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INSURANCE AND CORPORATE LIABILITY DEFENSE REPORTER

2016 PREMISES LIABILITY - SPECIAL EDITION

Your House Counsel® and its Member Firms are very pleased to provide you with this updated Premises Liability Special Edition of the Your House Counsel® Insurance and Corporate Liability Defense Reporter.

This Special Edition of the I&CLDR is focused on how similar issues at retail establishments weigh in very differently across the country in the many jurisdictions of our Member Firms.

We look forward to introducing you to our new Regional Editions of the I&CLDR. These will provide regional snapshots of notable Insurance and Corporate Liability Defense issues and cases as well as news from our local Member Firms.

And as the Your House Counsel® membership continues to grow, so too shall the number of jurisdictions and cases provided to you by the I&CLDR.

*Howard S. Shafer, President
Your House Counsel®*

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YHC NEWS

IN THE NEWS

Over seven thousand hail damage lawsuits were filed in Hidalgo County, Texas as a result of a series of storms in 2012, of which over 4,000 were reportedly settled. On March 1, 2015, in the first hail damage lawsuit taken to trial in that county, a unanimous jury verdict was returned in favor of defendant National Lloyds Insurance Company. Scot Doyen of Your House Counsel Member Firm Doyen Sebesta was counsel for National Lloyds.

A.M. BEST WEBINARS FEATURES TWO YHC SPEAKERS ON DRONE ISSUES

Bruce Raymond and Tim Crawley were featured by A.M. Best in a recent two-part webinar series on the Legal, Claims and Risk Issues of Drones, as part of a panel of experts from the legal and insurance professions, available online here:

Part I - August 5, 2015: <http://www.ambest.com/webinars/drone15>

Part II - September 22, 2015: <http://www.ambest.com/webinars/drone215>

ACE 2016

From June 22 to 24, 2016 several of our Member Firms attended the annual America's Claims Event in Minneapolis, MN. Your House Counsel is proud to be a Platinum Sponsor, and presented the Featured Session 'Out of Control Gun Violence - The Increase of Liability for Third-Party Violence and Criminal Acts' on June 24th.

INTERDRONE 2016

From September 7 to 9, 2016 YHC Member Firms will be at the annual International Drone Conference and Exposition "InterDrone 2016" in Las Vegas. Your House Counsel is proud to be a Silver Sponsor. Please come visit us at Booth 1407, across from the DJI pavilion.

FEATURED FIRM



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Landrum & Shouse, LLP traces its history from pre-World War II legal service by its founding partners. For nearly 40 years following military service, the late Weldon Shouse and the late Charles Landrum, Jr., together with their firms, practiced law throughout Kentucky before merging in 1984 to become what is now known as Landrum & Shouse, LLP. The resulting firm was built upon the well-deserved reputations of its founders as experienced, knowledgeable and hard-working Lexington civil litigation lawyers.

A high percentage of our partners have been named as Super Lawyers. Others have received AV ratings in Martindale-Hubbell's peer-rating system. Still others are members of legal organizations such as the Trucking Insurance Defense Association (TIDA) and the National Railroad Trial Counsel organization.

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In each area of practice, the firm is committed to zealous advocacy of the clients' best interests without compromising personal attention and effective representation. Members of the firm have taken leadership roles in key local and national legal organizations. Additionally, the attorneys are involved in numerous social and civic activities and devote considerable time to bettering the public perception of the profession through speaking and teaching engagements.

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Slip & Fall In General

It is well settled that a storekeeper is under a duty to exercise reasonable care in providing and maintaining reasonably safe premises for the use of his customers. *Clayton v. Kroger Co.*, 455 So.2d 844 (Ala.1984). As this Court stated in *Clayton*, "[T]he storekeeper is not an insurer of the customer's safety, but is liable for injury only in the event he negligently fails to use reasonable care in maintaining his premises in a reasonably safe condition.

In a slip and fall action, it is necessary for the plaintiff to prove:

- (a) that the foreign substance slipped upon was on the floor a sufficient length of time to impute constructive notice to the defendant, or
- (b) that the defendant had actual notice of the substance's presence on the floor, or
- (c) that the defendant was delinquent in not discovering

and removing the foreign substance. In the absence of such proof, the plaintiff has not made out a prima facie case that the defendant was negligent in the maintenance of its floors. *S.H. Kress & Co. v. Thompson*, 267 Ala. 566, 103 So.2d 171 (1957).

Slip & Fall On Snow/Ice

Store owner had no duty to place doormats and was not guilty of any negligence resulting in customer's slip and fall just inside door, where rain had not accumulated in unusual amount, and customer alleged no design or construction abnormality. *Wal-Mart Stores v. White*, 476 So.2d 614 (1985).

Absent unusual accumulation or other circumstances, presence of rainwater on floor is not breach of due care by owner of building frequented by public. *Id.*

"When it rains, surfaces naturally become more slippery than usual—a fact with which a customer is sufficiently familiar. To require a storekeeper to keep a floor completely

dry during a rainstorm or to hold him responsible for every slick place due to tracked-in rain water would impose an unreasonable standard of care and would, in effect, make him an insurer of the customer's safety. Of course, each case must be examined in light of its particular circumstances, and where there are unusual accumulations of rain water or other circumstances, due care may require that the storekeeper take affirmative measures such as mopping, applying anti-slip compounds, or posting warnings." *Terrell v. Warehouse Groceries*, 364 So.2d 675 (Ala.1978)

Duty owed to invitee by landowner is to keep premises in reasonably safe condition and, if premises are unsafe, to warn of hidden defects and dangers that are known to the landowner but that are hidden or unknown to the invitee; however, landowner is not liable to invitees for harm caused to them by any activity or condition on land whose danger is known or obvious to them. *Hartzog v. Compass Bank*, 686 So.2d 325 (1996)

In order for dangerous condition on property to be "obvious" to invitee so that owner or occupier has no duty to warn of condition, that condition and risk must be apparent to and of type that would be recognized by a reasonable person in the position of invitee. *Id.* In order for a condition to be 'known' to a person, that person 'must be aware of the existence of the condition and must appreciate the danger it involves.'

Items Falling Off Shelves

"A store owner's duty is well-established. That duty is 'to exercise reasonable care to provide and maintain reasonably safe premises for the use of his customers.' *Maddox v. K-Mart Corp.*, 565 So.2d 14, 16 (Ala.1990). Consequently, injured 'plaintiffs must prove that the injury was proximately caused by the negligence of [the store owner] or one of its servants or employees. Actual or constructive notice of the presence of the substance [or instrumentality that caused the injury] must be proven before [the store owner] can be held responsible for the injury.' *Id.*"

No presumption of negligence arises from the mere fact of injury to the customer. The burden rests upon the plaintiff to show that the injury was proximately caused by the negligence of the storekeeper or one of its servants or employees. Actual or constructive notice of the presence of the

offending substance must be proven before the proprietor can be held responsible for the injury." *Cash v. Winn-Dixie Montgomery, Inc.*, 418 So.2d at 876

Evidence that shows merely a high frequency of accidents at a store is insufficient to establish that the store owner had knowledge of a specific dangerous condition at that store. *Wal-Mart Stores v. Manning*, 788 So.2d 116 (2000)

Parking Lot Defects

The duty of a premises owner to an invitee is limited to hidden defects which are not known to the invitee and would not be discovered by him in the exercise of ordinary care. *Browder v. Food Giant, Inc.*, 854 So.2d 594 (2002)

In *Browder v. Food Giant*, a depression and drainage pipe in grocery store parking lot constituted an open and obvious danger, and thus the store was not liable for injuries to patron who fell when her foot got caught in a hole in the pavement. The patron testified that the day of the fall was clear and sunny, that nothing obstructed her view of the depression, that she was not "looking for anything like that," and that she did not normally look in front of her while walking.

Assault

Although duty may be imposed on a business owner to take reasonable precautions to protect invitees from criminal attack, duty is imposed only when owner possesses actual or constructive knowledge that criminal activity that could endanger an invitee was a probability. *Bailey v. Bruno's Inc.*, 561 So.2d 509 (1990).

In *Bailey v. Bruno's Inc.*, evidence showing increase of amount of criminal activity in the area around supermarket, and evidence that the manager of supermarket had been negotiating with off-duty police officers for purpose of getting them to work as security guards was insufficient to impose duty on supermarket to take reasonable precautions to protect invitee from armed robbery which occurred in parking lot of supermarket. Police records revealed only seven incidents of violence or threats of violence in the 21-month period preceding assault on invitee, and an earlier assault occurred inside the store, not in the parking lot. Thus, the supermarket did not know that acts were occurring or were about to occur on the premises that posed an imminent probability of harm to invitees.



Elardo, Bragg & Rossi, P.C. represents primarily businesses, insurers and professionals through efficient and cost-effective litigation across Arizona and Southern California. We are known for our extensive experience in the insurance industry and civil litigation. Our practice encompasses insurance defense work in all areas, including personal and commercial litigation, construction defect, premises liability, products liability, bad faith, dram shop, professional liability and agribusiness, as well as the defense of large self-insureds.

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Slip & Fall In General

To establish a claim for negligence, a plaintiff must prove the following elements: "(1) a duty requiring the defendant to conform to a certain standard of care; (2) a breach by the defendant of that standard; (3) a causal connection between the defendant's conduct and the resulting injury; and (4) actual damages." *Gipson v. Kasey*, 214 Ariz. 141, 143, 150 P.3d 228, 230 (2007).

Whether there is a duty is a question of law, to be decided by the Court. *Markowitz v. Arizona Parks Board*, 146 Ariz. 352, 354, 706 P.2d 364, 366 (1985). Duty is the requirement to adhere to a standard of conduct in order to protect others against unreasonable risks of harm. In determining whether a duty exists, the Court focuses on the relationship between the individuals involved. *Id.*

For example, a "landlord is under a duty of ordinary care to inspect the premises when he had reason to suspect defects existing at the time of the taking of the tenancy and to either repair them or warn the tenant of their existence. In other words, *he is under the duty to take those precautions for the safety of the tenant as would be taken by a reasonably prudent man under similar circumstances.*" *McLeod By & Through Smith v. Newcomer*, 163 Ariz. 6, 8, 785 P.2d 575, 577 (Ct. App. 1989).

A person's status as an invitee (highest), licensee, or trespasser (lowest) determines the degree of care owed. A "licensee" (or social guest), is on the property by expressed or implied invitation for a social purpose. A property owner owes a licensee "no duty other than to refrain from knowingly letting [licensee] run upon a hidden peril or wantonly or will-

fully causing him harm. However, the rule is that a host who knows of a concealed danger upon the premises is guilty of negligence if he permits the guest [licensee], unwarned of the peril, to come in contact therewith, and he may be held liable to the guest for an injury thus sustained. *Shannon v. Butler Homes, Inc.*, 102 Ariz. 312, 316, 428 P.2d 990, 994 (1967).

A “trespasser” - on the property without actual or implied permission - is owed no duty “unless the landowner has been guilty of some willful or wanton disregard for the plaintiff’s safety.” *Webster v. Culbertson*, 158 Ariz. 159, 161, 761 P.2d 1063, 1065 (1988).

An invitee is on the property by express or implied invitation for a business purpose. It is well-settled in Arizona “that the proprietor of a business is under an affirmative duty [of reasonable care] to make the premises reasonably safe for use by invitees; however, he is not an insurer of their safety and is not required to keep the premises absolutely safe.” *Preuss v. Sambo’s of Arizona, Inc.*, 130 Ariz. 288, 289, 635 P.2d 1210, 1211 (1981).

In the slip and fall context, the mere incidence of a slip and fall on the business premises is insufficient to establish negligence on the part of the proprietor. Thus, a plaintiff must prove the proprietor had notice of the dangerous condition by either of the following ways: “1) that the foreign substance or dangerous condition (was) the result of defendant’s acts or the acts of his servants, or 2) that defendant had actual knowledge or notice of the existence of the foreign substance or dangerous condition, or 3) that the condition existed for such a length of time that in the exercise of ordinary care the proprietor should have known of it and taken action to remedy it (i. e., constructive notice).” *Id.* (quoting *Walker v. Montgomery Ward & Co., Inc.*, 20 Ariz. App. 255, 258, 511 P.2d 699, 702 (1973)).

Note, a “dangerous condition” is defined as a one which creates “an unreasonable risk of harm.” *Andrews v. Fry’s Food Stores of Arizona*, 160 Ariz. 93, 96, 770 P.2d 397, 400 (Ct. App. 1989). Therefore, the general rule follows that a property owner owes no duty of reasonable care to safeguard or warn of a hazardous condition which is “open and obvious,” i.e., it is reasonably expected that those on the premises will see and avoid it. *Tribe v. Shell Oil Co., Inc.*, 133 Ariz. 517, 519, 652 P.2d 1040, 1042 (1982).

However, if the circumstances are such that the “proprietor should anticipate [foreseeability of harm] the harm from the condition despite its obviousness,” then the proprietor still owes a duty of reasonable care to discover and correct or warn of the condition, despite the injured person’s knowledge of the condition. *Id.*

In addition, Arizona has adopted the “Mode-of-Operation” Rule. This rule provides that under certain circumstances, even where a proprietor has no actual or constructive knowledge of the unreasonably dangerous condition, a proprietor

may be held liable, if the business adopted a particular method of operation from which it could be reasonably anticipated that unreasonably dangerous conditions would regularly arise. *Chiara v. Fry’s Food Stores of Arizona, Inc.*, 152 Ariz. 398, 400-1, 733 P.2d 283, 285 (1987) (replaces the “notice” requirement with “existence” of a dangerous condition.).

As a result, the majority of cases upholding the mode-of-operation rule have involved open or “self-service” food displays. E.g., *Bloom v. Fry’s Food Stores, Inc.*, *Bloom v. Fry’s Food Stores*, 130 Ariz. 447, 636 P.2d 1229 (App.1981); *Tom v. S.S. Kresge Co.*, 130 Ariz. 30, 633 P.2d 439 (App.1981) (grapes); *Tom v. S.S. Kresge Co.*, 130 Ariz. 30, 633 P.2d 439 (App.1981) (soft drinks); *Rhodes v. El Rancho Markets*, 9 Ariz.App. 576, 454 P.2d 1016 (1969) (lettuce); *Jasko v. F.W. Woolworth Co.*, 177 Colo. 418, 494 P.2d 839 (1972) (pizza sold by the slice); *Gonzales v. Winn-Dixie Louisiana, Inc.*, 326 So.2d 486 (La.1976) (glass bottle of olive oil); *Bozza v. Vornado, Inc.*, 42 N.J. 355, 200 A.2d 777 (1964) (self-service cafeteria); *Ciminski v. Finn Corp.*, 13 Wash.App. 815, 537 P.2d 850 (1975) (self-service cafeteria).

The test for whether conduct is negligent is whether there is a foreseeable risk of injury from the conduct. *Donnelly Const. Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 187, 677 P.2d 1292, 1295 (1984). Therefore, the general rule to be applied is that where reasonable people could differ as to whether the danger of some injury is foreseeable, the question of negligence is one of fact for a jury to decide. *City of Phoenix v. Weedon*, 71 Ariz. 259, 264, 226 P.2d 157, 160 (1950); *Beach v. City of Phoenix*, 136 Ariz. 601, 603, 667 P.2d 1316, 1319 (1983).

