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CASENOTES

HEARSAY AS TO INTERNET REVIEWS INADMISSIBLE IN SLIP AND FALL CASE

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Filed 3/9/18 Malouf v. BJ's Restaurant CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SAMAR MALOUF, Plaintiff and Appellant, v. BJ'S RESTAURANTS, INC., Defendant and Respondent.	G053565 (Super. Ct. No. 30-2013-00663152) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Mary Fingal Schulte, Judge. Affirmed.

Law Offices of Steven J. Cooper and Steven J. Cooper for Plaintiff and Appellant.

Horvitz & Levy, Peter Abrahams, and Scott P. Dixler; Manning & Kass Ellrod, Ramirez, Trester and Brian T. Moss for Defendant and Respondent.

* * *

A jury returned a unanimous defense verdict in this slip-and-fall case against defendant BJ's Restaurants, Inc. (BJ's). Plaintiff Samar Malouf appealed from the judgment, arguing the court committed prejudicial evidentiary errors. We find no error and affirm the judgment.

FACTS

In August 2011, Malouf slipped and fell near the restroom as she was preparing to leave a BJ's restaurant. A waitress and the restaurant's assistant manager came to her aid. Malouf told the assistant manager she was fine other than some pain where she hit the floor. She refused an ambulance and medical care, but requested a bag of ice. Later that night Malouf noticed bruising on her body and sought medical care the following morning. The attending physician performed X-rays but found nothing broken.

Sometime in 2012, a doctor informed Malouf she had a tear in the rotator cuff in her shoulder. Approximately three years later, she had surgery to repair the tear, and then a second shoulder surgery to remove some scar tissue that formed. Sometime in 2013, Malouf saw a different doctor who informed her she had a bulged disk in her neck, requiring surgery. Malouf never had that surgery.

In July 2013, Malouf sued BJ's, asserting claims for negligence and premises liability. Her claim at trial was that BJ's was negligent because its restaurant had a slate floor with a glossy finish that created a falling hazard.

At trial, on the issue of liability, Malouf testified on her own behalf and presented the testimony of her husband, her daughter, and a flooring expert. Malouf testified the floor was "shiny," and her daughter described it as "waxy," but no witness described any liquid or other substance on the ground that would have made the floor

more slippery.[1] Indeed, Malouf's daughter testified she ran her finger over the floor on the day of the incident and no residue came off the floor onto her finger, nor was it wet. Malouf's expert testified the shiny gloss on the floor would have rendered the floor slippery when wet (but, again, there is no evidence the floor was wet). Notwithstanding the lack of evidence, Malouf's expert surmised that, because Malouf fell, the floor must have been wet.

BJ's countered with the testimony of the assistant manager on duty that night, as well as its vice-president of restaurant facilities, and a flooring expert to rebut Malouf's expert.

The vice-president testified the slate flooring met industry standards for being non-slippery because it had a coefficient of friction greater than 0.5. He further testified that the glossy finish applied to the slate flooring actually increased the coefficient of friction, making the flooring even less slippery. The same flooring was used in many other BJ's locations.

BJ's flooring expert testified that he tested a number of slate floors from other BJ's restaurants that appeared identical to the floor at issue here, and they always tested non-slip, both wet and dry. He testified that, in his review of the evidence, he did not find any indication that the floor had been wet. He testified that if Malouf had fallen due to a contaminant on the floor, there would have been a skid mark, and none was observed. Nor, in his opinion, would the cleaning solution used by BJ's create any slipping danger. He further opined that shiny or glossy floors are common in commercial settings, and they supply a high degree of traction when dry. He further explained that people can slip even on high-traction floors, and a floor does not need to be slippery for someone to slip. Instead, people can slip due to the type of shoes they are wearing,

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[1] Malouf's daughter testified the floor was *not* slippery, but later testified it was slippery.

hazards on the floor, irregularities in their gait, or other psychological or physiological factors such as distraction.

The jury returned a unanimous verdict, answering "No" to the following question: "Was Defendant BJ'S RESTAURANTS, INC. negligent in the use, maintenance, or management of the property?" Malouf appealed from the judgment.

DISCUSSION

Malouf argues the court made three errors: First, the court granted BJ's motion in limine to "'exclude hearsay statements allegedly made by patrons [and] waitress'"; Second, the court granted BJ's motion in limine "'to exclude internet postings regarding slips, falls or flooring'"; Third, the court permitted BJ's flooring expert to testify concerning his testing of the floor at different BJ's locations. "We review evidentiary rulings for an abuse of discretion." (*People v. Butler* (2012) 212 Cal.App.4th 404, 426.)

We begin with the court's ruling on BJ's motion in limine regarding statements by patrons and a waitress. The motion was based on a guest incident report Malouf wrote on the date of the incident in which she wrote "other guests told me that other people[] slipped too." At her deposition, Malouf claimed an unidentified waitress made a similar statement. The court ruled plaintiff could not "introduce any evidence whatsoever with regards to . . . statements allegedly made by patrons and a waitress regarding slips on the floor, absent appropriate foundation."

