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PROTRUDING FLOOR MAT TESTS “OPEN AND OBVIOUS CONDITION” DOCTRINE

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Premises liability for negligence presupposes an unreasonably dangerous condition which causes injury. Within this context, an unreasonably dangerous condition is one which is known or discoverable to the landowner, but not open and obvious to those invited to use the premises through the reasonable use of their senses. Under such circumstances, the landowner may owe a legal duty to those invited to use the premises to either repair or remove a hidden hazard, or, in the alternative, provide an adequate warning of its presence. An adequate warning takes a hidden hazard and communicates the general scope the risk, allowing those using the premises to avoid the hazard.

Conversely, if a defect on the premises is open and obvious, a landowner may not owe a legal duty to repair/remove or warn of such a condition because those using the premises should be able to avoid such readily apparent hazards in looking out reasonably for their own safety. As illustrated by the *Buchaklian* opinion described herein, this principle is sometimes referred to as the “open and obvious condition” doctrine. In *Buchaklian* court, the court referenced a limited “forgetfulness or distraction” exception to the open and obvious doctrine. As noted by the court, this exception to the “no legal duty” rule for obvious premise defects may not apply where the landowner “has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.” Under such limited circumstances, the landowner may owe a legal duty to take remedial measures to protect those using the premises from such apparent defects on the premises.

IF LOOKING, OBSERVABLE HAZARD?

In the case of *Buchaklian v. Lake County Family Young Men's Christian Association*, No. 2-99-0353 (Ill.App. 2nd Dist. 2000), plaintiff Soolton Buchaklian alleged that negligence on the part of defendant Lake County Family Young Men's Christian Association (YMCA) caused her to trip and fall while walking across a mat on the YMCA's premises. The facts of the case were as follows:

Buchaklian had been a member of the YMCA since 1995. She typically swam at the YMCA three days a week for about an hour each day. It was her practice to change her clothing in the locker room, then shower, and proceed to the pool.

On February 10, 1997, at approximately 7 a.m., Buchaklian changed into her swimming suit in the women's locker room and proceeded to the shower area with her friend, Ana Paporagian. As they approached the shower area, Buchaklian tripped and fell in the area

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of a black mat. After falling, Buchaklian observed that one particular piece of the mat was standing up approximately an inch or two higher than the other portions of the mat. Buchaklian was taken by ambulance to a hospital.

During her deposition [i.e., out of court sworn testimony], Buchaklian stated that, "If I had been looking at the mat, I would have seen this thing sticking up." Buchaklian further admitted that she would not have tripped if she had been looking at the mat.

Buchaklian had never seen the mat in this condition before, she did not know how long it had been in that condition, she did not know what caused the piece to be sticking up, she had never tripped on the mat prior to that date, she had heard no complaints about the mat prior to that date, and she had never complained about it.

Ana Papparigian testified during her deposition that she observed Buchaklian stumble and fall but did not see the mat before Buchaklian fell. Ana stated that after Buchaklian fell she saw that a piece of the mat was sticking up approximately an inch higher than the rest of the mat. She did not know how long this piece of mat had been sticking up or why the piece was sticking up. She had crossed the mat on numerous occasions but had never tripped on it or made any complaints about it, and no one had ever complained to her about the mat.

Jennifer Patterson, a former YMCA patron, testified during her deposition that she was not present at the time Buchaklian fell and that she became aware of the incident after speaking with Buchaklian's attorney in the YMCA locker room in 1998. Patterson noted that the mat had been changed from a black one to a maroon and blue one, but she could not specify the date of that change. She described the mat in the locker room before it was changed as one big square piece, cut to fit the hallway, which had little triangular shapes, made out of woven rubber, that were connected together. She stated that the edges of the mat were frayed across the entire width of the front and back of the mat. Patterson testified that both she and her daughter had tripped on the mat but that she had never complained about the mat to anyone at the YMCA except to other women in the locker room.

The trial court found the YMCA owed no duty to Buchaklian based on the "open and obvious condition" doctrine. In addition, the trial court found that "the YMCA had no notice of the alleged defect in the mat and that the YMCA owed Buchaklian no duty as a matter of law." Accordingly, the trial court granted summary judgment in favor of the YMCA. Buchaklian appealed.

