

COURT ADDRESSES ISSUES IN DRAM SHOP/PREMISES LIABILITY CASE

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McMurtry, et al. v. Weatherford Hotel Inc., et al.

Ct. Appeals, Div. [One, January 10, 2013](#)

Authored by the JSH Appellate Team

Decedent got drunk at the Weatherford Hotel bar. She was cut off and escorted back to her room. The window in decedent's room was approximately 3 feet wide, 40 inches tall, and had no locks. Outside the window, a balcony wrapped around the hotel, but extended only partially across the bottom of the window, leaving a 12 inch gap. Decedent crawled through the window and fell through the gap to her death.

The court first held that Plaintiff's expert was qualified under Rule 702 to testify on both the premises and dram shop theories of liability. His testimony flowed from his "years of experience in the hospitality industry dealing with safety and liability issues in public accommodations." On the premises liability claim, as to whether the danger was "open and obvious," the court found genuine issues of material fact on whether the Hotel could reasonably anticipate the harm, given the 12 inch gap, signs in the hotel inviting guests to smoke "on the balcony," and the absence of window locks. The Court further held that whether the Decedent trespassed onto the balcony was a jury question. Guests were invited at check-in to smoke on the balcony; the signage in decedent's room invited guests to smoke on the balcony; and the Hotel was aware of instances in which guests had sat on window ledges to smoke.

On the dram shop claim, the court held that whether the Hotel exercised reasonable care in escorting Decedent to her room—given the presence of the potentially hazardous window configuration—was an issue of material fact. A juror might conclude that the accident was foreseeable.

Finally the court reversed the trial court's denial of an adverse inference instruction. Hotel staff had deleted the bar's surveillance footage, which would have shown the accident. The Hotel argued that the log prepared by the staff based on the footage was sufficient, and that the deletion of the footage was an inadvertent mistake. The Court disagreed, holding that an adverse inference instruction was warranted. The Court reasoned that the moment staff learned of the accident, they should have anticipated a lawsuit and preserved the evidence. Consequently, the Court vacated the denial of an adverse inference instruction and ordered that it be reconsidered on remand.