Note, under some circumstances a property owner may be liable for the negligent actions of an independent contractor. *Ft. Lowell-NSS Ltd. P’ship v. Kelly*, 166 Ariz. 96, 104, 800 P.2d 962, 970 (1990).

Slip & Fall On Foreign Substance

A business “has an affirmative duty to make and keep [its] premises reasonably safe for customers.” *Contreras v. Walgreens Drug Store No. 3837*, 214 Ariz. 137, 138, 149 P.3d 761, 762 (Ct. App. 2006).

The Arizona courts have consistently held that a plaintiff must show that the defective condition had been in existence for a sufficient length of time prior to the injury for the proprietor, in the exercise of reasonable care, to find and correct it, or take remedial action. *Walker v. Montgomery Ward & Co., Inc.*, 20 Ariz. App. 255, 259, 511 P.2d 699, 703 (1973).

Further, Arizona has found it insufficient that a determination of defendant’s culpability be “based solely upon evidence of defendant’s housekeeping practices, and to eliminate the requirement that plaintiff make at least some showing of how long the substance had been on the floor. Such a test is not the law in Arizona, nor is it the law in a majority of the other

jurisdictions.” *Id.*

“A greater duty rests upon one engaged in selling merchandise, to discover whether a dangerous condition exists on the premises, than devolves upon his invitee who has a right to assume that the premises are reasonably safe for her use.” *El Grande Mkt. No. Two, Inc. v. McAlpin*, 13 Ariz. App. 302, 303, 475 P.2d 961, 962 (1970) (citing *Glowacki v. A. J. Bayless Markets*, 76 Ariz. 295, 263 P.2d 799 (1953)).

Were it not for the estimate of time [30-40 minutes] that the apricot pit had been on the ramp, given by the store manager, evidence concerning the defendant’s constructive knowledge may well have been deficient. *Id.* at 962 (Held: defendant liable to plaintiff for injuries sustained as a result of a slip and fall on an apricot peach on store’s entrance ramp.).

Defendant store was not liable to plaintiff for injuries sustained from a slip and fall on liquid that spilled on the store’s floor. Evidence that spills occurred twice a week in a store open 24 hours a day, without any showing of location of spills or hazard they presented to customers, was insufficient to establish regularity of hazardous condition to render store liable, under mode-of-operation rule. *Contreras v. Walgreens Drug Store No. 3837*, 214 Ariz. 137, 149 P.3d 761 (Ct. App. 2006).

The jury is not permitted to speculate as to whether the foreign object had been present for a length of time sufficient to put defendant on constructive notice of its presence. “The pebble could have been deposited ten seconds before the plaintiff fell, or ten minutes, or two hours and ten minutes. There is no evidence from which the jury could infer that one period of time was more reasonable than any other. Only if it had been there for a sufficient length of time for the defendant, in the exercise of reasonable care, to find and remove it, could the defendant be found negligent. Submission of these facts to the jury would require the jury to guess whether the pebble had been on the stairway for a sufficient length of time. This cannot be permitted.” *Preuss v. Sambo’s of Arizona, Inc.*, 130 Ariz. 288, 290, 635 P.2d 1210, 1212 (1981) (quoting *McGuire v. Valley Nat. Bank of Phoenix*, 94 Ariz. 50, 52-53, 381 P.2d 588, 589 (1963)).

Proprietor of business was not liable for injuries sustained by invitee when she slipped and fell on a rock outside entrance to business premises. Plaintiff offered no evidence which could establish that the rock’s presence was caused by the defendant or one of its agents, there was no indication that defendant had actual notice of presence of rocks on entrance ramp on day of accident, and there was no indication of length of time that rock had been present on entrance ramp. *Id.*

Where the supervisor and manager of defendant’s gas station testified that oil spills regularly occurred at the gas station and that defendant had established uniform guidelines for cleaning up these spills, these statements coupled with the visible location of the danger were sufficient under

the mode-of-operation rule “to raise inferences from which a reasonable jury might conclude either that a [defendant’s] employee found the spill and acted unreasonably by putting a paper towel over it rather than cleaning it up, or that a [defendant’s] employee acted unreasonably by not finding an oil spill with a paper towel over it right where people walk into the store.” *Shuck v. Texaco Ref. & Mktg., Inc.*, 178 Ariz. 295, 297, 872 P.2d 1247, 1249 (Ct. App. 1994).

The mode-of-operation rule was not applicable where a hospital visitor slipped and fell on spilled milk. *Borota v. Univ. Med. Ctr.*, 176 Ariz. 394, 395, 861 P.2d 679, 680 (Ct. App. 1993). The evidence was insufficient to establish that third-party interference was reasonably foreseeable where the spill occurred several floors away from the cafeteria and there was no evidence that patients’ food trays were delivered from the elevator where visitor slipped. *Id.* at 396.

Where plaintiff slipped on a slippery substance near the deli counter in a grocery store, the mode-of-operation rule “turns to what constitutes sufficient notice that such an occurrence would occur in the store on a ‘regular basis’ to survive summary judgment. Clearly, it does not require specific knowledge of a specific risk.” *Blancas v. Carniceria Puerto Del Torro No. 2, Inc.*, 1 CA-CV 11-0218, 2013 WL 2325402 *5 (Ariz. Ct. App. May 28, 2013).

Slip & Fall On Snow/Ice

“The general test for whether a defendant’s conduct breached the standard of care is whether a foreseeable risk of injury existed as a result of defendant’s conduct. *Cathey v. Hassayampa Cmty. Homeowners’ Ass’n, Inc.*, 1 CA-CV 08-0671, 2009 WL 4263338 (Ariz. Ct. App. Nov. 27, 2009).

Genuine issues of material fact as to reasonableness of snow-removal company’s decision to leave its truck and backhoe in middle of road while plowing roads in private subdivision precluded summary judgment in favor of company in homeowner’s personal injury action, which arose from personal injuries allegedly sustained when homeowner purportedly slipped on ice while attempting to guide motorist around backhoe. *Id.* at *3. Reasonable people could disagree about whether company took adequate precautions in leaving its snow removal vehicles in the road. *Id.* at *4.

“[I]t is not completely unreasonable for a passenger to exit a vehicle and assist the driver in turning or reversing a vehicle in tight or narrow spaces. Arguably, someone slipping as they exit their car was within the scope of the risk created by Grady’s conduct, particularly in these snowy and icy conditions.” *Id.* at *5.

Summary judgment is improper where issue regarding the “[location] the snow removal vehicles were parked, the exact condition of the road at the scene of the accident, the width of the road and how difficult it would have been to drive the car in reverse” are in dispute. *Id.*

Where the defendant is a governmental body or municipality in Arizona the applicable law in regards to maintenance

of roadways is “that which is reasonable under the circumstances, that the applicable standard of care is that of an ordinary prudent man, and that the governmental body is not an insurer of travelers on its roadways.” *Walker v. Coconino Cnty.*, 12 Ariz. App. 547, 549, 473 P.2d 472, 474 (1970) (Note, there is a split in authority amongst jurisdictions concerning the duty of a state or municipality in the case of ‘natural accumulations’ of ice on the roadway.).

A natural accumulation occurs where rain or snow falls on the roadway, or runoff from thawing snow flows across the street, and subsequently freezes causing ice to form on the road. In such a case the moisture on the roadway results wholly from the elements and is not caused by any act of the governmental body. *Id.*

Parking Lot Defects

Layout of store parking lot and the traffic therein was an open and obvious condition. *Flowers v. K-Mart Corp.*, 126 Ariz. 495, 497, 616 P.2d 955, 957 (Ct. App. 1980)

Store did not breach its duty to customers, who were injured upon being struck by an automobile on store’s parking lot, by failing to provide crosswalk for their use across driveway separating store from its parking lot, because it had no duty to warn customers, who saw the vehicle, against an open and obvious dangers. *Id.* at 497-98.

Further, there must be some causal connection between the parking lot layout and the accident. *Id.* at 959. Where “the sole cause of the accident was the failure of [defendant] to see [plaintiff], perhaps, her failure to see the car. It does not appear that any marking on the surface of the parking lot would or could have had any relationship to the accident.” *Id.*

Summary judgment precluded where defendant hospital failed to maintain a “stop” traffic control signal which had been painted at the end of an aisle of its parking lot. Evidence indicated that the plaintiff, a pedestrian, had relied upon this sign on the roadway as he crossed over a driveway in the parking lot. However, a driver did not notice the markings and her vehicle struck the plaintiff. *Chernov v. St. Luke’s Hospital Medical Center*, 123 Ariz. 521, 601 P.2d 284 (1979).

Arizona has adopted the view that “an easement holder has a duty to act reasonably under the circumstances in its use of the servient estate, but ... the duty does not extend beyond the scope of that use.” *Timmons v. Ross Dress For Less, Inc.*, 2 CA-CV 2013-0053, 2014 WL 1153248 *1 (Ariz. Ct. App. Mar. 21, 2014).

Genuine issues of material fact existed as to scope of retailer’s duty to business invitees to maintain curb and steps between parking lot and elevated area in front of retailer’s store, where defendant held non-exclusive easement so that its invitees could access its store, for injuries she sustained when plaintiff tripped and fell on curb while leaving retailer’s store. *Id.*

Court granted summary judgment where plaintiff, who

frequently had attended baseball games, had been injured by a foul ball at a baseball stadium after choosing to sit in an unscreened area that did not offer protection from foul balls, because “as a matter of law [the stadium owners] complied with their duty to protect spectators from an unreasonable risk of being injured by a foul ball”; to hold otherwise “would expose [them] to liability for injuries sustained by those spectators who choose to sit in unscreened areas, despite the open and obvious risk of sitting in such areas and the availability of a protected alternative.” *Bellezzo v. State*, 174 Ariz. 548, 551-54, 851 P.2d 847, 851 (Ct. App. 1992)

Restatement section removing liability from vendor of property after vendee took possession did not completely relieve apartment owners and property managers of liability for injury caused when tenant stepped in a pothole in the parking lot four days after receiver took possession and control of property; to relieve owners of liability completely would clash with principles of comparative fault and comparative contribution. *Fehribach v. Smith*, 200 Ariz. 69, 22 P.3d 508 (Ct. App. 2001).

Assault

As a general matter, there is no duty to prevent a third person from causing physical harm to another unless the defendant stands in a special relationship with the third person or with the victim that gives the victim a right to protection. *Barkhurst v. Kingsmen of Route 66, Inc.*, 1 CA-CV 13-0166, 2014 WL 1745870 (Ariz. Ct. App. May 1, 2014) (citing Restatement (Second) of Torts § 315 (1965); see also *Gipson v. Kasey*, 214 Ariz. 141, 150 P.3d 228 (2007).

Some examples of special relationships include “a parent’s duty to control a child, a master’s duty to control a servant, a landowner’s duty to control a licensee, and the duty of caretakers in charge of individuals with dangerous propensities to control those individuals.” *Id.*

“A special or direct relationship, however, is not essential in order for there to be a duty of care. In the absence of a special or direct relationship, public policy considerations may support the existence of a legal obligation.” *Id.*

A.R.S. § 4-312(B) does not immunize a “social host” from liability for serving alcohol to a minor who became intoxicated and injured an innocent third party. “Arizona courts, therefore, will entertain an action for damages against a non-licensee who negligently furnishes alcohol to those under the legal drinking age when that act is a cause of injury to a third person.” *Estate of Hernandez by Hernandez-Wheeler for & on Behalf of Hernandez v. Arizona Bd. of Regents*, 177 Ariz. 244, 256, 866 P.2d 1330, 1342 (1994)

In Arizona, a liquor licensee has a duty “to exercise affirmative, reasonable care in serving intoxicants to patrons who might later injure themselves or an innocent third party, whether on or off the premises.” *Patterson v. Thunder Pass, Inc.*, 214 Ariz. 435, 438, 153 P.3d 1064, 1067 (Ct. App. 2007)

To recover for negligence, a plaintiff also must show that the liquor licensee's negligent conduct was the proximate cause of his injury. *Hebert v. Club 37 Bar*, 145 Ariz. 351, 353, 701 P.2d 847, 849 (Ct. App. 1984). Similarly, to recover under Arizona's "dramshop statute," A.R.S. § 4-311 (Supp.2009), the plaintiff must show that a licensee sold liquor to an obviously intoxicated person and that person's consumption of the liquor was a proximate cause of the plaintiff's injury.

Whether proximate cause exists is usually a question for the jury, however summary judgment is proper where reasonable people could not differ. *Robertson v. Sixpence Inns of Am., Inc.*, 163 Ariz. 539, 546, 789 P.2d 1040, 1047 (1990). "The proximate cause of an injury is that which, in a natu-

ral and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred." *Id.* "An intervening cause is an independent cause that intervenes between defendant's original negligent act or omission and the final result and is necessary in bringing about that result." *Id.*

An intervening cause becomes a superseding cause, when the intervening cause was "unforeseeable by a reasonable person in the position of the original actor and when, looking backward, after the event, the intervening act appears extraordinary." *Ontiveros v. Borak*, 136 Ariz. 500, 506, 667 P.2d 200, 206 (1983).

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Slip & Fall In General

To establish the owner’s liability on a negligence theory, the plaintiff must prove duty, breach, causation and damages. *Ortega v. Kmart Corp.*, 26 Cal. 4th 1200, 1205-06, 36 P.3d 11, 14 (2001)).

It is well-settled in California that although a store owner or possessor of land is not an insurer of the safety, “the owner does owe [patrons] a duty to exercise reasonable care in keeping the premises reasonably safe.” *Moore v. Wal-Mart Stores, Inc.*, 111 Cal. App. 4th 472, 476, 3 Cal. Rptr. 3d 813, 816 (2003) (citing *Ortega v. Kmart Corp.*, 26 Cal. 4th 1200, 1205, 36 P.3d 11, 14 (2001)).

“A store owner exercises ordinary care by making reasonable inspections of the portions of the premises open to customers.” The degree of care is to commensurate with the

risks involved. *Id.* (If the store invites customers to “inspect, remove, and replace” goods on shelves, the exercise of ordinary care may require precautions and more frequent inspections.) The property owner must exercise the care required of a reasonably prudent person under similar circumstances. *Id.*

However, if an unsafe condition of the property is so “open and obvious” that a person could reasonably be expected to discover it, then the property owner does not have a duty to warn or remedy the dangerous condition. *Osborn v. Mission Ready Mix*, 224 Cal. App. 3d 104, 121-22, 273 Cal. Rptr. 457, 468 (Cal. Ct. App. 1990). Note, this is not true in all cases, and the property owner may have a duty to remedy a dangerous condition, even though there is no duty to warn thereof, if there is a “foreseeability” of injury due to the conditions. *Id.*

Where through the exercise of ordinary care a store owner knows of, or should have discovered a hazardous condition, the proprietor must either cure or repair the defect to make the premises reasonably safe or provide an adequate warning of the “foreseeable” danger. *Williams v. Carl Karcher Enterprises, Inc.*, 182 Cal. App. 3d 479, 488, 227 Cal. Rptr. 465, 469 (Ct. App. 1986) disapproved on other grounds by *Soule v. Gen. Motors Corp.*, 8 Cal. 4th 548, 882 P.2d 298 (1994).

