SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Puddle Of Water Not Open And Obvious

By Sidney A. Klingler

A puddle of water is not always open and obvious, the Court of Appeals held in the unpublished decision of *Pernell v Suburban Motors Company, Inc,* issued April 23, 2013. In a split opinion with Judge Saad dissenting, Judges Cavanagh and Shapiro held that the trial court had erroneously granted summary disposition on the grounds that a small puddle of water on the floor of an automobile dealership was open and obvious.

Plaintiff Pernell slipped in the service bay of an automobile dealership while being escorted to the customer service lounge. She did not see the small puddle of water before falling, but only after falling noticed that her hand was wet and she had wet spots on her clothes. The service technician who escorted Plaintiff observed a wet spot on the floor after Plaintiff had fallen, "probably no bigger than a dinner plate at most." A porter at the dealership likewise observed a small puddle in the area after Plaintiff fell.

SECREST WARDLE NOTES:

The Court of Appeals in *Pernell* categorically rejected a general rule that a puddle of water is always open and obvious. In this case, it was critical that no one had observed the condition before Plaintiff's fall, and no other testimony indicated that the condition was visible upon casual inspection. The Court discounted observation of the puddle after Plaintiff's fall, suggesting it was then visible only on "close inspection." In light of this opinion, testimony that a condition was observed by anyone prior to an accident, or other specific testimony indicating the visibility of the condition, is critical.

Defendant argued that the condition was open and obvious first, because Plaintiff was in an area – an automotive service bay – where there reasonably could be an accumulation of water, and second, because Plaintiff could have looked down and seen the water before walking through it. The majority rejected the first argument, noting that "defendant presented no evidence that typical service bay areas have accumulations of liquid on the floor of which customers should be aware." While there was evidence that Defendant expected dangerous accumulations of fluids to develop in the service bay area, the Court noted that there was no evidence that a customer at the dealership would have the same expectation.

As to the second argument, the Court observed that Defendant presented no evidence that Plaintiff was not looking where she was going, nor that she would have discovered the accumulation of liquid if she had looked where she was going. The Court categorically rejected the proposition that accumulations of liquid on floors are always observable, noting that such a presumption "fails to take into consideration the *particular* condition at issue and its unique qualities which may or may not make it observable or 'wholly revealed by casual observation' *before* the slip and fall. The Court analogized to the case of *Watts v Michigan Multi-King, Inc.,* 291 Mich App 98; 804 NW2d 569 (2010), where the Court held that a recently mopped, wet floor was not an open and obvious condition. The Court in *Pernell* noted that the *Watts* Court had soundly rejected the contention that a wet floor in a restaurant is a common everyday hazard which is *always* open and obvious regardless of its visibility.

Ultimately, the Court engaged in a fact intensive analysis to conclude that Defendant presented no evidence that the accumulation of water was "observable upon casual inspection before plaintiff slipped and fell." The Court observed that there was no testimony that anyone else had seen the puddle before Plaintiff fell, and thus no inference that Plaintiff should have seen it because others saw it. The Court further noted the absence of testimony of a difference in floor color or shine resulting from the accumulation so as to make it plainly visible to a person approaching it. The Court found the fact that the puddle was observed after the fall to be "irrelevant," noting that most conditions are observable upon close inspection. The test for whether a condition is open and obvious is whether "an average person with ordinary intelligence would have discovered it upon casual inspection." Considering the record evidence, or lack thereof, the Court held that defendant did not establish "that an average person with ordinary intelligence should have discovered *this* accumulation of water upon casual inspection before plaintiff slipped and fell."

The Court also resuscitated Plaintiff's negligence claim, which the trial court had dismissed as a mislabeled premises liability claim. The Court noted that Plaintiff claimed Defendant owed her a duty in common law "which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of another." The Court reasoned that Defendant's liability, if any, arose "because defendant engaged in escorting plaintiff to the customer service lounge," not because of its status as an invitor. The Court found the claim of "negligent escorting" to be based on "negligent conduct independent of defendant's status as the premises owner." Accordingly, summary disposition of the general negligence claim was also reversed.

Judge Saad dissented, observing simply that had someone looked down, the condition would have been apparent. Judge Saad relied on the testimony of the two employees who observed the puddle after the accident. "Simply because people may ignore something open and obvious until someone slips and, thus, draws attention to it, does not mean that the puddle or banana peel or curb only materialized after the fall."

Judge Saad also dissented from the reinstatement of the negligence claim, noting that plaintiff's injury was premised on the condition of the premises, not the employee's conduct.

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