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Don't trip over these common premises-liability defenses

HOW TO OVERCOME "OPEN AND OBVIOUS" AND "TRIVIAL DEFECT" ON MOTIONS AND AT TRIAL

We have all been there: picking up the phone to introduce yourself to the adjuster or defense attorney on a new premises-liability case, and before you can even say "hello" the first words you hear are "open and obvious" or "trivial defect." Fortunately for plaintiffs' attorneys, these defenses aren't all they are cracked up to be and are nowhere as damaging to plaintiffs' cases as the defense attorneys would have you believe.

We will break down these two defenses and show you ways to defeat them at MSJ and trial.

Open and obvious

"Open and obvious" is a common defense argument in any premises-liability case. To understand this defense, it's important to understand the basic theory of a premises-liability case for an unsafe condition on the property. An "unsafe condition" is one that poses an unreasonable risk of harm to persons. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119.) Owners/controllers of property owe multiple duties of care to maintain their properties free of unsafe or dangerous conditions. They must take precautions to repair unsafe conditions, protect against harm from the condition, or give an adequate warning of the condition, if they know or reasonably should have known about the existence of the condition. (CACI 1003.)

As the name suggests, the defense argues that if an unsafe condition is open and obvious, the owner/controller of the property had no duty to warn the plaintiff about it because the plaintiff should have noticed it and avoided it. "Open and obvious" is a "recharacterization of the

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2022

former assumption of the risk doctrine," making it a theory of contributory negligence. (*Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 665.) In essence, the theory is that if the condition was so obvious that the plaintiff saw it or should have seen it, then the fault lies with the plaintiff for "assuming the risk" and encountering the danger.

CACI 1004 defines an "obviously unsafe condition" as follows:

> If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the [owner/lessor/occupier/one who controls the property] does not have to warn others about the dangerous condition.

(CACI 1004.)

Note, however, that this theory does not fully obviate the defendant of all potential liability:

> [T]he obvious nature of a danger is not, in and of itself, sufficient to establish that the owner of the premises on which the danger is located is not liable for injuries caused thereby, and that although obviousness of danger may negate any duty to warn, it does not necessarily negate the duty to remedy.

(*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 119.)

CACI 1004 also clarifies in the second paragraph of the instruction that the defendant must still use reasonable care "to protect against the risk of harm if it is foreseeable that the condition may cause injury to someone who because of necessity encounters the condition." In other words, just because a condition might be open and obvious does not mean that the defendant is not liable under a different duty, such as the duty to remedy, fix or correct an unsafe condition.

Litigating around open and obvious

In practice, open and obvious will arise in most premises-liability cases as the defense will try to throw up any and all potential defenses, in the hopes one will stick. The key to defeating this defense is the proper case workup.

Written discovery

Since the obviousness of a condition is highly fact-specific, use written discovery as an opportunity to determine exactly how the defense is claiming the condition was obvious, and if the defense will make any concessions about the hidden or concealed nature of the condition that can later be used in opposing a motion for summary judgment or at trial. For example, can you get the defense to agree as to the size/shape/location of the condition? The lighting conditions? Will the defense concede that the condition existed in a pathway where it was foreseeable people would be walking? Written discovery is also an opportunity to obtain video footage or photographs documenting the condition, to the extent any exist.

Depositions

When it comes time to do depositions, it is important to prepare your client on the inevitable questions about whether they saw the dangerous condition before the incident happened. But it is just as important to ask the defendant or the defendant's person most knowledgeable as to whether they believed the condition was dangerous, and to get the defendant's witnesses to describe the condition. Under Evidence Code section 805, a lay witness may provide opinion testimony if it is based on the witness's perception and is helpful to a clear understanding of the witness's testimony. Courts have extended Evidence Code section 805 to cover opinion testimony on the obviousness of a condition. (*Osborn*, *supra*.) Most defense witnesses will be coached to claim the condition was obvious, but you may be able to get concessions on other smaller facts, like the color, shape, or size of the condition. If the witness is sticking to their "it was obvious!" lines, lock them into sounding ridiculous so you can use the clips later at trial (discussed below).

Site inspection

Finally, if the condition is still in existence, a site inspection will assist you in obtaining evidence for your expert to review prior to expert depositions and trial, to set up for the judge or jury how the condition is concealed and not obvious.

Addressing the "open and obvious" defense in briefs

It is not always "obvious" that a condition is dangerous and a defendant should not be able to win on a motion for summary judgment or at trial by simply claiming that it was so. These arguments can be attacked on a few different grounds.

First, the dangerous condition may not actually be obvious. As a type of contributory negligence, the standard is whether a reasonable person in the plaintiff's position would have appreciated the risk of harm. (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754.) It is a question for the jury, as the trier of fact, to determine the obvious (or not obvious) nature of the condition and any contributory negligence of the plaintiff in not appreciating the risk. (*Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 34.)