Note, however, a property owner’s duty of care can extend beyond the limits of his property if the landowner’s property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site. *Barnes v. Black*, 71 Cal. App. 4th 1473, 1478, 84 Cal. Rptr. 2d 634, 637 (1999).

Further, a person controls property that he or she does not own or lease when he or she uses the property as if it were his or her own. *Contreras v. Anderson*, 59 Cal. App. 4th 188, 197-98, 69 Cal. Rptr. 2d 69, 74 (1997). “The crucial element is control.” *Salinas v. Martin*, 166 Cal. App. 4th 404, 414, 82 Cal. Rptr. 3d 735, 741 (2008).

A store owner has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect the premises. The degree of care is to commensurate with the risks involved. *Id.* (If the store invites customers to “inspect, remove, and replace” goods on shelves, the exercise of ordinary care may require precautions and more frequent inspections.) The property owner must exercise the care required of a reasonably prudent person under similar circumstances. *Id.*

In slip and fall cases order to establish liability, the plaintiff must prove that the property owner had either actual or constructive knowledge of the hazardous condition. *Id.* Constructive knowledge means the hazardous condition “was present for a sufficient period of time to charge the owner with constructive knowledge of its existence.” *Id.* In such a case the plaintiff has the burden of proving that the property owner had “notice of the defect in sufficient time to correct it.” *Id.* The plaintiff can “raise an inference that the condition existed long enough” with evidence that the site/location where the dangerous condition existed “had not been inspected within a reasonable period of time.” *Id.* at 477.

Circumstantial evidence may be used to establish constructive notice; however, mere speculation and conjecture with respect to how long a dangerous condition has existed are insufficient to satisfy a plaintiff’s burden. *Ortega*, 26 Cal. 4th at 1206. Circumstantial evidence “that an inspection had not been made within a particular period of time prior to an accident may warrant an inference that the defective condition existed long enough so that a person exercising reasonable care would have discovered it.” *Id.* at 1210.

Where the dangerous or defective condition has been created by reason of his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the

defective or dangerous condition. Under such circumstances knowledge thereof is imputed to him. *Hatfield v. Levy Bros.*, 18 Cal. 2d 798, 806, 117 P.2d 841, 845 (1941). Where “the evidence is such that a reasonable inference can be drawn that the condition was created by employees of the [defendant], then [the defendant] is charged with notice of the dangerous condition.” *Getchell v. Rogers Jewelry*, 203 Cal. App. 4th 381, 385, 136 Cal. Rptr. 3d 641, 644 (2012).

In addition, note that California is not a “mode of operation” state and has expressly rejected to adopt such a theory. “A store owner’s choice of a particular ‘mode of operation’ does not eliminate a slip and fall plaintiff’s burden of proving the owner had knowledge of the dangerous condition that caused the accident. Moreover, it would not be prudent to hold otherwise. Without this knowledge requirement, certain store owners would essentially incur strict liability for slip and fall injuries, i.e., they would be insurers of the safety of their patrons. For example, whether the french fry was dropped 10 seconds or 10 hours before the accident would be of no consequence to the liability finding.” *Moore*, Cal. App. 4th at 479.

The general provides that “a landlord owes a duty of care to a tenant to provide and maintain safe conditions on the leased premises.” *Portillo v. Aiassa*, 27 Cal. App. 4th 1128, 1134, 32 Cal. Rptr. 2d 755, 758 (1994). This duty includes taking reasonable steps to secure common areas under the landlord’s control. *Ann M. v. Pac. Plaza Shopping Ctr.*, 6 Cal. 4th 666, 675, 863 P.2d 207, 212 (1993) disapproved on other grounds by *Reid v. Google, Inc.*, 50 Cal. 4th 512, 235 P.3d 988 (2010).

In addition, “a lessor who leases property involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is transferred so as to prevent any unreasonable risk of harm to the public who may enter.” *Portillo*, 27 Cal. App. 4th at 1134; See also *Mora v. Baker Commodities, Inc.*, 210 Cal. App. 3d 771, 781, 258 Cal. Rptr. 669, 675 (Ct. App. 1989) (Even where a commercial landlord executes a contract (or renews a lease) which requires the tenant to maintain the property in a certain condition, the landlord is obligated at the time the lease is executed to take reasonable precautions to avoid unnecessary danger.).

“[W]here a landlord has relinquished control of property to a tenant, a ‘bright line’ rule has developed to moderate the landlord’s duty of care owed to a third party injured on the property as compared with the tenant who enjoys possession and control.” *Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412. Therefore, in order for the landlord to be held liable the plaintiff must show that the landlord had actual knowledge of the dangerous condition in question, as well as the right and ability to cure the condition. *Id.*

Lastly, under the doctrine of non-delegable duty, a landlord cannot escape liability for failure to maintain property in a

safe condition by delegating the duty to an independent contractor. *Srithong v. Total Inv. Co.*, 23 Cal. App. 4th 721, 726, 28 Cal. Rptr. 2d 672, 674 (1994).

Slip & Fall On Foreign Substance

Business and property owners have a duty to use ordinary care in keeping their premises reasonably safe for customers and those whose must pass over the premises. *Hale v. Safeway Stores*, 129 Cal. App. 2d 124, 276 P.2d 118 (3d Dist. 1954).

Therefore, store owners must exercise ordinary care to keep their aisles and passageways that are open to the customers in a reasonably safe condition as to not expose their business invitees to any hazards or dangers. *Craddock v. Kmart Corp.*, 89 Cal. App. 4th 1300, 1306, 107 Cal. Rptr. 2d 881, 885 (2001). Note that in a premises liability action, the jury may be specially instructed to consider that the attention of persons visiting public stores ordinarily is attracted by the display of wares offered for sale and may be absorbed by the transaction which they have in mind. *Id.*

The mere presence of a foreign substance on the floor is insufficient to establish liability. The plaintiff must show that the property owner had actual or constructive notice of the hazardous condition in sufficient time to remedy it. *Moore*, 3 Cal. Rptr. 3d at 816.

When dealing with a slippery substance, note that “slipperiness” is an elastic term and the fact that a floor is slippery does not necessarily mean that it is dangerous to walk on, rather “it is the degree of slipperiness that determines whether the condition is reasonably safe.” *Baker v. Manning’s Inc.*, 122 Cal. App. 2d 390, 394, 265 P.2d 96, 98 (1953).

Where evidence that supermarket operator had not inspected aisle where patron slipped on puddle of milk for at least 15 to 30 minutes, and that milk could have been on floor for as long as two hours, a reasonable inference was permitted for the patron’s premises liability action that the dangerous condition existed long enough for it to be discovered by the owner. *Ortega v. Kmart Corp.*, 26 Cal. 4th 1200, 1204, 36 P.3d 11, 15 (2001). Thus, the court held “it remains a question of fact for the jury whether, under all the circumstances, the defective condition existed long enough so that it would have been discovered and remedied by an owner in the exercise of reasonable care.” *Id.* at 1213.

Where plaintiff suffered injury as a result of a slip and fall on vomit in defendant’s store, the court held defendant liable. *Wills v. J.J. Newberry Co.*, 43 Cal. App. 2d 595, 111 P.2d 346 (1941). In this case several sales girls four to five minutes earlier to plaintiff’s incident witnessed another customer slip and fall but did nothing more than buzz for authority to come assess the situation. *Id.* at 599. While the evidence did not show that any of the sales girls or defendant had actual knowledge of the vomitus substance on the floor, the prior customers fall was an unusual occurrence that required immediate attention and therefore “the jury was justified

in concluding that defendant had [constructive] notice of a dangerous conditions in the aisle at least four minutes before the plaintiff was injured.” *Id.*

Slip & Fall On Snow/Ice

The distinction between artificial and natural conditions has been expressly rejected. “A (person’s) life or limb (or property) does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because that person has been injured by a natural, as opposed to an artificial, condition.” *Sprecher v. Adamson Companies*, 30 Cal. 3d 358, 371, 636 P.2d 1121, 1128 (1981).

Therefore, the question to be addressed is “whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances.” *Id.* Factors to be considered by the trier of fact include: “the likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor’s degree of control over the risk-creating condition.” *Id.* at 372.

Items Falling Off Shelves

Where the owner operates his store on a self-service plan, under which customers are invited to inspect, remove, and replace goods on the shelves, the exercise of ordinary care may require the owner to take greater precautions and make more frequent inspections than would otherwise be needed to safeguard against the possibility that such a customer may create a dangerous condition by disarranging the merchandise. *Bridgman v. Safeway Stores, Inc.*, 53 Cal. 2d 443, 448, 348 P.2d 696, 698 (1960).

Self-service store was liable for injuries sustained by customer when a stack of pumpkins collapsed and knocked her down. Defendant failed to exercise its due care to discover the dangerous conditions and to make reasonable inspections of its premises. *Id.*

Parking Lot Defects

Storekeeper was not liable for injuries sustained by invitee who slipped on melting ice cream and fell while walking on parking lot adjacent to store, absent any proof that storekeeper had constructive notice of existence of dangerous condition. *Perez v. Ow*, 200 Cal. App. 2d 559, 19 Cal. Rptr. 372 (1962).

“If the floodlights [on defendant’s property] were operated by the new clock [timer to control the operation of the lights] on the day of the accident, if [the clock/timer] failed to turn them on until after [plaintiff fell over cement island], if that caused a dark and dangerous condition in the parking lot, defendant was chargeable with knowledge of the fact.” *Gilbert v. Pessin Grocery Co.*, 132 Cal. App. 2d 212, 226, 282 P.2d 148, 160 (1955).

Generally a defendant will not be found liable in a “curb-jumping” case, however, three categories of cases exist where landowners have been found liable: 1) “cases where

the business provided no protection whatever from encroaching vehicles," 2) cases in which "the defendants had knowledge of prior similar incidents" and were found liable "even when there was some type of barrier," and 3) "cases where the building design required customers to await service by standing adjacent to a parking lot or driveway" because "if a car jumped the curb, there was a high likelihood that a pedestrian would be at the location." *Robison v. Six Flags Theme Parks Inc.*, 64 Cal. App. 4th 1294, 1303, 75 Cal. Rptr. 2d 838, 844 (1998) (citing *Jefferson v. Qwik Komer Mkt., Inc.*, 28 Cal. App. 4th 990, 994-95, 34 Cal. Rptr. 2d 171, 174 (1994) (provides an analysis of "curb-jumping" cases across the country.)

An amusement park created a dangerous condition to any foreseeable invitee where it placed the picnic area in the middle of its parking lot located at the end of heavily-traveled traffic lane, without barrier or curb to separate picnickers from traffic, and thus park had actual knowledge of danger to picnickers which required it, as reasonable landowner, to take protective measures so as to avoid injury to picnickers from an out-of-control automobile. *Robison*, 64 Cal. App. 4th at 1304-05.

This case arguably fell into the both first and third categories of liability. As to the first, [defendant] arguably provided "no protection whatever" from an oncoming car which fails to turn left at the appropriate point. As to the third, the design of the parking lot and picnic area required customers to assume a fixed position at the picnic table in the direct line of traffic. *Id.* at 1303.

Sidewalks

Generally, absent a statute providing otherwise, a landowner is under no duty to maintain in a safe condition an abutting public street or sidewalk. *Sexton v. Brooks*, 39 Cal. 2d 153, 156, 245 P.2d 496 (1952).

However, "an abutting owner is liable for the condition of portions of the public sidewalk which he has altered or constructed for the benefit of his property and which serve a use independent of and apart from the ordinary and accustomed use for which sidewalks are designed. The duty to maintain such portions of the street runs with the land, and a property owner cannot avoid liability on the ground that the condition was created by his predecessors in title." *Contreras*, 59 Cal. App. 4th at 202.

Therefore, in order to establish liability there must be (1) special benefit conferred to the owner's property, (2) alteration of sidewalk for a non-typical or non-ordinary purpose or use, and (3) the degree of exclusivity of benefit. *Id.*

Assault

A business proprietor is not an insurer of the safety of his invitees, "but he is required to exercise reasonable care for their safety and is liable for injuries resulting from a breach of this duty. The general duty includes not only the duty to inspect the premises in order to uncover dangerous con-

ditions, but, as well, the duty to take affirmative action to control the wrongful acts of third persons which threaten invitees where the occupant has reasonable cause to anticipate such acts and the probability of injury resulting therefrom." *Taylor v. Centennial Bowl, Inc.*, 65 Cal. 2d 114, 121, 416 P.2d 793, 797 (1966).

"A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure to the possessor to exercise reasonable care to: (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it." *Kentucky Fried Chicken of Cal., Inc. v. Superior Court*, 14 Cal. 4th 814, 823, 927 P.2d 1260, 1265 (1997) (California courts have adopted the Restatement (Second) of Torts, Section 344).

"Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection." *Id.* at 1265-66 (Comment f to section 344).

"Only when "heightened" foreseeability of third party criminal activity on the premises exists - shown by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location - does the scope of a business proprietor's special-relationship-based duty include an obligation to provide guards to protect the safety of patrons." *Delgado v. Trax Bar & Grill*, 36 Cal. 4th 224, 240, 113 P.3d 1159, 1168-69 (2005).

"Even when proprietors . . . have no duty . . . to provide a security guard or undertake other similarly burdensome preventative measures, the proprietor is not necessarily insulated from liability under the special relationship doctrine. A proprietor that has no duty . . . to hire a security guard or to undertake other similarly burdensome preventative measures still owes a duty of due care to a patron or invitee by virtue of the special relationship, and there are circumstances (apart from the failure to provide a security guard or undertake other similarly burdensome preventative measures) that may give rise to liability based upon the proprietor's special relationship." *Id.*

In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary

measures. *Frances T. v. Vill. Green Owners Assn.*, 42 Cal. 3d 490, 499-501, 723 P.2d 573, 577 (1986); *O'Hara v. W. Seven Trees Corp.*, 75 Cal. App. 3d 798, 802-03, 142 Cal. Rptr. 487, 489-90 (Ct. App. 1977).

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Slip & Fall In General

When a plaintiff is injured on the property of another as a result of the presence of a hazardous condition on the property or a dangerous condition created by the owner's conduct or activity on the property, the plaintiff must seek relief pursuant to the Colorado Premises Liability Act (the "PLA"). C.R.S. § 13-21-115. The express language of the PLA precludes a plaintiff from asserting any common law claims (e.g., negligence per se) or defenses (e.g., "open and obvious" doctrine). *Vigil v. Franklin*, 103 P.3d 322, 328 (Colo.

2004) (noting the broad reaching scope of the PLA, "in any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property, the landowner shall be liable only as provided in subsection (3).").

