

The owner of a shopping mall hired a construction company to design and construct a new entryway to the mall. The construction company negligently selected an unusually slippery material for the floor covering. A week after the entryway was completed, a customer who had come to the mall to buy cosmetics slipped on the floor of the entryway, sustaining injuries. The customer sued the mall owner for the construction company's negligent design of the mall's entryway.

Will the injured customer be likely to recover damages?

- A. No, because no other customers had previously slipped on the floor.
- B. No, because the construction company will likely be considered an independent contractor.
- C. Yes, because the customer intended to make a purchase at the mall.
- D. Yes, because the mall owner's duty to maintain safe conditions was nondelegable.

Explanation:

Nondelegable duties

(duties that cannot be assigned to another to avoid liability)

Maintain safe conditions on premises open to public (eg, store, restaurant)

Safely perform activities that:

are abnormally or highly dangerous

infringe on private property right (eg, nuisance, trespass)

are regulated by law *or*

are conducted in public place

A principal is generally not vicariously liable for torts committed by its **independent contractor**—one who performs work for another outside an employment relationship. However, **vicarious liability will be imposed** if the independent contractor's work breaches a **nondelegable duty** owed by the principal—a duty of care that cannot be assigned to a third party to avoid liability. This includes the **duty of a land possessor** who holds his/her land open to the public to **keep the premises safe for business visitors**.

Here, the construction company was likely an independent contractor since it was hired for a one-time job—to design and construct a new entryway to the mall. And though the mall owner ordinarily would not be liable for an independent contractor's torts, the mall owner had a nondelegable duty to maintain safe conditions for its customers **(Choice B)**. Since the construction company's work—selecting a slippery material for the floor—breached that duty, the mall owner is vicariously liable for the customer's resulting injuries.

(Choice A) Proof of prior accidents could help show that the entryway was negligently designed. But such proof is not required here since (1) land possessors have a nondelegable duty to use reasonable care to discover dangerous conditions on the land before an injury occurs and (2) the construction company's negligence is stipulated above.

(Choice C) Since the mall was held open to the public, the mall owner had a nondelegable duty to maintain safe premises for *all* business visitors (eg, window shoppers)—not just those intending to make a purchase. Therefore, the customer's intention to make a purchase is irrelevant to her recovery.

Educational objective:

A principal is generally not vicariously liable for its independent contractor's torts. However, vicarious liability will be imposed when the independent contractor breaches a nondelegable duty of care owed by the principal—eg, a land possessor's duty to keep the premises safe for business visitors.

References

Restatement (Third) of Torts: Liab. for Physical & Emotional Harm § 57 (Am. Law Inst. 2012)
(no vicarious liability generally for independent contractors).

Restatement (Second) of Torts § 344 (nondelegable duty to keep business premises safe).

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