 Conn. 446, 479, 569 A.2d 10 (1990); we decline to impute constructive knowledge to a purchaser of a product based on a purported duty to perform scientific testing where there are no industry standards against which test results may be assessed.

[9] We note that the plaintiff's counsel conceded at oral argument before this court that a claim regarding an inherent defect in a product may appropriately lie against the product manufacturer.

[10] In concluding that the plaintiff was not required to prove notice, the Appellate Court cited cases involving the mode of operation rule. See *DiPietro* v. *Farmington Sports Arena, LLC*, supra, 123 Conn. App. 621. We previously have noted the close relationship between the mode of operation and affirmative act rules: "[T]here is no logical distinction between a situation in which the storeowner directly creates the condition or defect, and where the storeowner's method of operation creates a situation [in which] it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition or defect." (Internal quotation marks omitted.) *Kelly* v. *Stop & Shop, Inc.*, supra, 281 Conn. 784, quoting *Meek* v. *Wal-Mart Stores, Inc.*, 72 Conn. App. 467, 478, 806 A.2d 546, cert. denied, 262 Conn. 912, 810 A.2d 278 (2002). Affirmative act cases for injuries from negligently displayed merchandise differ from mode of operations cases chiefly in that the injury is not triggered by an intervening customer's act. See *Meek* v. *Wal-Mart Stores, Inc.*, supra, 474; *Holody* v. *First National Supermarkets, Inc.*, 18 Conn. App. 553, 556, 559 A.2d 723 (1989). The mode of operation analysis is applicable "only to those accidents that result from particular hazards that occur regularly, or are inherently foreseeable, due to some specific method of operation employed on the premises." *Fisher* v. *Big Y Foods, Inc.*, 298 Conn. 414, 423, 3 A.3d 919 (2010). Thus, like the affirmative act rule, an action brought under the mode of operation rule includes an element of notice in its prima facie case.

[11] See *Wal-Mart Stores, Inc.* v. *Blaylock*, 591 N.E.2d 624, 628 (Ind. App. 1992) (actual knowledge of danger from employees' aisle display of stacked products); *Wal-Mart Stores, Inc.* v. *Sholl*, 990 S.W.2d 412, 418 (Tex. App. 1999) (evidence of "at least constructive knowledge of the hazardous condition" when there were paint cans stacked on high shelves); *Canfield* v. *Albertsons, Inc.*, 841 P.2d 1224, 1226 (Utah App. 1992) (no need to show actual or constructive notice when defendant "chooses a method of operation where it is reasonably foreseeable that the expectable acts of third parties will create a dangerous condition"), cert. denied, 853 P.2d 897 (1993).