However, while the PLA abrogates other common law claims, several exceptions to this rule have been carefully carved out. For example, the General Assembly amended

the PLA in 2006 after the *Vigil* decision expressly authorizing the application of (to premises-liability cases) comparative negligence, pro-rata liability, and assumption of the risk. Further, the PLA does not necessarily abrogate other statutory claims. See *Robinson v. Legro*, 2014 CO 40 (Colo. 2014) (holding that the PLA does not abrogate liability created by Colorado's 2004 dog-bite statute); see also *S.W. v. Towers Boat Club, Inc.*, 2013 CO 72, 315 P.3d 1257 (rejecting that the PLA narrowed the attractive nuisance doctrine holding that "all children - regardless of their classification as trespassers, licensees, or invitees - may bring a claim under the attractive nuisance doctrine.").

The PLA applies to "landowners," however, this term is applied broadly and thus the key inquiry in determining if someone is a landowner is whether the party has a sufficient possessory interest in the property. Absent such a possessory interest, a party may be regarded as a landowner if it legally conducted an activity or created a condition on the property and is, therefore, responsible for that activity or condition. Colorado courts have relied on § 328E of the Restatement (Second) of Torts, "as articulating a broad view of who may be deemed a possessor of land." *Jordan v. Panorama Orthopedics & Spine Ctr., PC*, 2013 COA 87 cert. granted in part, 13SC545, 2014 WL 689560 (Colo. Feb. 24, 2014). That section defines a possessor of land as:

- (a) a person who is in occupation of the land with intent to control it,
- (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
- (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).

Where Landlord was contractually obligated to maintain the sidewalk where accident occurred, Tenant was not a landowner under the PLA because it did not have a sufficient possessory interest in the sidewalk nor did it conduct an activity on the sidewalk. *Id.* Also, a janitor contractor can be held responsible as a landowner under the PLA. *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612, 615 (Colo. App. 2003). Further, exclusive possession of the premises is not the "pivotal inquiry," so tenants of leased property can be held responsible as Landowners under the PLA. *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1219 (Colo. 2002). Defendants can be held to be landowners pursuant to their permit to graze sheep on the federal land where a dog-bite occurred. In reaching this decision the Court held that the defendants had "a legal entitlement to be on the property, and they were responsible for creating a condition, or conducting an activity, on the property that caused the injury." *Robinson v. Legro*, 2014 CO 40 (Colo. 2014). Defendant contractor may not be a landowner under the PLA even though defendant "legally 'created a condition' on the

premises by removing its safety signage" if City now owned the premises and "had fully reassumed responsibility for the conditions and activities at the site, as well as physical control of the medians at the time of the accident." *Collard v. Vista Paving Corp.*, 2012 COA 208, 292, P.3d 1232, 1238 (Colo. App. 2012) (emphasis added).

The PLA "applies to a personal injury action that meets four requirements: (1) the action involves the plaintiff's entry on the landowner's real property; (2) the plaintiff's injury occurred while on the landowner's real property; (3) the injury occurred by reason of the property's condition, activities conducted on the property, or circumstances existing on the property; and (4) the landowner breached the duty of care it owed the plaintiff under the PLA's classification of trespasser, licensee, or invitee." *Larrieu v. Best Buy Stores, L.P.*, 2013 CO 38 (Colo. 2013).

Further, the PLA affords broad protection to landowners, even where it is alleged by the plaintiff that the injuries sustained as a result of activities were not "inherently related to the land." *Id.* at 559. The PLA "applies to conditions, activities, and circumstances on the property that the landowner is liable for in its legal capacity as a landowner." *Id.*

In order for liability to be imposed upon a property owner, there must be a breach of a duty owed by the property owner to the injured persons. The PLA, provides the respective degree of duty of care that a landowner owes to trespassers, invitees, and licensees. *Id.* The status of a plaintiff is an issue to be determined by the court, but the ultimate issues of liability and damages are questions of fact for a jury, or if none, for the trial judge. § 13-21-115(4), (5).

Subsection 5 of the PLA explicitly defines the terms "invitee," "licensee," and "trespasser" as follows:

- (a) "Invitee" means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner's express or implied representation that the public is requested, expected, or intended to enter or remain.
- (b) "Licensee" means a person who enters or remains on the land of another for the licensee's own convenience or to advance his own interests, pursuant to the landowner's permission or consent. "Licensee" includes a social guest.
- (c) "Trespasser" means a person who enters or remains on the land of another without the landowner's consent.

C.R.S. § 13-21-115(5).

A trespasser is afforded the lowest level of protection and may recover only for damages "willfully or deliberately caused by the landowner." C.R.S. § 13-21-115(3)(a). A licensee, on the other hand, is afforded greater protection and may recover for damages caused "[b]y the landowner's unreasonable failure to exercise reasonable care with respect to dangers created by the landowner of which the landowner

actually knew; or [b]y the landowner's unreasonable failure to warn of dangers not created by the landowner which are not ordinarily present on property of the type involved and of which the landowner *actually knew*." C.R.S. § 13-21-115(b) (l), (ll) (emphasis supplied).

For an invitee, which is afforded the highest level of protection, the PLA requires proof that "(1) the landowner actually knew or should have known of the danger to the invitee and (2) the landowner unreasonably failed to exercise reasonable care to protect the invitee from that danger." *Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 570 (Colo. 2008). In determining whether the plaintiff was an invitee, it is not necessary for the landowner to have profited from the plaintiff's presence on the premises. *Wycoff v. Grace Cmty. Church of Assemblies of God*, 251 P.3d 1260, 1267-68 (Colo. App. 2010). "The principal distinction between an 'invitee' and a 'licensee' turns on whether that person's presence on the land was affirmatively invited or merely permitted." *Id.* Further, "anyone who receives implicit or explicit assurance of safety is entitled to the invitee status and the reasonable care that goes with it." *Id.*

In order to establish that a property owner "actually knew or should have known" of a hazardous condition requires a showing of actual or constructive knowledge. *Lombard*, 187 P.3d at 572. Constructive knowledge is defined as "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Id.* at 571.

The *Lombard* Court further clarified that "reasonable care is measured by what a person of ordinary prudence would or would not do under the same or similar circumstances. It is also well settled that a person of ordinary prudence would generally follow the law, and thus a court can adopt the standard of reasonable conduct from a statute or ordinance." *Id.* at 574.

For example, in an action brought by an invitee who slipped and fell while descending a ladder on the landowner's premises, *Lombard* held that in determining whether the landowner failed to exercise reasonable care, the plaintiff may present evidence showing the landowner violated a statute or ordinance. The defendant in this case built and maintained a unit that utilized a ladder to access a loft sleeping area rather than a staircase as required in the county's building code. *Lombard* found the statute was intended to protect the health and safety of the public. As such, the plaintiff was a member of the class the building codes were intended to protect. *Lombard*, 187 P.3d at 575-76 (remanding case because genuine issues of fact still existed). Note, however, not every violation of a building code results in a dangerous condition, or notice of a dangerous condition, within the meaning of the premises liability act. The Court reiterated in *Lombard v. Colorado Outdoor Educ. Ctr., Inc.*, 266 P.3d 412, 419 (Colo. App. 2011), that a "violation of a statute or ordinance may be considered merely as 'evidence

of a failure to exercise reasonable care.'" Thus, the trial court properly instructed the jury that "[i]f you find that [owners] violated the applicable building code, you may consider that violation as evidence that [owners] failed to exercise reasonable care. You must consider all evidence regarding this issue in determining whether [owners] exercised reasonable care." *Id.* However, *Lombard*, 266 P.3d 412, 419 (Colo. App. 2011), refused to allow the jury instructions to impute knowledge to a landowner of a violation of the building code.

A landowner cannot "delegate his or her legal responsibility to maintain the premises in a safe condition" to an independent contractor in order to avoid liability under the PLA. *Reid v. Berkowitz*, 2013 COA 110, 315 P.3d 185, 192, as modified on denial of reh'g (Sept. 26, 2013). However, this is not the rule in a landlord-tenant situation when the tenant is entitled to possession of the premises to the exclusion of the landlord. In such cases, it is the tenant, rather than the landlord, that is considered the landowner for purposes of the PLA. *Wilson v. Marchiondo*, 124 P.3d 837 (Colo. App. 2005). It is also important to note that when the landlord agrees to make repairs in such a way that the tenants have effectively surrendered their right to exclusive possession and control, the landlord may be found to be in sufficient control as to be considered a landowner under the PLA. See *Nordin v. Madden*, 148 P.3d 218, 220 (Colo. App. 2006) ("[T]he covenant to repair gives the landlord a right to enter the premises, and hence amounts to a retention of a degree of control. A more logical basis for these decisions derives from the special relationship between the parties. It also arises from the likelihood that the tenant, in reliance upon the landlord's promise to repair, might forego efforts which he might otherwise make to repair the dangerous condition.").

Lastly, a plaintiff bringing a premises liability claim under the PLA which involves both a landowner and an independent contractor must prove the knowledge requirement against the landowner, and not just against the independent contractor. *Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1459, 1462 (D. Colo. 1997) (Footnote 4: "Even if there were evidence that [independent contractor] knew or should have known about the condition of the elevator, no authority exists for imputing this knowledge to [landowner]... Thus plaintiff must still present evidence that [landowner] knew or had reason to know of the elevator condition in order to avoid summary judgment.").

Slip & Fall On Foreign Substance

Defendant was liable for injuries suffered by a plaintiff truck driver who slipped and fell on grease-coated ice while on the defendant's premises. Evidence was sufficient to support a finding that the defendant knew, or should have known, the grease spill existed thereby creating a danger to the safety of its invitees, and the defendant unreasonably failed to exercise reasonable care to protect the plaintiff from such danger. The evidence showed that the store manager knew about the problem prior to defendant's fall, that another

driver previously notified the defendant of the condition, that the store crew did not pressure-wash the delivery docks to remove all grease until after defendant's incident, and that the store did not warn invitees or drivers about the spill. *Avery v. Wal-Mart Stores, Inc.*, 2013 COA 10, 302 P.3d 321, 323-24 (Colo. 2011).

In *Henderson*, the plaintiff, an injured employee of building lessee, brought a premises liability action against the building's janitorial contractor for personal injuries sustained when plaintiff slipped and fell down a staircase on which water was present. *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612 (Colo. App. 2003). Although, the defendant was held to be a "landowner" for purposes of the PLA and had a contractual duty to clean the facility including mopping any spills of which it was aware, summary judgment in favor of the defendant was proper. The contractor's incident report indicated that it had received a call to clean up the water before the fall. However, the incident report was held inadmissible under business record exception and, therefore, summary judgment against plaintiff was proper. *Id.*

Defendant was found liable for injuries suffered where plaintiff was shopping at defendant's store and slipped on some spilled milk and fell, injuring her arm, knee, and lower back. Defendant had not posted any signs warning its patrons of the spilled milk and, although one of its employees had swept a portion of the store sometime before plaintiff's fall, the employee had not swept the aisle where the milk had been spilled. On appeal, the Court perceived no substantial, prejudicial error where the jury was instructed that negligence under the PLA was a failure to exercise reasonable care rather than an unreasonable failure to exercise reasonable care. *Lawson v. Safeway, Inc.*, 878 P.2d 127, 128 (Colo. Ct. App. 1994).

Slip & Fall On Snow/Ice

Summary judgment was awarded in favor of defendant where plaintiff slipped on icy stairway leading to her apartment complex parking lot injuring her finger as she grasped the handrail. It was undisputed that defendant had actual or, at least, constructive knowledge of the dangerous condition—the maintenance staff was checking and clearing snow and ice on the property. However, the defendant did not act unreasonably given the climactic conditions at the time of the incident (only "trace amounts of precipitation" was present) and the evidence of the actions of the defendant before the accident occurred. The *Kappius* Court held, "[t]here is no evidence that the Defendants had the ability to go in and take away or alleviate the climactic conditions affecting the stairway..." *Kappius*, No. 04 CV 3121, 2005 WL 3199453 (Colo. Dist. Ct. July 25, 2005). "The duty to act reasonably in light of the foreseeability of injury is a precept that still holds true under the [PLA]. In analyzing the unreasonable failure to exercise reasonable care, what is implicated is whether the landowner's action is reasonable in light of the foreseeability of harm and the totality of the circumstances at the time." *Id.*

The obligation of the landowner in possession of property to maintain the premises in a safe condition for invitees may not be delegated to an independent contractor. Plaintiff, one of defendant's customers, settled her claim against the independent contractor hired by defendant to maintain the premises. A new trial was ordered to determine the percentage of negligence attributable to the independent contractor in connection with any award in favor of customer against department store. Judgment was for Plaintiff, who was "also entitled to an instruction that any negligence of [the independent contractor] must be imputed to [the landowner]." *Kidwell v. K-Mart Corp.*, 942 P.2d 1280 (Colo. App. 1996).

Plaintiff, an employee of a tenant, sued the owner of an office building for injuries sustained when she fell on ice-covered steps. The owner successfully moved for summary judgment by arguing that it owed no duty to plaintiff because it had transferred exclusive control of the maintenance of the premises to a property manager. In reversing the summary judgment, the *Jules* Court held that "the premises liability statute . . . imposes a statutory duty upon those persons 'in possession of real property'" and that "[s]o long as a landowner retains such possession . . . it cannot delegate the statutory duties imposed upon it by § 13-21-115(1)." The Court found that defendant never transferred possession of the property to the third-party property manager and, thus, defendant owner was considered the landowner under the PLA. *Jules v. Embassy Properties, Inc.*, 905 P.2d 13, 15 (Colo. App. 1995).

Sidewalks

The *Burbach* Court held the PLA did not abrogate the common law rule that "an owner of property adjacent to a public sidewalk does not have a duty to pedestrians to keep the sidewalk reasonably clear of naturally accumulated snow and ice." *Burbach v. Canwest Inv., LLC*, 224 P.3d 437, 439 (Colo. App. 2009). Thus, Defendant was not responsible for condition of icy sidewalk where defendant employed maintenance personnel to remove snow from the abutting public sidewalk from time to time. The Court found that defendant did not remove the snow voluntarily, but rather did so pursuant to the snow removal ordinance to avoid the imposition of penalties and, therefore, it did not assume a duty to clear the sidewalk. *Id.* at 442; *Jefferson County Sch. Dist. R-1 v. Justus*, 725 P.2d 767, 770 (Colo. 1986) ("[A] party may assume duties of care by *voluntarily* undertaking to render a service" (emphasis added)).

Liability for a Third-Party's Criminal Acts

Colorado courts have considered whether a business proprietor owes a legal duty to protect its patrons from a third-party's criminal acts. Generally, a landowner may be liable to an invitee if the landowner "unreasonably failed to exercise reasonable care to protect against dangers of which he actually knew or should have known." C.R.S. § 13-21-115(3)(c).

The “foreseeability of harm plays a prominent role in resolving the tavern proprietor’s legal duty of care to patrons and other persons legitimately on the tavern premises.” *Observatory Corp. v. Daly*, 780 P.2d 462, 467-68 (Colo. 1989). However, the Court must also consider “the social utility of the proprietor’s conduct, the magnitude of the burden of guarding against the injury, the consequences of placing that burden upon the defendant, and any other relevant factors implicated by the facts of the case.” *Id.* at 468.

