

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Distractions do not Escape the Open and Obvious Defense

By Caroline Grech-Clapper

In the recently unpublished decision of *Cameron v J&J Hospitality, Inc., d/b/a Big Boy Restaurant and Red Roof Ins., Inc.*, the Court of Appeals upheld the trial court's summary dismissal of this case based on the lack of duty because of an open and obvious condition of a wet floor. The Court held that a reasonable person would be alerted by a potentially treacherous condition by making a casual observation of the general surroundings. A distraction such as dripping water would make the condition even more obvious.

As plaintiff entered the only entrance of the restaurant in early January he saw that the sidewalk leading up to the restaurant foyer was wet with slush or snow. As he entered the foyer of the restaurant, he looked up because he heard the sound of water leaking from the ceiling. He slipped and fell on the wet tile floor.

The Court found that the water on the floor and the danger it posed would have been readily apparent to a person who made a casual inspection of the area. The restaurant posted a wet floor sign six feet away from where the plaintiff fell. The Court found that had plaintiff looked at the area, he would have seen the sign and the wet floor. The Court held that a "reasonable person hearing and observing water dripping from a ceiling would be alerted that a slippery condition might be present...and would anticipate the danger presented by the leak..."

Plaintiff argued that he did not observe the general surroundings because he was distracted by the sound of water emanating from the ceiling. The Court disagreed and found that not only was that a poor excuse not to see the condition, but that the sound of the water should have put him on notice that there was a high likelihood that the floor could be wet. The

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A noisy distraction that would put a person on notice that a dangerous condition may exist does not escape the open and obvious defense. Certainly, if a person can hear and see water dripping from a ceiling, it would be logical to believe that the water would drip onto the floor below. Furthermore, the distraction argument will not pass muster if the claimant cannot prove that she would have fallen even if she had looked.

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Court also held that to find otherwise would cause the change of the focus from the condition of the property itself to shift to the effect of the condition on the specific plaintiff—which is not the current law.

Plaintiff further argued that his case should still survive because the only entrance into the restaurant was covered in water and, therefore, it was a special aspect because it was unavoidable. However, plaintiff's testimony did not support that argument. Plaintiff testified that the water in the foyer was in spotty puddles, not a continuous sheet of water, and that there were dry parts of tile exposed. He also stated that there was a mat on the floor. Plaintiff did not prove that he could not have safely walked across the tile if he had looked down and observed the wet floor. The Court held that without that evidence, the jury would have to guess if plaintiff could have safely walked across the foyer if he had looked down before walking. Therefore, dismissal was appropriate because speculation and conjecture are not sufficient to create a material question of fact to survive a motion for summary disposition.

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