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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Whether Wet Restaurant Floor Was "Open And Obvious" Was A Jury Question

By Caroline Grech-Clapper

In *Watts v Michigan Multi-King d/b/a Baha Fresh*, ___ Mich App ___ (12/14/10), the Court of Appeals found that a recently mopped restaurant floor was not "obvious" upon "casual inspection" and was not similar to *Sidorowicz v Chicken Shack*, the case that determined that a blind man encountering a visible puddle of water in a men's bathroom was open and obvious.

In *Watts,* case the Plaintiff slipped and fell on a wet floor while taking her tray from her table to the trash receptacle. There was no precipitation falling that day, but Plaintiff stated that there may have been snow on the ground outside. After she fell, Plaintiff was helped up by a restaurant employee, who said, "sorry, we just mopped the floor." When Plaintiff stood up, she noticed that her hand and clothes were damp, but did not notice any spills or color to the wetness. She testified that "it looked like the tile that's on the floor" except for a smudge created by her fall. Another employee also apologized to Plaintiff and explained that they had just mopped the floor. The incident report generated by the restaurant employees acknowledged that Plaintiff slipped on the wet floor, but indicated that "wet floor" signs were on display. At her deposition, Plaintiff stated that she observed the floor as she walked toward the trash receptacle and that she did not notice anything on, or unusual about, the floor before she fell. She did not see any caution signs, spills, or anything else indicating that the floor was anything other than normal. She did not see anyone mopping the floor before her fall.

The Court of Appeals found that the trial court improperly granted the Defendant summary disposition based on the "open and obvious" doctrine because the Plaintiff presented evidence that the hazard (a recently mopped restaurant floor) was not "obvious" upon "casual inspection." The court concluded that Defendant and the trial court "turned the *Sidorowicz* holding on its head by concluding that conditions a reasonable person who could

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The holding in this case may expand litigation with restaurant cases where the plaintiff claims she could not see the wet floor. In this case, the Court found that if a person who can see is unable to see a condition, it is not open and obvious. Although Defendant's employees said a a caution sign was placed, Plaintiff denied it.

It is better to continue to warn by having a caution sign than not alerting of potential dangers. Additionally, photographs taken immediately following an incident that show the condition with a caution sign present may have made this case more defensible on the "open and obvious" issue.

see would *not* see may be considered open and obvious." Further, the court rejected Defendant's argument that a wet restaurant floor "is a common everyday hazard of which customers are expected to be aware, making it *always* open and obvious regardless of its visibility." The Court noted that Defendant "offered no testimony or other evidence to demonstrate that the floor was visibly wet at the time of Plaintiff's fall or that a reasonable person would have observed that condition on casual observation. Instead, defendant tried to broaden the open and obvious doctrine so as to render even non-visible hazards visible."

The Court concluded that Defendant and the trial court appeared to misunderstand *Sidorowicz*. The reason the water in *Sidorowicz* was deemed open and obvious was that, despite being unseen by a blind person, it was discoverable on casual inspection by a person who could see. "Defendant's contention that hazards which are not visible even to a reasonable and sighted person can still be open and obvious runs counter to the most fundamental principle of the doctrine" - that "the hazard be discoverable 'upon casual inspection.'" The Court concluded that Defendant's argument rested on "a broadened version of the assumption of risk doctrine which, even in its narrower form, was abolished in Michigan 45 years ago."

The Court reversed the dismissal, and sent the case back for trial.

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