In order to establish liability, the plaintiff must prove “that the tavern proprietor had some notice, either actual or constructive (“knew or should have known”), that a tavern patron constituted an unreasonable risk of harm to persons legitimately on the tavern premises.” *Id.* at 468 (finding foreseeability does not require “any prior notice of the specific time and manner in which a tavern patron would engage in harmful conduct”).

In *Observatory*, the plaintiff, a tavern patron, was seriously injured when another intoxicated patron, who was leaving the parking lot of the tavern, drove his car into the rear of a vehicle occupied by plaintiff. *Id.* at 463-65. Plaintiff’s claims were based on the defendant’s negligence in breaching its statutory and common-law duty not to serve alcoholic beverages to a visibly intoxicated person and, independent of that claim, on the Observatory’s negligent failure to protect Daly from the physical harm inflicted on him by the intoxicated patron while plaintiff was on the defendant’s premises. *Id.* at 463. The *Observatory* Court held:

“While there is not such a significant degree of social utility in operating a tavern as to tilt the balance in favor of negating any legal duty to protect persons legitimately on the tavern premises from the harmful conduct of a tavern patron, we nonetheless must be mindful of the magnitude of the burden that would be implicated by imposing a legal duty to protect Daly from the physical harm perpetrated by Sheard under the circumstances of this case. To impose such a duty would be tantamount to requiring a tavern employee to divine future violence on the part of a tavern patron notwithstanding the absence of any objective evidence indicating that the patron constituted an unreasonable risk to the safety of others. The practical consequences of such a rule would be to render the tavern proprietor a virtual insurer of the safety of all persons legitimately on its premises. We decline to adopt such a rule. *We accordingly conclude that the Observatory had no legal duty to protect Daly from the physical harm perpetrated against him by Sheard, a tavern patron, under the circumstances of this case.*” *Id.* at 469-70 (emphasis added).

In *Vigil v. Pine*, 176 Colo. 384, 490 P.2d 934 (1971), the de-

fendant was held liable for the brutal beating that resulted in the death of plaintiff where the testimony “indicated that [the tavern proprietor] knew of Pine’s violent tendencies [where the evidence showed that Pine had at least three prior altercations with other patrons], but also that [the tavern proprietor] had sufficient time and opportunity to physically intervene to protect Vigil.” *Id.*

The Colorado Dram Shop Act, § 12-47-801, C.R.S., is the sole means for someone injured by an intoxicated person to obtain a remedy from the vendor who sold or provided alcohol to the intoxicated person. *Build It & They Will Drink, Inc. v. Strauch*, 253 P.3d 302, 303 (Colo. 2011). The statute expressly “abolishes any common law cause of action against a vendor of alcohol while simultaneously creating statutory liability for such vendors under narrowly defined circumstances, including when the vendor willfully and knowingly serves alcohol to a visibly intoxicated person.” *Id.*; C.R.S. § 12-47-801. The statute further establishes the general proposition that “in certain cases the consumption of alcohol beverages rather than the sale, service, or provision thereof is the proximate cause of injuries or damages inflicted upon another by an intoxicated person except as otherwise provided in this section.” C.R.S. § 12-47-801(1). The statute replaces the common law definition of proximate cause with specific statutory requirements, eliminating civil liability for a liquor licensee except when “the licensee willfully and knowingly sold or served any alcohol beverage to such person who was under the age of twenty-one years or who was visibly intoxicated” and the injury was a result of that intoxication. C.R.S. § 12-47-801(3)(a). Under these circumstances, a tavern owner will be liable for damages (up to \$150,000) when the sale or service of alcohol is the proximate cause of a plaintiff’s injuries. C.R.S. § 12-47-801(3)(c).

Recently, *Strauch* noted that liability pursuant to the Colorado Dram Shop Act (C.R.S. § 12-47-801) does not require the plaintiff’s injuries to be “foreseeable” as a result of the sale or service of alcohol. *Build It & They Will Drink, Inc. v. Strauch*, 253 P.3d 302, 308 (Colo. 2011). In that case, the plaintiff left defendant’s night club and was stabbed by another patron of the club approximately a block and a half away. The plaintiff then brought an action against the defendant for serving alcohol to a visibly intoxicated person resulting in his assault. *Id.* at 303-304. Accordingly, the Court acknowledged that because the issue fell under the Dram Shop Act, the Court was therefore, “not presented with an issue of general premises liability...” *Id.* at 308. Thus, the foreseeability analysis presented in *Observatory* was irrelevant to the Court’s discussion of dram-shop liability. *Id.*

CONNECTICUT



The law firm of Raymond Law Group in Glastonbury, Connecticut, provides aggressive and professional representation in cases involving business, technology, personal injury and employment. Bruce Raymond founded the firm in 2007 after a successful career at one of the region's largest litigation and trial firms. Raymond Law Group was founded on the core principles of excellent client service, lean business practices, value billing, and effective use of technology in firm management and litigation. Bruce started the firm because he believed the traditional law firm model was failing to deliver value to clients in a rapidly changing business environment. Clients ranging from individuals, corporations and insurance companies were looking for an alternative to the traditional law firm model. Raymond Law Group is the alternative.

Practice Areas: Business Litigation; Insurance Litigation; Products Liability and Toxic Tort; Employment; Professional Negligence; Fire Litigation; Technology Law.

Slip & Fall In General

It is undisputed that the owner of a retail store has a duty to keep the premises in a reasonably safe condition for the benefit of its customers. See, e.g., *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107, 116 (2012); *Baptiste v. Better Val-U Supermarket, Inc.*, 262 Conn. 135, 140, 811 A.2d 687 (2002).

The legal standard that is applied to premises liability claims brought by business invitees can be described as follows. "Typically, [f]or [a] plaintiff to recover for the breach of a duty owed to [him] as [a business] invitee, it [is] incumbent upon [him] to allege and prove that the defendant either had actual notice of the presence of the specific unsafe condition which caused [his injury] or constructive notice of it.... [T]he notice, whether actual or constructive, must be notice of the very defect which occasioned the injury and not merely of conditions naturally productive of that defect even though subsequently in fact producing it.... In the absence of allegations and proof of any facts that would give rise to an enhanced duty ... [a] defendant is held to the duty of protecting its business invitees from known, foreseeable dangers." (Citations omitted; internal quotation marks omitted.) *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107, 116-117 (2012); *Baptiste v. Better Val-U Supermarket, Inc.*, 262 Conn. 135, 140, 811 A.2d 687 (2002).

If the plaintiff, however, alleges an affirmative act of negligence, [that is], that the defendant's conduct created the

unsafe condition, proof of notice is not necessary.... That is because when a defendant itself has created a hazardous condition, it safely may be inferred that it had knowledge thereof. *Meek v. Wal-Mart Stores, Inc.*, 72 Conn.App. 467, 474, 806 A.2d 546, cert. denied, 262 Conn. 912, 810 A.2d 278 (2002). See also, *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107, 123 (2012).

When, however, the plaintiff does not allege either that the defendant's conduct created the unsafe condition or that the defendant had actual notice of the condition, courts have stated that "[t]he controlling question [becomes] that of constructive notice: whether the condition had existed for such a length of time that the [defendant's] employees should, in the exercise of due care, have discovered it in time to have remedied it." *Morris v. King Cole Stores, Inc.*, 132 Conn. 489, 492-93, 45 A.2d 710 (1946). See also, *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107, 119 (2012).

Connecticut also adopts the "mode of operation rule" of premises liability pursuant to which a business invitee who is injured by a dangerous condition on the premises may recover without proof that the business had actual or constructive notice of that condition if the business' chosen mode of operation creates a foreseeable risk that the condition will regularly occur and the business fails to take reasonable measures to discover and remove it. *Kelly v. Stop & Shop*, 281 Conn. 768 (2007). The "mode of operation rule" does not impose strict liability on business owners. Rather, "[t]he rule permits a plaintiff to make out a prima facie case of neg-

ligence without the necessity of proving that the defendant had actual or constructive notice of the transitory hazardous condition that caused the plaintiff's injury. A defendant may rebut that case, however, with evidence that it exercised reasonable care under the circumstances, and the plaintiff retains the burden of proving that the steps taken by the defendant were not reasonable. *Kelly v. Stop & Shop, Inc.*, *supra*, 281 Conn. 791-92. In short, although the mode of operation rule, when it applies, eases substantially a plaintiff's burden of proof in a premises liability matter, it does not eliminate it." *Fisher v. Big Y Foods, Inc.*, 298 Conn. 414, 423 (2010). See also, *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107, 123 (2012).

Slip & Fall On Snow/Ice

In the absence of unusual circumstances, a property owner, in fulfilling the duty owed to invitees upon his property to exercise reasonable diligence in removing dangerous accumulations of snow and ice, may await the end of a storm and a reasonable time thereafter before removing ice and snow from outside walks and steps. To require a landlord or other inviter to keep walks and steps clear of dangerous accumulations of ice, sleet or snow or to spread sand or ashes while a storm continues is inexpedient and impractical. *Kraus v. Newton*, 211 Conn. 191, 197-198 (1989). What rises to an unusual circumstance is an issue that courts have grappled with. See, e.g., *Leon v. DeJesus*, 123 Conn. App. 574, 577-578 (2010) (declining to review claim that status as home health care worker was unusual circumstance); *Sinert v. Olympia & York Dev. Co.*, 38 Conn. App. 844, 847 (1995) (status as commercial landlord is not an unusual circumstance).

The possessor of premises who has invited persons to those premises for a business purpose cannot escape liability for a claimed breach of its duty to exercise reasonable care to keep the premises in a safe condition by hiring another to maintain the premises in a safe condition. *Tarzia v. Great Atlantic & Pacific Tea Comp.*, 52 Conn.App. 136 (1999). See also, *Smith v. Town of Greenwich*, 278 Conn. 428, 456(2006).

Items Falling Off Shelves

Where the storekeeper operates under a self-service system, he must take into account the possibility of shoppers disarranging the merchandise and possibly leaving it in a dangerous condition; therefore, [when] a storekeeper has no basis for believing that customers will discover a dangerous condition or realize the risk involved, he is under a duty to exercise ordinary care either to make the condition reasonably safe for their use or to give a warning adequate to enable them to avoid the harm. *Meek v. Wal-Mart Stores, Inc.*, 72 Conn.App. 467 (2002). See also, *Kelly v. Stop & Shop, Inc.* 281 Conn. 768, 785 (2007).

Because self-service businesses are likely to achieve savings by virtue of their method of operation, it is appropriate to hold them responsible for injuries to customers that are

a foreseeable consequence of their use of that merchandising approach unless they take reasonable precautions to prevent such injuries. *Kelly v. Stop & Shop*, 281 Conn. 768, 786 (2007). Such is consistent with the mode of operation rule. *Id.* at 785.

Parking Lot Defects

A business owner owes business invitees a duty to maintain premises in a reasonably safe condition. *Martin v. Stop & Shop Supermarket Cos.*, 70 Conn. App. 250, 251, 796 A.2d 1277 (2002) accord *Cruz v. Drezek*, 175 Conn. 230, 234, 397 A.2d 1335 (1978). See also, *Baptiste v. Better Val-U Supermarket*, 262 Conn. 135, 140 (2002); *Mott v. Wal-Mart Stores East, LP*, 139 Conn. App. 618, 627 (2012).

To hold a defendant liable for personal injuries, the plaintiff must prove: (1) the existence of a defect, (2) that the defendant knew or in the exercise of reasonable care should have known about the defect, and (3) that such defect had existed for such a length of time that the [defendant] should, in the exercise of reasonable care, have discovered it in time to remedy it. See *Cruz v. Drezek*, 175 Conn. 230, 238-39, 397 A.2d 1335 (1978). See also, *Baptiste v. Better Val-U Supermarket*, 262 Conn. 135, 140 (2002). The analysis falls under the same premises liability paradigm set forth above in *DiPietro v. Farmington Sports Arena, LLC*, 306 Conn. 107, 119 (2012). See, *Mott v. Wal-Mart Stores East, LP*, 139 Conn. App. 618, 627 (2012) quoting *Fisher v. Big Y Foods, Inc.*, 298 Conn. 414 (2010).

Assault

The test for determining legal duty is a two-prong analysis that includes: (1) a determination of foreseeability; and (2) public policy analysis. *Monk v. Temple George Associates*, 273 Conn. 108 (2005). The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised; in other words, would the ordinary person in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result. *Id.* The liability of premises owner depends on the foreseeability of the criminal attack on plaintiff as well as the extent to which the owner's alleged negligence was a substantial factor in causing the plaintiff's injuries. *Id.* The absolute prevention of crime on the premises is not a necessary condition to satisfying a duty of care in negligence action; that obligation is fulfilled by exercising reasonable care. *Id.*

It was reasonably foreseeable that criminal assault of the general nature of the one perpetrated against nightclub patron might occur on the premises of parking lot, and thus, foreseeability was established in negligence action brought against owner and operator of parking lot by patron who was injured when another nightclub customer, who was former girlfriend of patron's husband, verbally confronted patron and followed patron to parking lot, where patron had parked her car, and physically attacked patron in parking lot; serious crimes had occurred in the vicinity prior to this inci-

dent, and owner and operator knew or should have known that such serious crimes had occurred. *Id.*

In considering whether public policy suggests the imposition of a duty in negligence action, courts consider the following four factors: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety

of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions. *Id.* A totality of the circumstances rule is most consistent with the public policy goals of the legal system, and therefore, fact that there is no evidence of a prior similar incident on parking lot owners' premises, although significant to foreseeability, is not dispositive in negligence action. *Id.*

FLORIDA



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Practice Areas: Insurance Defense and Products Liability; Medical Malpractice Defense; Pharmacy Malpractice; Legal Malpractice; Other Professional Liability; Bad Faith Law and Insurance Coverage; Insurance Subrogation/Recovery; Construction Defect Litigation; Health Care Law; Admiralty and Maritime Law; Premises Liability; Aviation Law; Appellate/Trial Support; Long Term Care

Slip & Fall In General

The general rule is that a property owner owes an invitee two duties: the duty to use “reasonable care in maintaining the property in a reasonably safe condition”, and a duty to warn of any hazards of which the owner “has or should have knowledge and which are unknown to the invitee and cannot be discovered by the invitee through the exercise of reasonable care. *Wolford v. Ostenbridge*, 861 So. 2d 455, 456 (Fla. Dist. Ct. App. 2003). Note these are two distinct duties, and therefore a property owner who has created or is aware of a dangerous condition has already breached the duty of care in maintaining the premises in a reasonably safe condition regardless of the owner’s knowledge. *Id.*

In regards to the duty to warn, an invitee cannot establish liability where the invitee’s knowledge of the danger is equal to or superior to the landowner’s knowledge. *Knight v. Waltman*, 774 So. 2d 731, 733 (Fla. Dist. Ct. App. 2000). However, the discharge of the duty to warn does not necessarily discharge the landowner’s duty to maintain the property in a reasonably safe condition. *Id.* at 734. If it is foreseeable to the property owner that an invitee could be harmed by the danger, despite the invitee’s knowledge, the property owner may still be liable. *Id.* This is because where the proprietor’s conduct creates a “foreseeable zone of risk,” the law places a duty on the proprietor to mitigate the risk or take reasonable precautionary measures to protect other from the danger posed. *McCain v. Florida Power Corp.*, 593 So. 2d 500, 503 (Fla. 1992).