Malouf did not cite, nor have we discovered, anything in the record indicating she attempted to lay an appropriate foundation for either the unidentified waitress's statement or statements by unidentified guests. "A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will

not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself. [Citations.] ‘“‘Where the court rejects evidence temporarily or withholds a decision as to its admissibility, the party desiring to introduce the evidence should renew his offer, or call the court’s attention to the fact that a definite decision is desired.’”’” (*People v. Holloway* (2004) 33 Cal.4th 96, 133.) The court never rendered a final ruling excluding this evidence, and thus there can be no error.[2]

Even if the proper foundation had been laid, Malouf herself could not have testified to these statements over objection. Malouf argues on appeal that the statements were not offered for their truth, i.e., to show that the floor was slippery, but merely to show that BJ’s had notice of the slippery condition. But this argument ignores the multiple layers of hearsay. The alleged statement by the waitress, that others had fallen, was, under Malouf’s theory, offered to show BJ’s knowledge of the condition. But the waitress’s statement about her knowledge, even if attributed to BJ’s, was an *out of court* statement offered to show BJ’s had knowledge, and thus inadmissible hearsay if offered through Malouf’s testimony.

Next, we consider the court’s ruling concerning internet reviews. BJ’s motion in limine recited that in the deposition of Malouf’s flooring expert a number of Yelp reviews were included in the expert’s file. We do not have those reviews in the record, but they apparently commented on the flooring in some manner. According to BJ’s motion, the expert did not identify the Yelp reviews as forming the basis of his

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[2] Malouf also contends the court excluded contemporaneous statements by the assistant manager to the effect of, “I keep telling them don’t put too much wax on the floor because it becomes very slippery and they never reply to me,” and that the prior week another patron had fallen in the same place. However, we see nothing in the court’s ruling excluding statements by the assistant manager. Moreover, the assistant manager testified at trial and could have been interrogated about these alleged statements, but was not.

opinion. The court excluded "internet postings regarding slips, falls or flooring associated with any restaurants owned and/or operated by defendant, without prejudice to plaintiff laying a foundation as to relevance. Thus far, she has not shown a proper foundation for the proferred evidence."

At trial, Malouf testified that she went online and searched for "slip-and-fall at BJ's restaurant Huntington Beach on Google." When asked if she found any reviews, the court sustained an objection based on hearsay and lack of foundation. On appeal, Malouf contends the court prevented her from laying a foundation.

But Malouf never made an offer of proof as to what the evidence would be and what sort of foundation she could lay. "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (Evid. Code, § 354; see *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 886 ["The failure to make a specific offer of proof constitutes waiver of a contention that the court erroneously excluded evidence"].)

Here, we do not even know what these reviews allegedly said, much less how Malouf could lay a foundation to establish a hearsay exception. Statements posted on the Internet are obviously out of court statements, but Malouf again contends these reviews would have been relevant to the nonhearsay purpose of showing BJ's was on notice of a hazardous floor condition. However, in addition to not knowing what the reviews said, we have no basis to conclude Malouf could have established that BJ's actually knew about these reviews. Accordingly, we may not reverse on this basis.

Finally, Malouf contends the court should have excluded the testimony of BJ's flooring expert concerning testing he did on flooring at other BJ's restaurant locations. Malouf filed a motion in limine to that effect, which the court *granted* "unless defense can show a foundation through their witness that the flooring at other BJ's restaurants was the same."

BJ's expert testified that the floors at other BJ's restaurants appeared identical to the flooring at the restaurant where Malouf slipped, and that all of the floors he tested met industry standards for traction. The expert testified he was only able to examine the actual flooring of the Huntington Beach location by photograph because the glossy finish had been stripped at some point. The expert offered testimony regarding the specific type of glossy finish that had been applied to the Huntington Beach floor. Further, BJ's vice-president of restaurant facilities testified that almost all of the BJ's restaurants in the area had the same flooring as the Huntington Beach location. The combined effect of this testimony was sufficient to establish the relevance of testing the flooring at other BJ's locations.

In contending otherwise, Malouf relies heavily on the testimony of her own expert witness that no two slate floors are identical because of the inherent variation in slate. But that testimony went to the weight of BJ's expert's testimony, not its admissibility.

Moreover, any error in permitting BJ's expert's testimony was not prejudicial. On the central issue of the condition of the floor, Malouf's case was weak. Her only real evidence was her expert's testimony that because she fell, the floor must have been wet. And even if the floor had been wet or otherwise contaminated, there was no evidence at all that BJ's was on notice of the problem. (See CACI No. 1003 [in negligent maintenance of property action, plaintiff must prove defendant "knew or, through the exercise of reasonable care, should have known" of the condition that created

the risk of harm].) There was ample evidence that the flooring and finish met industry standards for traction. We are not persuaded that removing testimony about testing other BJ's locations would have changed the outcome.

DISPOSITION

The judgment is affirmed. BJ's shall recover its costs incurred on appeal.

IKOLA, J.

WE CONCUR:

FYBEL, ACTING P. J.

THOMPSON, J.