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On appeal Buchaklian argued that the trial court erred in finding that the YMCA owed no duty of care to her. Specifically, Buchaklian claimed the YMCA owed her a legal duty because “she was an invitee on the YMCA's property at the time she was injured by a condition existing on the YMCA's property.”

In a negligence action, the appeals court noted that “the plaintiff must establish that the defendant owed the plaintiff a duty of care, that the defendant breached that duty, and that the defendant's breach proximately caused the plaintiff's injuries.” Accordingly, the court stated “there is no negligence” unless a legal duty is owed.

In determining the existence of a legal duty, the court cited the following factors as relevant for consideration:

(1) the reasonable foreseeability and (2) likelihood of injury, (3) the magnitude of the burden on defendant in guarding against injury and (4) the consequences of placing that burden on defendant.

According to the court, the reasonable foreseeability of injury could be determined by applying section 343 of the Restatement (Second) of Torts to the relevant facts of a particular case. As cited by the appeals court, section 343 of the *Restatement (Second) of Torts* provided, in pertinent part, as follows:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (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. *Restatement (Second) of Torts* § 343 (1965).

Moreover, in determining the foreseeability of injury, the appeals court found Comment d to section 343 of the Restatement provided further explanation regarding “what an invitee is entitled to expect”:

An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein.

Therefore an invitee is not required to be on the alert to discover defects which he might be negligent in not discovering.

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This is of importance in determining contributory negligence in failing to discover a defect, as well as in determining whether the defect is one which the possessor should believe that his visitor would not discover " *Restatement (Second) of Torts*, § 343, Comment d, at 217 (1965).

Analyzing the facts of this case under section 343, the appeals court concluded that "the YMCA would have discovered the condition of the mat" through "the exercise of reasonable care." Specifically, the court found the YMCA "should have realized that the condition of the mat involved an unreasonable risk of harm to invitees." Moreover, the court found that "the YMCA should have expected that invitees would not discover or realize the danger, or would fail to protect themselves against it." As a result, the appeals court noted that "the YMCA appears to have failed to exercise reasonable care to protect invitees against the danger." Having found the injury was reasonably foreseeable under the circumstances of this case, the appeals court held that "the YMCA owed the Buchaklian a duty of care."

Having found the YMCA owed Buchaklian a legal duty of care under the circumstances of this case, the appeals court then addressed YMCA's contention that "the defect in the mat encountered by Buchaklian was "open and obvious" and therefore negated any duty the YMCA owed to Buchaklian." As noted by the court, landowners "are not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious." According to the court, the law generally assumes that persons who encounter such open and obvious conditions "will take care to avoid any danger inherent in such conditions."

Certainly a condition may be so blatantly obvious and in such a position on the defendant's premises that he could not reasonably be expected to anticipate that people will fail to protect themselves from any danger posed by the condition.

As cited by the court, section 343A of the *Restatement (Second) of Torts* would limit the liability of possessors of land for open and obvious dangers as follows:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness.* (Emphasis added.) *Restatement (Second) of Torts* § 343A (1965).

However, for a dangerous condition to be open and obvious, the appeals court acknowledged that "an invitee must reasonably be expected to discover it and protect himself against it."

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As described by the appeals court, the trial court had concluded that Buchaklian's injuries resulted from an open and obvious condition.

Here, the trial court granted summary judgment in favor of the YMCA on the basis that Buchaklian had stated during her discovery deposition that as she was walking toward the mat she was looking straight ahead, not at the mat, and that if she had been looking at the mat she "would have seen this thing sticking up" and would not have tripped.

The appeals court, however, disagreed with the trial court's conclusion that, "as a matter of law, the defect in the mat was an open and obvious danger." Moreover, the appeals court rejected the trial court's reasoning that Buchaklian could have necessarily avoided this premise defect "had she looked down at the floor in the area where she was going instead of looking straight ahead."

Buchaklian did not observe the defect until after her fall and had never seen it on any previous occasion; Ana Paporigian did not see the defect in the mat until it was pointed out to her after Buchaklian's fall and had never seen the defect on any previous occasion; Jennifer Patterson had previously observed defects in the mat because both she and her daughter had tripped on the mat.