In a slip and fall case, to recover for injuries the plaintiff must generally prove that the premise owner either had actual or constructive knowledge of the condition “in that the condition existed for such a length of time that in the exercise of ordinary care, the premises owner should have known of it and taken action to remedy it.” *Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315, 320 (Fla. 2001) (citing *Colon v. Outback Steakhouse of Florida, Inc.*, 721 So. 2d 769, 771 (Fla. Dist. Ct. App. 1998)). Constructive knowledge may be established circumstantial evidence such as (1) the length of time a substance has been on the floor, or (2) the fact that the condition occurred with such frequency or regularity making it foreseeable. *Id.*; see also *Brooks v. Phillip Watts Enterprises, Inc.*, 560 So. 2d 339, 341 (Fla. Dist. Ct. App. 1990) (Failure to inspect during a particular period of time prior to an accident may warrant an inference that the dangerous condition existed long enough so that the exercise of reasonable care would have resulted in discovery.); see also *Grizzard v. Colonial Stores, Inc.*, 330 So.2d 768, 769 (Fla. 1st DCA 1976) (The time required for frozen orange juice concentrate to partially liquefy could be deemed sufficient time to constitute constructive notice.).

In addition, negligence may also be established where the defendants “method of operation is so inherently dangerous that while the owner did not actually create the specific condition which caused the fall, they still may be held liable.” *Schaap*, 579 So.2d at 834. In such a case negligence can be estab-

lished by proving: “(1) either the method of operation is inherently dangerous, or the particular operation is being conducted in a negligent manner; and (2) the condition of the floor was created as a result of the negligent method of operation.” *Id.*

Items Falling Off Shelves

The general rule is that “all premises owners owe a duty to their invitees to exercise reasonable care to maintain their premises in a safe condition. *Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315, 320 (Fla. 2001). Note that “whether a business entity was negligent in stacking items on a shelf in a particular manner, and at a particular location thus causing a dangerous condition to exist is a jury question.” *Klaue v. Galencare, Inc.*, 696 So.2d 933, 935 (Fla. 2d DCA 1997); *Harrell v. Beall’s Dep’t Store, Inc.*, 614 So.2d 1142 (Fla. 2d DCA 1993).

Defendant was found liable where a customer sustained injuries when a box containing a van console fell on her head. While walking down an aisle, the customer observed two employees transferring merchandise from atop a display to a lower shelf, and as the customer walked past them, she heard someone say “oh,” upon which she turned in the direction of the sound and was struck on her right forehead, and fell to the floor. When she stood up she observed a box containing a van console on the ground near where she had fallen. *Wal-Mart Stores, Inc. v. Boertlein*, 775 So. 2d 345 (Fla. Dist. Ct. App. 2000) (Wal-Mart failed to come forward with evidence to suggest a genuine issue of material fact.).

In action where plaintiff sued defendant for maintaining a dangerous condition in its store by improperly using an inadequate shelf unit causing merchandise to fall on plaintiff’s head, the doctrine of *res ipsa loquitur* was inapplicable and judgment was held in favor of defendant. Finding it was not clear that instrumentality which caused injury was under exclusive control of store, and direct proof of negligence was not unavailable, as expert testified that shelf’s design was inadequate to support weight of merchandise placed on it. *Monforti v. K-Mart, Inc.*, 690 So. 2d 631 (Fla. Dist. Ct. App. 1997); see also *Wal-Mart Stores, Inc. v. Rogers*, 714 So. 2d 577 (Fla. Dist. Ct. App. 1998) (Shopper brought negligence action against store seeking damages for injuries sustained when she was struck by a toy radio which fell from display hook).

Parking Lot Defects

A property owner is not an insurer of safety but nevertheless owes two duties to its business invitees: 1) to warn of concealed dangers which are or should be known to the owner and which are unknown to the invitee and cannot be discovered through the exercise of due care; and 2) to use ordinary care to maintain its premises in a reasonably safe condition. *Rocamonde v. Marshalls of Ma, Inc.*, 56 So. 3d 863, 865 (Fla. Dist. Ct. App. 2011).

Defendant was not liable in an action brought by customer for injuries sustained as a result of a trip and fall over a wheel stop in the defendant’s parking lot. *Ramsey v. Home Depot U.S.A., Inc.*, 124 So. 3d 415 (Fla. Dist. Ct. App. 2013). The

general rule holds that “although a property owner has a duty to maintain its premises in a reasonably safe manner for its invitees, there is no duty to warn against an open and obvious condition which is not inherently dangerous.” *Id.* at 417. The wheel stop in this case was situated in its appropriate location, furthermore the accident did not occur on a rainy day or at night with insufficient lighting, and therefore “the wheel stop would have been readily observable to patrons employing their own sense.” *Id.* In addition, plaintiff failed to come forward with any evidence that defendant failed to use ordinary care to maintain the accessible parking area in a reasonably safe condition. *Id.* at 418.

A pothole creates an unreasonable risk of harm because it is not a natural condition and forms when a landowner fails to maintain a portion of property (i.e., the pavement) that has fallen into disrepair. *Burton v. MDC PGA Plaza Corp.*, 78 So. 3d 735 (Fla. Dist. Ct. App. 2012). Where plaintiff was injured as a result of tripping over a pothole, commercial landlord’s and tenant’s duty to maintain the premises in a reasonably safe condition was not discharged by pedestrian’s knowledge of the pothole in parking lot before she fell; instead pedestrian’s knowledge merely raised an issue of fact as to her own comparative negligence. *Id.* at 732.

Where plaintiff was injured after walking through a large planting bed to get from a sidewalk outside the defendant’s premises into defendant’s parking lot, the planting bed “did not constitute a dangerous condition that could give rise to liability on the part of defendant due to the alleged failure to maintain the premises in a reasonably safe condition.” Finding, defendant had no duty to warn plaintiff of the danger of walking in the planting bed, because the planting bed and stump did not constitute a dangerous condition when used as a planting bed and not for walking. *Dampier v. Morgan Tire & Auto, LLC*, 82 So. 3d 204, 208 (Fla. Dist. Ct. App. 2012).

Where plaintiff tripped and fell over a parking bumper in defendant’s parking lot late at night, “allegations that on the night in question, the light which normally illuminated this area of the complex was not working. While open and obvious conditions may negate the existence of negligence and permit a summary disposition, the added factor of the effect or impact, if any, of the lighting in the subject area on visibility gives rise to a genuine issue of material fact—whether defendants were negligent in maintaining the lighting in the area where the accident occurred—whether there was any duty to maintain lighting in that area—whether irrespective of such lighting, there was sufficient illumination so as to preclude any negligence on the part of the defendants. *Rivard v. Grimm*, 621 So. 2d 580 (Fla. Dist. Ct. App. 1993); See *Bianchi v. Garber*, 528 So.2d 969 (Fla. 4th DCA 1988).

Assault

Under the common law generally there is no duty to prevent the misconduct of third persons. *Jackson Hewitt, Inc. v. Kaman*, 100 So. 3d 19, 28 (Fla. Dist. Ct. App. 2011). However there are limited circumstances in which an actor may have a duty

to prevent the tortious conduct of another. *Id.*

The first exception arises when “there is a special relationship between the defendant and the person whose behavior needs to be controlled or the person who is a foreseeable victim of such conduct.” *Id.* Further, “when relying on a special relationship between the defendant and the person whose conduct needs to be controlled, the defendant must have the right or ability to control the third person’s conduct.” *Id.* at 29. For example, a special relationship exists between a landlord and tenant. *T.W. v. Regal Trace, Ltd.*, 908 So. 2d 499, 503 (Fla. Dist. Ct. App. 2005). “The rule in Florida is well established that a landlord has a duty to protect a tenant from reasonably foreseeable criminal conduct.” *Id.* (citing *Salerno v. Hart Fin. Corp.*, 521 So.2d 234, 235 (Fla. 4th DCA 1988). “However, in order to impose that duty an injured tenant must prove that the landlord has knowledge of prior similar criminal conduct occurring on the premises.” *Id.*

The second exception to the general rule provides that “the duty to protect strangers against the tortious conduct of another can arise if, at the time of the injury, the defendant is in actual or constructive control of:

1. the instrumentality, e.g., *Avis Rent-A-Car Sys. v. Garmas*, 440 So.2d 1311 (Fla. 3d DCA 1983) rev. denied, 451 So.2d 848 (Fla.1984) (owner of dangerous instrumentality liable to third persons for negligent use by anyone to whom it has been entrusted);
2. the premises on which the tort was committed, e.g., *Allen v. Babrab, Inc.*, 438 So.2d 356 (Fla.1983) (tavern owner has duty to protect patrons from disorderly conduct of third persons); or
3. the tort-feasor, e.g., *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545 (Fla.1981) (employer vicariously liable for compensatory damages resulting from negligent acts of employees committed within scope of their employment even if employer without fault); *Snow v. Nelson*, 450 So.2d 269 (Fla. 3d DCA 1984) approved, 475 So.2d 225 (Fla.1985) (parent may be held responsible for torts of child). *Jackson Hewitt*, 100 So. 3d at 29.

Where hotel patrons brought negligence action against hotel, hotel security guard and third party after they were stabbed in hotel parking lot, defendant’s experience with violent and criminal activity on its premises evidenced by the 911 calls, even if less serious than the tragic violence experienced by plaintiffs, creates an issue for the finder of fact regarding notice to defendant of the potential danger and the foreseeability of the instant attack. *Hardy v. Pier 99 Motor Inn*, 664 So. 2d 1095, 1098 (Fla. Dist. Ct. App. 1995).

Where the plaintiff was hit over the head with a pool cue, the Florida Supreme Court stated that, if a bar owner knew or should have known of a general risk to patrons and failed to take reasonable steps to guard against that risk, the bar owner may be held liable for the resulting injuries. *Hall v. Billy Jack’s, Inc.*, 458 So. 2d 760, 762 (Fla. 1984).

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Slip & Fall In General

Illinois has adopted the rules set forth in Sections 343 and 343A of the *Restatement (Second) of Torts* regarding the duty of possessors of land to their invitees. *Joyce v. Mastri*, 861 N.E.2d 1102, 1117 (Ill. App. Ct. 1st Dist. 2007).

Section 343 provides that 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;
- (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. *Joyce*, 861 N.E.2d at 1117; *Restatement (Second) of Torts* (1965).

To state a cause of action for negligence in a premises liability case, a plaintiff must demonstrate that the defendant owed a duty of care to the plaintiff, that the defendant breached the duty, and that an injury was proximately caused by the breach. *Prostran v. City of Chicago*, 811 N.E.2d 364, 368 (Ill. App. Ct. 1st Dist. 2004).

Whether a duty exists is a question of law. *Id.* at 85. The factors that must be considered in determining whether a duty exists are: (1) the foreseeability that defendant's conduct will result in injury to another; (2) the likelihood of injury; (3) the magnitude of guarding against it; and (4) the consequences of placing that burden upon defendant. *Sandoval v. City of Chicago*, 830 N.E.2d 722, 726 (Ill. App. Ct. 1st Dist. 2005).

The law generally considers the likelihood of injury slight when the condition at issue is open and obvious because it is assumed that persons encountering the potentially dangerous condition of the land will appreciate and avoid the risks.

Prostran, 811 N.E.2d at 372.

Illinois law holds that persons or entities that own or control land are not required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious. *Sandoval*, 830 N.E.2d at 726. However, there are two exceptions to the open and obvious rule: the distraction exception and the deliberate encounter exception. *Prostran*, 811 N.E.2d at 370.

Regarding the distraction exception to the open and obvious rule, a property owner will be found to owe a duty of care if it is reasonably foreseeable that the plaintiff's attention might be distracted so that she would not discover the obvious condition. *Id.*

Primarily, in those instances where courts have applied the distraction exception to impose a duty upon a landowner, it is clear that the landowner created, contributed to, or was responsible in some way for the distraction which diverted the plaintiff's attention from the open and obvious condition and, thus, was charged with reasonable foreseeability that an injury might occur. *Sandoval*, 830 N.E.2d at 730. The defendant is not required to anticipate the specific plaintiff's own negligence or make his premises injury-proof. *Id.* at 728.

Under the deliberate encounter exception to the open and obvious rule, a duty is imposed when a possessor of land has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. *Prostran*, 811 N.E.2d at 370.

The exception has most often been applied in cases involving some economic compulsion, as where workers are compelled to encounter dangerous conditions as part of their employment obligation. *Id.* at 89.

Slip & Fall On Ice/Snow

The Snow and Ice Removal Act, 745 ILCS 75/1 (West 2006), provides that «owners and others residing in residential units» are «encouraged to clean the sidewalks abutting their residences of snow and ice.» As such, «it is undesirable for any person to be found liable for damages due to his or her efforts in the removal of snow or ice from such sidewalks» except for acts or omissions which amount to willful or wanton conduct. The Snow and Ice Removal Act does not provide immunity for injuries if the unnatural accumulation of ice was caused by defective construction, improper maintenance, or insufficient maintenance of the premises. *Greene v. Wood River Trust*, 2013 IL App (4th) 130036, 376 Ill. Dec. 215, 998 N.E.2d 925.

In addition to this Act, the courts apply the Natural Accumulation Rule whereby a landowner or possessor of real property has no duty to remove natural accumulations of snow, water or ice from its property. *Krywin v. The Chicago Transport Authority*, 238 Ill.2d 215 (2010).

For areas other than residential sidewalks abutting the property, a landowner or hired contractor cannot be held liable

for injuries sustained unless a plaintiff shows that the defendant aggravated a natural condition or that the origin of the accumulation of ice, snow, or water was unnatural. *Hornacek v. 5th Ave. Prop. Mgmt.*, 959 N.E.2d 173, 182 (Ill. App. Ct. 1st Dist. 2011). Property owners will not be held liable for injuries resulting from natural accumulations of ice, snow, or water tracked inside the premises from the outside. *Frederick v. Professional Truck Driver Training School, Inc.*, 328 Ill.App. 3d 472, 478 (2002).

If the landowner or hired contractor creates an unnatural accumulation, then liability may attach as a result of failing to use ordinary care. *Id.* at 182-83. The fact that snow has been cleared and that there are piles of snow present suggests that the snow piles are an unnatural accumulation. *Id.* at 183.

Slip & Fall On Foreign Substance

A business owner breaches its duty to an invitee who slips on a foreign substance if: (1) the substance was placed there by the negligence of the proprietor; (2) its servant knew of its presence; or (3) the substance was there for a sufficient length of time so that, in the exercise of ordinary care, its presence should have been discovered, i.e., the proprietor had constructive notice of the substance. *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 953 N.E.2d 427, 431 (Ill. App. Ct. 1st Dist. 2011).

Where a business invitee is injured by slipping and falling on the premises and there is no way of showing how the substance became located on the floor, liability may be imposed if the defendant or its employees had constructive notice of its presence. *Id.* at 431. Constructive notice exists if the substance was there for a long enough time period that the exercise of ordinary care would have made it known. *Id.* at 431. However, where a defendant creates the dangerous condition, the defendant's constructive or actual notice becomes irrelevant. *Caburnay v. Norwegian Am. Hospital*, 963 N.E.2d 1021 (Ill. App. Ct. 1st Dist. 2011).