Second, even if the dangerous condition was obvious, the defendant may still be liable for a breach of a different duty, if it is foreseeable that "because of necessity or other circumstances, a person may choose to encounter a condition." (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 447.)

For example, if a dangerous condition exists in the only pathway available at a premises to access a job site, even if it is obvious, the defendant can be liable for failing to remedy the condition. (See, e.g., *Osborn*, *supra*; *Kaney v. Mazza*, (2022) ___ Cal.App.4th ___ [considering the open and obvious defense when it was still foreseeable that a person may encounter the condition].)

Even if there are other pathways available, courts have still found defendants to be liable in situations where there is a "practical necessity" to

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2022

walk across a certain pathway. (*Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179, 1185 [finding issues of material fact existed regarding the duty to remedy].) Courts have further held that "[a] pedestrian has the right to assume that a public sidewalk is in reasonably safe condition" and therefore there is no requirement for pedestrians to constantly look at the ground to be on the lookout for dangerous conditions. (*Garber v. City of Los Angeles* (1964) 226 Cal.App.3d 349.)

Addressing the defense at trial

So, you survive the dispositive motions, and now you're going to trial. How do you set the case up for the jury to get the win on liability? Often this argument can be used against the defense to show the ridiculousness of their position on liability and failure to accept responsibility for what happened. It is crucial to face these defenses head on and address them as early as the mini opening and voir dire, before even getting to opening statement. For example:

- Who thinks that people should be watching where they're walking at all times?
- And ultimately that they are responsible if they fall because there is something dangerous in their walking path?
- Who thinks that yes, people should be careful where they're walking but the property owner or the store has a duty to make sure that the walking paths are kept clear of dangers?
- Who thinks that may be too high of a burden placed on the property owners or property managers?

It may also be worth retaining a "conspicuity" or human factors expert to defeat these defenses. A conspicuity expert, as the title suggests, will opine as to how easy the dangerous condition was to see or not see. He or she will take into consideration the totality of the circumstances surrounding the fall and discuss other foreseeable factors that may have drawn the plaintiff's attention away from the alleged "open and obvious" condition.

For example, say the plaintiff is injured when she slips on a banana peel at the local grocery store. The defense is going to say, "look at how bright yellow that banana peel was, how could plaintiff not see it!?" To flip this on them, the conspicuity/human factors expert will review everything going on at the scene of the fall that the defendant intentionally placed to draw the customer's attention: the bright lights advertising 2-for-1 deals on avocados, or the TV screen directly above the banana section that invites the customers to sign-up for a grocery store credit card and receive a 10% discount on banana purchase.

Given all these distractions, the expert should be able to opine that a reasonable person would likely look at these attention-grabbing advertisements and away from the ground. Then you can argue in closing that all of these distractions were intended to increase profits of the defendant, and there is an implied warranty that the grocery store will keep its floors free of dangers so customers can freely walk through its aisles without fear of serious injury, and the defendants failed to hold up their end of the bargain.

Trivial defect

While the "trivial defect defense" is frequently used in premises cases, it is actually not an affirmative defense. Rather, because a "trivial defect" is one that is so insignificant that there is no duty of care imposed, it falls under the aspect of duty and it is part of the plaintiff's burden to plead and prove that a condition is indeed dangerous, and therefore, not trivial. (*Caloroso v. Hathaway*, (2004) 122 Cal.App.4th 922, 929.)

Depending on the facts of the case, the determination of whether a defect is trivial can be a matter of law, or a triable issue of fact. (See *Caloroso* 122 Cal.App.4th at 922; *Stathoulis v. City of Montebello*, (2008) 164 Cal.App.4th 559.)

The trivial-defect doctrine began as a means to protect public entities from liability from injuries suffered on public property due to conditions that were so insignificant, that "no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." (*Kasparian v. Avalon Bay Communities* (2007) 156 Cal.App.4th 11, 27.)

The doctrine has expanded to encompass actions brought against private landowners. (*Caloroso, supra*, at p. 927.) When it comes to walkways and areas of foot traffic, courts have recognized that a public or private entity is not required to maintain the walkway in perfect condition. (*Ursino v. Big Boy Restaurants*, (1987) 192 Cal.App.3d 394, 399.)

Examples of defects that courts have ruled to be trivial have included small cracks in walkways and discrepancies in height of adjoining sections of concrete. For example:

- In *Caloroso*, the plaintiff tripped on a crack in the walkway that was less than one half inch at its highest, this was found to be a trivial defect. (*Caloroso, supra*, at p. 925.)
- In *Fielder v. City of Glendale,* the Court determined that a three-quarters of an inch depression in a walkway constituted a trivial defect. (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719).
- The Court in *Ness v. City of San Diego* expanded on previous rulings, determining that raised sections in a walkway due to a tree of a height of seven-eighths of an inch was a trivial defect. (*Ness v. City of San Diego* (1956)144 Cal.App.2d 668, 673).