The deposition testimony indicates that the condition of the mat was not "so blatantly obvious and in such a position" that the YMCA could not reasonably be expected to anticipate that invitees would fail to protect themselves from any danger posed by the condition of the mat.

As a result, the appeals court concluded that there was some question "as to whether the danger was open and obvious." In so doing, the court noted that the YMCA had denied any liability based upon a "lack of notice of the defect." In the opinion of the appeals court, such lack of notice suggested that "the dangerous condition was not apparent."

The evidence in the record can support a reasonable inference that the defect in the mat was difficult to discover because of its size, the lack of significant color contrast between the defect and the surrounding mat, or merely the short time that a person has in which to discover the defect as he or she takes a few steps toward the mat.

The appeals court, therefore, found that the trial court had erred in concluding "as a matter of law that the defect in the mat was either open and obvious or that it could reasonably be expected to be discovered."

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Such a situation raises the issue of whether a reasonably prudent person should have anticipated that an injury would result from walking normally... [T]he issue of whether a condition is obvious is determined by the objective knowledge of a reasonable person...

We refuse to hold that invitees, as a matter of law, are required to look constantly downward. Indeed, it may be necessary for a pedestrian to keep a lookout for other pedestrians to avoid collision, and Buchaklian could not look both up to avoid other pedestrians and, at the same time, down to protect herself from tripping on the mat.

Since "reasonable minds could differ as to whether a condition was open and obvious" under the circumstances of this case, the appeals court found summary judgment in favor of the YMCA was inappropriate. In so doing, the appeals court found a dangerous condition was not necessarily open and obvious simply because Buchaklian admitted that "she could have seen the condition if he or she had looked."

The "obviousness" of a condition or whether in fact the condition itself served as adequate notice of its presence or whether additional precautions were required to satisfy the defendant's duty are questions properly left to the trier of fact [i.e. the jury].

We determine in this case that, where Buchaklian was an invitee and had to walk over a mat in order to utilize the YMCA pool facilities, and where Buchaklian may not have seen a defect in the mat before she tripped, genuine issues of material fact exist as to whether the defect in the mat was an open and obvious danger that Buchaklian should have seen.

In reaching this conclusion, the appeals court also noted that "[t]he existence of an open and obvious condition is not a *per se* [i.e., in and of itself] bar to the finding of a legal duty. On the contrary, the court found that the "forgetfulness or distraction" exception to the "open and obvious condition" doctrine might impose a legal duty on the landowner to exercise reasonable care.

The "forgetfulness or distraction" exception is based on determining whether the possessor should "anticipate the harm" despite the obviousness...

[W]here the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." *Restatement (Second) of Torts*, § 343A, Comment f, at 220 (1965).

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Furthermore, even if the danger is obvious, it does not conclusively determine the duty of the possessor or whether the possessor has acted reasonably under the circumstances but, rather, is important in determining whether the invitee was contributorily negligent or assumed the risk.

As a result, the appeals court concluded that “the jury must still determine whether the YMCA breached its duty to Buchaklian.”

Whether a defendant has breached its duty is a question of fact. The trier of fact must determine whether the YMCA took any safety precautions and, if so, whether the measures were adequate to satisfy its duty of reasonable care...

If the jury finds that the condition was open and obvious, then it must determine whether the YMCA took any safety precautions and, if so, whether the measures were adequate to satisfy its duty of reasonable care...

If the jury finds the YMCA liable, it must then decide whether and to what degree Buchaklian was also negligent. A question of fact exists concerning whether Buchaklian was responsible for her injuries because she did not look down while walking over the mat...

In sum, we hold that where reasonable persons could draw divergent inferences from the undisputed material facts or where reasonable minds could differ as to a material fact, such as whether a condition is open and obvious, summary judgment should be denied and the issue decided by the trier of fact.

Accordingly, the trial court erred in finding, as a matter of law, that the defect in the mat was open and obvious and that as a result the YMCA owed no duty of care to Buchaklian.

For the foregoing reasons, we reverse the summary judgments of the circuit court of Lake County. This cause is remanded for further proceedings consistent with this decision.