A landowner does not have a duty to continuously remove snow or water that is tracked inside a building from natural accumulations outside. *Lohan v. Walgreens Co.*, 488 N.E.2d 679, 681 (Ill. App. Ct. 1st Dist. 1986).

Sidewalks

The *de minimis* rule barring actions against municipalities for minor defects in sidewalks is rooted in the scope of the municipalities' duty to maintain their property in a reasonably safe condition. *Hartung v. Maple Inv. & Dev. Corp.*, 612 N.E.2d 885, 888 (Ill. App. Ct. 2d Dist. 1993).

Municipalities do not have a duty to keep all sidewalks in perfect condition at all times. *Id.* at 888. Thus slight defects frequently found in traversed areas are not actionable as a matter of law. *Id.* at 887. However, because there is no mathematical formula or bright-line test for determining what constitutes a slight defect, each case must be determined on its own facts. *Id.* at 888. The surrounding circumstances, particularly whether the sidewalk is located in a commercial

or residential neighborhood and the anticipated volume of traffic on the sidewalk, are factors to be taken into consideration. *Birck v. Quincy*, 608 N.E.2d 920, 923 (Ill. App. Ct. 4th Dist.1993). In *Birck*, the appellate court held that a 1 7/8 inch height differential between two sidewalk slabs was not actionable as a matter of law. In *Hartung*, *supra*, the appellate court held that the *de minimis* rule also applies to private landowners and possessors of land. *Hartung* at 888.

Parking Lot Defects

Property owners have a duty to provide a safe means of travel for pedestrians between the parking lot and the office building. *Hornacek*, 959 N. E. 2d at 184.

Items Falling Off Shelves

A proprietor owes its patrons the duty of exercising reasonable care. *Lovejoy v. National Food Stores, Inc.*, 299 N.E.2d 816, 819 (Ill. App. Ct. 5th Dist.1973). In *Lovejoy*, the appellate court affirmed the finding that the owner was negligent where the plaintiff offered no direct evidence why bottles fell

on her but rather proceeded on a theory that the defendant was negligent in stacking the bottles as displayed and that the defendant knew or should have known that the display created a hazard and should have taken precautions to eliminate the hazard.

Assault

Ordinarily, a party owes no duty of care to protect another from the harmful or criminal acts of third persons. *Aidroos v. Vance Uniformed Prot. Servs.*, 897 N.E.2d 402, 407 (Ill. App. Ct. 1st Dist. 2008). There are, however, four exceptions to this rule: (1) when the parties are in a special relationship - i.e., common carrier/passenger, innkeeper/guest, business invitor/invitee, or voluntarily custodian/protectee - and the harm is foreseeable; (2) when an employee is in imminent danger and this is known to the employer; (3) when a principal fails to warn his agent of an unreasonable risk of harm involved in the agency; and (4) when any party voluntarily or contractually assumes a duty to protect another from the harmful acts of a third party. *Id.*

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Slip & Fall In General

In order to establish a claim for negligence the plaintiff must prove the following three elements: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) injury to the plaintiff resulting from the defendant's breach. *Christmas v. Kindred Nursing Centers Ltd. P'ship*, 952 N.E.2d 872, 878 (Ind. Ct. App. 2011). The degree of duty owed is dependent upon whether the individual enters upon another's property as an invitee, a licensee, or a trespasser. *Id.*

Indiana law defines licensees and trespassers as "those who enter premises for their own convenience, curiosity, or entertainment." *Burrell v. Meads*, 569 N.E.2d 637, 640 (Ind. 1991). Although both licensees and trespassers take the property "as is", the main distinction is that a licensee (as opposed to a trespasser) has a license, i.e., consent or

permission, to be on the property. *Id.* In order to qualify as an invitee, the Court has adopted the "invitation test" which provides that: "(1) An invitee is either a public invitee or a business visitor; (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public; (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." *Id.* at 642 (citing *Restatement (Second) of Torts* § 332).

A property owner owes a trespasser the duty to refrain from willfully or wantonly (intentionally) injuring him after discovering his presence. *Burrell*, 569 N.E.2d at 639.

A property owner owes a licensee the duty to refrain from willfully or wantonly injuring him or acting in a manner to

increase his peril. *Id.* The owner also has a duty to warn a licensee of any latent danger on the premises of which the owner has knowledge. *Id.*; See also *Pickering v. Caesars Riverboat Casino, LLC*, 988 N.E.2d 385, 393 (Ind. Ct. App. 2013) (Caesars casino patron lost invitee status and was treated as a licensee after he ducked under caution tape and proceeded up the casino's parking ramp onto the parking lot's roof.).

A property owner owes the highest duty of care to an invitee: a duty to exercise reasonable care for his protection while he is on the premises. *Id.* A "social guest" - an individual who enters upon the land by express or implied invitation - is owed the same duty of care as an invitee. *Id.* at 643. The Indiana Supreme Court has adopted *Restatement (Second) of Torts* Section 343 (1965), which defines the scope of duty owed to an invitee by a property owner:

"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." *Id.* at 639-40 (quoting *Restatement (Second) of Torts* § 343 (1965)).

However, a property owner is not an insurer of absolute safety and will not be held liable for any "condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." *Christmas*, 952 N.E.2d at 881 (citing Section 343A of the *Restatement (Second) of Torts*).

Therefore, a property owner must have actual or constructive knowledge of the presence of the hazardous condition in order to be held liable. *Schulz v. Kroger Co.*, 963 N.E.2d 1141, 1144 (Ind. Ct. App. 2012). Constructive knowledge is defined as a "condition [which] has existed for such a length of time and under such circumstances that it would have been discovered in time to have prevented injury if the storekeeper, his agents or employees had used ordinary care." *Id.*

A determination of whether there has been a breach of duty in a negligence action generally is a question of fact for a jury and, therefore, inappropriate for resolution by summary judgment. *Northern Indiana Pub. Serv. Co. v. Sharp*, 790 N.E.2d 462, 466 (Ind. 2003). The court may, however, determine as a matter of law whether a breach of duty has occurred when the facts are undisputed and lead only to a single inference or conclusion. *Id.*; See *Taylor v. Cmty. Hospitals of Indiana, Inc.*, 949 N.E.2d 361, 366 (Ind. Ct. App. 2011) (Summary judgment was granted where no genuine issues of material fact existed when plaintiff's, who slipped and fell on a hospital floor, assertions were based upon speculation

and conjecture that something was on the floor because she fell but admitted "she neither saw nor felt anything on the floor prior to or in the moments after her fall.").

However, genuine issues of fact relating to negligence cannot be established by inferential speculation alone, i.e., where the jury "'jumped the gap from reason to speculation.'" *Taylor*, 949 N.E.2d at 366 (quoting *Wright Corp. v. Quack*, 526 N.E.2d 216, 219 (Ind.Ct.App.1988)).

Slip & Fall On Foreign Substance

A customer, "a person who is invited to enter or remain on the land for a purpose directly or indirectly connected with business dealings with the possessor of the land," is treated as a business invitee when they enter the [store owner's] premises. Therefore, a property owner owes its customers a duty to exercise reasonable care for their protection while they remained on the premises. *Schulz*, 963 N.E.2d 1141, 1144 (Ind. Ct. App. 2012).

Grocery store lacked constructive knowledge of hazardous condition involving clear liquid on floor near soda display, where store's employee stated that she was not notified of existence of foreign substance on floor and that, to the best of her knowledge, no other employee was notified of existence of foreign substance on floor. Therefore, it was clear from the evidence presented that the window of time between an employee's presence in the location of the incident and the actual incident itself was at most 10 minutes, and as a result no genuine issue of fact existed that the defendant did not have constructive knowledge of the dangerous condition. *Id.* at 1145.

Genuine issues of material fact existed, precluding summary judgment for restaurant, as to whether there was object or defect in restaurant floor on which customer slipped and whether restaurant acted unreasonably in allowing foreign substance to remain on floor for a sufficient time to constitute constructive notice. *Barsz v. Max Shapiro, Inc.*, 600 N.E.2d 151 (Ind. Ct. App. 1992). The court based its decision on defendant's testimony stating that "many of the customers are accident-prone and that spills frequently occur at the restaurant...customers periodically spill food and drink on the way from the serving line to their tables, and that it is the responsibility of cafeteria bus personnel to clean these spills...Shapiro's serves between 1000 and 1800 customers daily...spills were commonplace." *Id.* at 154.

Similarly, genuine issues of material fact existed when plaintiff slipped and fell in defendant's department store where she stated that her fall was a result of slipping on a small stone or B-B. The court noted that under these circumstances, a finding of negligence would not require "inferential speculation" because "there is evidence of a defect in or on the floor from [plaintiff's] testimony." *Golba v. Kohl's Dept. Store, Inc.* (1992), Ind.App., 585 N.E.2d 14, 17 (Ind. Ct. App. 1992).

Defendant was held liable to plaintiff for injuries sustained

where plaintiff presented evidence of a specific failure on the hotel's part that led to her slip and fall in a bathtub i.e., the hotel's failure to clean the bathtub before her check-in, which resulted in a dangerously slippery condition of the tub from the previous guest's leftover soap. *Lincoln Operating Co. v. Gillis*, 232 Ind. 551, 557, 114 N.E.2d 873, 876 (1953) ("The general rule on negligence in Indiana is that an actor, until he has notice to the contrary, has the right to assume that other persons will exercise due care in their conduct toward him...[plaintiff] had the right to assume that the hotel operator had used due care in seeing to it that the bathtub was not in a dangerous condition.").

Slip & Fall On Snow/Ice

Several Indiana cases have discussed the extent of a landlord or business owner's responsibility to clear areas such as sidewalks, parking lots, and common areas from natural accumulations of ice and snow. *Bell v. Grandville Coop., Inc.*, 950 N.E.2d 747, 749 (Ind. Ct. App. 2011); See *Hammond v. Allegretti*, 262 Ind. 82, 311 N.E.2d 821 (1974); See *Orth v. Smedley*, 177 Ind.App. 90, 378 N.E.2d 20 (1978); See *Rossow v. Jones*, 404 N.E.2d 12, 14 (Ind.Ct.App.1980); See *Rising-Moore v. Red Roof Inns, Inc.*, 368 F.Supp.2d 867 (S.D.Ind.2005). Genuine issue of material fact as to whether defendants, an apartment cooperative, breached its duty to a visitor, who slipped and fell on ice, to maintain the premises in reasonably safe condition, specifically as to "whether defendants had actual or constructive knowledge of the icy conditions of its premises-which does not require that they knew of the actual formation of the ice patch plaintiff slipped upon-and whether defendant acted reasonably in response to such knowledge." *Id.* at 753. In this case, summary judgment was precluded because plaintiff offered evidence that in the 3 to 4 days prior ice patches had formed regularly in the complex from snow melting during the day and re-freezing at night, and that plaintiff had informed the defendants "on 'numerous' prior occasions that ice tended to form in that area and defendant failed to present any evidence of any reasonable measures taken to prevent such hazardous conditions." *Id.* at 752.

In a recent case, *Rising-Moore*, 368 F.Supp.2d 867 (S.D.Ind.2005) (Affirmed by the 7th Cir. because, "Only a duty of continuous monitoring and clearing during a winter storm would make an owner liable under these circumstances, and there is no such duty in Indiana." *Rising-Moore v. Red Roof Inns, Inc.*, 435 F.3d 813, 817 (7th Cir.2006)), defendant was not found liable for injuries sustained as a result of a slip and fall on ice, where the plaintiff entered a motel to check in while at the same time freezing rain began to fall. The plaintiff was inside for 5 to 20 minutes, and when he went back outside to go to his room, he slipped and fell on ice. Summary judgment was granted because no reasonable jury could have found that defendants breached its duty to the plaintiff to clear ice and snow where the time frame involved was a matter of minutes and the weather situation

was still developing. *Id.* at 874.

In *Hammond*, 262 Ind. 82, 311 N.E.2d 821 (1974) the plaintiff slipped and fell on ice that had accumulated in a business's parking lot. Pursuant to Section 343 of the *Restatement (Second) of Torts*, the Supreme Court found that the extent of a landlord or business owner's responsibility to clear areas such as sidewalks and parking lots from natural accumulations of ice and snow the court seemed to contemplate a general duty for business owners to remove ice and snow from their premises, with the question of whether that duty has been breached to be left to a trier of fact. *Bell v. Grandville Coop., Inc.*, 950 N.E.2d 747, 750 (Ind. Ct. App. 2011) (*Hammond* arguably was disapproved of on other grounds by *Burrell*, but that disapproval does not affect *Hammond's* analysis regarding landowner responsibility to remove natural accumulations of ice and snow; if anything *Burrell* simply expands that analysis to apply to social guests of landowners. See *Burrell*. 569 N.E.2d at 641.).

In *Orth*, 177 Ind.App. 90, 378 N.E.2d 20 (1978), not relying on *Hammond*, the Court of Appeals applied the "Connecticut Rule" in finding that the landlord was not liable to tenant for injuries sustained as a result of slip and fall on ice while exiting the apartment building. *Id.* at 94-95 (The Connecticut Rule recognizes that the landlord is entitled to actual or constructive notice of the presence of ice and snow and is also entitled to reasonable opportunity to remove the ice and snow).

Where the icy conditions developed after midnight, it was not detectable by sight, and where, at 6:00 a.m. when tenant slipped and fell on ice, landlords and their alleged agents were asleep, landlords did not have actual or constructive knowledge of accumulation of ice, landlords did not have reasonable opportunity in which to remove accumulation of ice, and thus landlords were not negligent or liable for failing to remove the natural accumulation of ice. *Id.* at 96.

In *Rossow*, 404 N.E.2d 12, 14 (Ind.Ct.App.1980), relying upon *Hammond*, the court held, "a landlord does have a duty of reasonable care that the common ways and areas, or areas over which he has reserved control, are reasonably fit and that hazards created through a natural accumulation of ice and snow are not beyond the purview of that duty." The court further concluded there was sufficient evidence that the landlord had breached this duty where he had not cleared a stairwell that had been accumulating ice and snow for a week. *Id.*

Defendant, an independent contractor, was liable to plaintiff where defendant owed a duty of reasonable care to plow and salt mall parking lot, in which patron slipped and sustained injuries, and evidence indicated that the independent contractor contracted with parent corporation that owned strip mall to remove snow from parking lot after an inch or more of snow had fallen and company plowed and salted the parking lot on evening that snow had fallen. *Kostidis v. Gen. Cinema Corp. of Indiana*, 754 N.E.2d 563 (Ind. Ct.

App. 2001).