The trivial-defect doctrine allows for the court to determine whether a defect is trivial as a matter of law. The doctrine is used as a "check valve" to eliminate unwanted litigation from the court system. (*Ursino, supra,* at p. 399.) When making this determination, the court must take into consideration all of the circumstances surrounding the accident

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2022

that may have made a defect more dangerous, rather than merely relying on the size of the defect.

Courts have recognized that each case must depend on its own facts, and that there is no "hard-fast" rule that will determine whether a defect is trivial. (*Fielder, supra*, at p. 728.) Factors that courts should take into consideration include whether the defect was uniform, if the defect was jagged or sharp, lighting of the area of the defect, time of day the injury occurred, and whether others have been injured by the same defect. (*Kasparian v. AvalonBay Communities Inc.*, (2007) 156 Cal.App.4th 11, 27.)

It is important to note, however, that actual notice of the defect does not necessarily alter the determination that a defect is trivial. (*Caloroso*, *supra*, at p. 929). In *Caloroso*, discussed above, the court upheld the granting of defendant's motion for summary judgment, considering that there was no dispute as to the size of the defect, the defect was clear from obstruction, and there was no evidence of prior injuries due to the defect presented.

Attacking the trivial-defect doctrine on dispositive motions

As the determination of a trivial defect can be made as a matter of law, the battle is often held on a motion for summary judgment. But while the trivial-defect doctrine does allow for courts to assess the "triviality" of a defect, courts do not have absolute power to determine whether a defect is trivial: Where either specific facts surrounding the defect are in dispute, or whether there were other factors making the defect more dangerous, summary judgement *is not proper*. (*Kasparian*, *supra*, at p. 25 [finding the trial court erred in granting a motion for summary judgment as both parties' expert declarations created triable issues of fact as to the dangerousness of the condition].)

As the name implies, the defense will attempt to use the trivial-defect doctrine to "trivialize" your case's dangerous condition, relieving their client of any duty to yours. They will try to do this by taking the power away from the jury. This can be done either by a summary judgement, or even worse, a judgement notwithstanding verdict.

To combat the trivial-defect defense, it is important to shift the focus from defect itself and highlight all of the circumstances surrounding the incident. The first thing to remember is to not let this fight become a battle of the rulers. If you are dealing with a defect of less than an inch in height, the court should not view the height alone in a vacuum. Cases such as *Fielder* should be used to inform the court that there is no "hard-fast" rule or specific height that determines a trivial defect. Consider also the following useful additional facts:

Building codes

Digging into building codes and tolerances for building defects can help amplify the danger posed by the defect, even if the defect is relatively small in size. For example, expert opinions on customs and practice can highlight that reasonable minds may differ as to how dangerous the defect was. The court in *Laurenzi v. Vranizan* (1945) 25 Cal.2d 806, 812, reversed a motion for nonsuit in favor of the defendant after recognizing that the city engineer's opinion that subject defect constituted a dangerous condition after only viewing a photograph, was enough to prove a triable issue.

The more factors behind the mechanism and circumstances of an injury that can be highlighted, the more the dangerousness of the condition becomes a question of fact, getting you past a motion for summary judgment.

Dispute on size

In *Palmer v. City of Long Beach*, (1948) 33 Cal.2d 134, the plaintiff contended that the since-repaired defect was three inches deep, while a defense witness stated that the defect was no more than a half inch. The Court in *Palmer* ruled that the contested size of the defect constituted a triable issue and agreed with the lower Court's denial of defendant's motion for nonsuit. (*Id*. at 138.) This especially comes into play in cases where the defect has since been repaired.

Overall environment

Although a defect may be small, it is often important to examine the dangerousness of the overall environment in which the defect is located. In *Clark v. City of Berkeley*, 143 Cal.App.2d 11, 16, the Court reversed a motion for summary judgment because, although the defect that caused the incident was only one half of an inch, when viewed in context with the six or seven years of overall disrepair of the entire walkway, the defect itself could not be considered trivial as a matter of law.

History of prior injuries

While notice alone does not always overcome the trivial defect defense, courts have held that a history of other injuries as a result of the defect is a factor in considering whether a condition is dangerous. (*Barone v. City of San Jose*, (1978) Cal.App.3d 284, 291.)

Your plan of attack in discovery must take into consideration this shift of focus from the defect itself. Gathering information such as prior injuries as a result of the defect and the amount of foot traffic the subject area gets will help form context supporting that the defect constituted a dangerous condition. Obtaining expert analysis and opinion as to the dangerousness of a defect based on building codes, lighting, and other conditions will help create triable issues of fact.

Conclusion

Of course, the best way to avoid these defenses is to conduct a thorough review of any potential case before sign up, because proper screening can be key to avoiding a headache later on and a potential defense on a dispositive motion or at trial. However, do not be discouraged by the size or location of a condition just because you anticipate an "open

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2022

and obvious" or "trivial defect" argument by the defense. With the proper understanding of how these defenses can really be used, you can set yourself up for success.

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