Items Falling Off Shelves

Store was liable to plaintiff for damages for injuries sustained when a box slipped from employee's hands and fell on customer. The store was based upon a warehouse merchandising concept where items were displayed upon shelving at levels accessible to customers while additional stock was stored on shelves overhead. Customarily, employees worked in pairs, i.e., with one standing atop a platform ladder bringing down additional items and the second "spotting the ladder." According to defendant's store policy, when a customer came into a work area, the employees were to stop stocking and were to assist the customer. The employee stated he did not see any customers in the immediate area, however when one of the boxes he retrieved from the additional storage shelves slipped out of his hands it hit plaintiff, who was perusing through the aisle, in the head. *K Mart Corp. v. Beall*, 620 N.E.2d 700, 702-03 (Ind. Ct. App. 1993). Plaintiff's admission that he saw the ladder yet failed to attach any significance to its placement in the warehouse aisle merely indicates "awareness" of its presence. Plaintiff, however, was unaware of the re-stocking activities which were carried on directly above him. The Court noted that, "the sense of familiarity with one's surroundings does not necessarily rise to the level of conscious deliberation or intentional embarkation upon a course of conduct in the face of danger as required by *Power*. Thus, Beall had neither reason nor opportunity to extricate himself from the aisle before the box struck him." *Id.* at 704; See *Power v. Brodie* (1984) 1st Dist. Ind. App., 460 N.E.2d 1241, 1243.

The doctrine of *res ipsa loquitur* is a rule of evidence that allows a jury to draw an inference of negligence under certain factual circumstances. *K-Mart Corp. v. Gipson*, 563 N.E.2d 667, 669 (Ind. Ct. App. 1990). The doctrine operates on the premise that negligence, like any other fact or condition, may be proved by circumstantial evidence, with the central inquiry being "whether the incident more probably resulted from the defendant's negligence rather than from some other cause." *Id.* Therefore, defendant was held liable where a display rack fell and injured plaintiff. *Id.* at 670. The court reasoned that, "As a matter of common sense and experience, display racks do not ordinarily fall for no apparent reason on customers in stores. The rack was installed by a K-Mart employee and there was no evidence presented that a third party may have tampered with the rack. It is reasonable to infer that negligence for a falling instrumentality is attributable to that party who was responsible for installing and maintaining the instrumentality. K-Mart was the party who was responsible for installing and maintaining the rack, and the jury could reasonably infer that it was negligent in the rack's fall." *Id.* at 67-71.

Parking Lot Defects

A business owner's duty to exercise reasonable care includes a duty to provide a safe and reasonable means of ingress

and egress, and may extend to warning of or protection from a danger that originates from third persons. *Lutheran Hosp. of Indiana, Inc. v. Blaser*, 634 N.E.2d 864, 869 (Ind. Ct. App. 1994).

A hospital's failure to post adequate safeguards or warnings to pedestrians and automobiles against use of "exit" driveway as entrance to parking lot was proximate cause of injuries sustained by business invitee, who was struck from behind by hit-and-run automobile turning into parking lot "exit," since accident occurred within hospital's scope of foreseeability. *Id.* at 872-73 (duty only extends to harm from the conduct of third persons that, under the facts of a particular case, is reasonably foreseeable to the proprietor).

However, an invitor owes no duty to invitees to protect them from runaway vehicles in parking lots, since this kind of occurrence is not sufficiently foreseeable for the invitor to be required to protect against it. *Id.* at 869-70 (citing *Fawley v. Martin's Supermarkets, Inc.*, 618 N.E.2d 10 (Ind. Ct. App. 1993) (In this case the runaway vehicle was operated by a drunken driver who lost control of his vehicle)).

Genuine issues of material fact existed, precluding summary judgment, where plaintiff was injured in a bank parking lot when she tripped and fell over the ridge between the asphalt of the bank's parking lot and the concrete walkway leading up to the bank building. The alleged dangerous condition and the injury both occurred entirely within the defendant's premises, and therefore created an issue as to "whether defendant bank's maintaining driveway and walkway with one inch rise between the two areas constituted negligence." *Verplank v. Commercial Bank of Crown Point*, 145 Ind. App. 324, 251 N.E.2d 52 (1969).

Evidence supported finding that shopping mall did not breach a duty to shopper that proximately caused injury; parking lot where shopper fell had adequate drainage, mall maintained the lot 24 hours a day, mall security officers were patrolling lot at time of fall, lighting was adequate, neither shopper nor her companions had difficulty walking into mall, and it was difficult to determine what shopper slipped on. *Hall v. Eastland Mall*, 769 N.E.2d 198 (Ind. Ct. App. 2002).

Genuine issue of material fact existed as to whether landowner breached duty of care to warn invitee of possibility that his pickup truck could slide into retention pond. However unusual invitee's actions may have been in parking lot due to his being blocked in, invitee's actions in attempting to maneuver his pickup truck into a position to be able to drive around other vehicle were not outside scope of the invitation and, therefore, he never lost his status as an invitee, for purpose of determining duty owed to him by property owner. *Winfrey v. NLMP, Inc.*, 963 N.E.2d 609 (Ind. Ct. App. 2012).

Assault

"Landowners have a duty to take reasonable precautions to

protect their invitees from foreseeable criminal attacks” and that “the duty to exercise reasonable care extends to keeping its parking lot safe and providing a safe means of ingress and egress.” *Id.*; see, e.g., *N. Ind. Pub. Serv. Co. v. Sharp*, 790 N.E.2d 462, 465 (Ind.2003) (“[p]roprietors owe a duty to their business invitees to use reasonable care to protect them from injury caused by other patrons and guests on their premises, including providing adequate staff to police and control disorderly conduct.”).

Therefore, “the law clearly recognizes that proprietors owe a duty to their business invitees to use reasonable care to protect them from injury caused by other patrons and guests on their premises.” *Kroger Co. v. Plonski*, 930 N.E.2d 1, 6 (Ind. 2010). However, the “duty only extends to harm from the conduct of third persons that, under the facts of a particular case, is reasonably foreseeable to the proprietor.” *Id.* at 7.

In determining “foreseeability,” the court must examine “all of the circumstances surrounding an event, including the nature, condition, and location of the land, as well as prior similar incidents to determine whether a criminal act was foreseeable.” *Id.*

“Concerning breach of duty, the fact that [plaintiff] felt safe on the numerous times she visited the Kroger store in the past is not dispositive. [Plaintiff] testified that she felt safe because of the existence of the surveillance cameras. And there is at least an inference that on the day of the attack the cameras were not being monitored. As for not doing anything differently, this is the point of the matter. That is to say, it is left to the fact finder to determine whether Kroger should have done more to protect its business invitees from foreseeable criminal activity, including providing adequate security personnel. On the question of breach of duty, Kroger has failed to show that the facts are not in dispute and thus it is entitled to judgment as a matter of law.” *Id.* at 10.

In addition, Indiana recognizes the gratuitous assumption of duty by one who, through affirmative conduct or agreement, assumes and undertakes a duty to act. *Board of Comm’rs v. Hatton* (1981), Ind.App., 427 N.E.2d 696, trans. denied.

Therefore, although the premises liability of a tavern owner for injuries to patrons generally does not extend to third persons beyond the boundaries of the tavern’s premises, a tavern owner could assume a duty to persons beyond the boundaries of a tavern. Where a bar patron was beaten by three men outside a bar in a parking lot genuine issues of material fact existed as to whether the bar gratuitously assumed a duty to its patron after he left the premises. *Ember v. B.F.D., Inc.*, 490 N.E.2d 764 (Ind. Ct. App. 1986) opinion modified on denial of reh’g, 521 N.E.2d 981 (Ind. Ct. App. 1988). The record supported a reasonable inference the tavern owner knew its parking lot was insufficient for its patrons’ use, and in addition was aware its patrons customarily used the parking lot across the street while patronizing it, and that the initial confrontation occurred at the entrance to this lot. *Id.* at 722.

James Santelli was murdered by Joseph Pryor while in his room at Mr. Rahmatullah’s Super 8 Motel. *Santelli v. Rahmatullah*, 993 N.E.2d 167, 169 (Ind.2013). It was alleged that the murder was a foreseeable criminal act and that Mr. Rahmatullah was negligent in the matter in which he maintained the motel. *Id.* at 170. Pryor was a non-party to the action. *Id.* The key issue question before the Indiana Supreme Court was whether intentional criminal conduct qualified as comparative fault under Indiana’s Comparative Fault Act. The Court held that it could. *Id.* at 179. This decision affirmed that intentional conduct (including criminal conduct) may be considered while allocating fault in a comparative fault case. *Id.* This result is consistent with the clear language of Indiana’s Comparative Fault Act. *Id.* at 177

KENTUCKY



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Slip & Fall In General

Kentucky adopted pure comparative fault in 1984 pursuant to the holding in *Hilen v. Hays*, 673 S.W.2d 713 (Ky. 1984) and now codified in Kentucky's *Rights of Actions Law* KRS § 411.182. With a pure comparative fault, claimant's negligence does not bar recovery, and any damage award will be reduced by the claimant's percentage of fault. See KRS 411.182. Under comparative fault, a plaintiff must still prove the defendant owed a duty to the plaintiff, breached that duty, and consequent injury followed. See *Pathways Inc. v. Hammons*, 113 S.W.3d 85, 88 (Ky. 2003). The general duty

of care owed to all persons will usually allow a case to proceed to jury in all but the most frivolous case.

Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. Kentucky's *Rights of Actions Law*, KRS § 411.130. Punitive damages may be recovered if the act was willful or by gross negligence. *Id.*

A premises owner has a duty to maintain his property in

such a way as not to expose others to what in the circumstances would be an unreasonable risk of harm. *Baker v. McIntosh*, 132 S.W.3d 230, 233 (Ky. Ct. App. 2004). 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, (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.

Under pre-comparative fault case law, if the hazard or condition was an open and obvious condition, the defendant owed no duty to the plaintiff who chose to proceed across it (regardless if natural or unnatural). However, now see *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013) (modifying law so defendants owe invitees a general duty of care but breach is a matter of fact for jury). Kentucky courts have defined “obvious” as meaning that both the condition and the risk are apparent to and would be recognized by a reasonable man in the position of the visitor exercising ordinary perception, intelligence and judgment. *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 444 (Ky. App. 2006).

Employers are liable for workers’ compensation for injury, occupational disease, or death without regard to fault as a cause of the injury, occupational disease, or death (unless as a result of a voluntary intent of the person to injure themselves). If a third party may be liable for injury but compensation may be payable, the injured employee may either claim compensation and/or proceed at law by civil action against the third person to recover damages, but he shall not collect from both. See KRS § 342.700.

If compensation is awarded, the employer (or fund or carrier) may recover from the third party in whom legal liability exists (but not exceeding amount awarded and not including his legal fees and expense). *Id.* Every claim to compensation must first be presented to the immediate employer (with no bar by limitations). *Id.* Still, a principal contractor, intermediate, or subcontractor shall be liable for compensation to any employee injured by any of his intermediate or subcontractors to the same extent as the immediate employer (if injured on, in or about the property the contractor is working or controls). KRS § 342.610; KRS § 342.700. Claims against the principal and intermediate claims must be made by the claimant within 1 year of an ALJ decision saying the employer has insufficient security to pay the full and maximum benefits that could be determined to be due him. KRS § 342.700. As a matter of public policy, contractors cannot waive these rights against the employer (or drop a claim for a new contract). *Id.*

Slip & Fall On Conditions

In cases of invitees, the courts must ask whether the land possessor could reasonably foresee that an invitee would be

injured by the danger. *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901 (Ky. 2013). Courts no longer makes a “no-duty” determination, but rather makes a “no-breach” determination, dismissing a claim on summary judgment or directed verdict when there is no negligence as a matter of law, the plaintiff having failed to show a breach of the applicable duty of care. *Id.* This approach places the reasonable-foreseeability analysis in the hands of the fact-finders, the jury. *Id.* The hospital owed the party a duty of reasonable care to an invitee encouraged to visit her husband. When considering if the duty were breached, it had to be asked if despite the hazard’s obviousness, was their reason for the hospital to expect the party’s attention might be distracted from the hazard or that the party would choose to encounter the hazard when it reasonably appeared the advantages of doing so would outweigh the risk, both of which were questions for a jury.

Trip and fall claims are broken down into three areas: *Permanent Conditions*; *Transient Conditions*; and *Weather Related*.

1) Permanent Conditions

A premises owner has a duty to conduct his activities in such a way as not to expose others to what in the circumstances would be an unreasonable risk of harm. *Baker v. McIntosh*, 132 S.W.3d 230, 233 (Ky. App. 2004). Kentucky case law has generally held that foreseeability is “the most important factor in determining whether a duty exists.” *Pathways Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). The Kentucky Supreme Court has held that the “foreseeability of harm becomes a factor for the jury to determine what was required by the defendant in fulfilling the applicable standard of care.” *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 914 (Ky. 2013). (Prior to 2013, Kentucky allowed “open and obvious” as an absolute defense. However, *Shelton* makes “open and obvious” a jury issue for apportioning fault, and any pre-2013 cases may be limited in application.)

Kentucky has traditionally had an absolute open and obvious defense for cases dealing with premises liability. Kentucky’s law regarding the open and obvious doctrine was that a landowner has a duty to an invitee to eliminate or warn of unreasonable risks of harm. Kentucky has defined “obvious” as meaning that both the condition and the risk are apparent to and would be recognized by a reasonable man in the position of the visitor exercising ordinary perception, intelligence and judgment. *Reece v Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 444 (Ky. App. 2006). The open and obvious defense has seemingly become dead for dispositive motion pursuant to the holding in *Shelton*, unless there is no dispute about the benign nature of the condition, such as a properly constructed 6” curb. The *Shelton* Court ultimately held that a jury should decide how far one must go to satisfy its duty to exercise reasonable care if there is any question about the “condition” causing the injury.

2) Transient Conditions

Kentucky treats the presence of transient conditions (e.g. foreign substances on floor like a banana peel or a spilled drink) separately from permanent conditions.

Lanier v. Wal-Mart Stores, Inc., 99 S.W.3d 431,435 (Ky. 2003) created a shifting burden when the Kentucky Supreme Court held that “once the plaintiff establishes that he or she fell as a result of a transitory foreign substance, a rebuttable presumption of negligence arises. At that point, the burden shifts to the defendant to show by the greater weight of evidence that it exercised reasonable care in the maintenance of the premises under the circumstances. The circumstances could include the nature of the specific hazard and the nature of the defendant’s business.” The Court in *Lanier* later emphasized that “the proprietor is guilty of negligence only if he fails to use reasonable care under the circumstances to discover the foreseeable dangerous condition and to correct it or to warn customers of its existence.” *Id.* For example, if the business establishes that the spill occurred in between fifteen (15) minute “safety sweeps” a jury could find that the business acted reasonably in discovering spills, and render a defense verdict.

The rule set forth in *Lanier* was extended to other temporary trip hazards in *Bartley v. Educ. Training Sys.*, 134 S.W. 612 (Ky. 2004). In *Bartley*, the plaintiff tripped and fell while traversing the school’s main classroom. The Plaintiff looked back and noticed a “big wrinkle” in a piece of carpet, a “runner like thing” that lay in the aisle way. The Court reversed the lower court’s finding of summary judgment for the Defendant. The Court held that a customer retains the burden of proving that: (1) he or she had an encounter with a foreign substance or other dangerous condition on the business premises; (2) the encounter was a substantial factor in causing the accident and the customer’s injuries; and (3) by reason of the presence of the substance or condition, the business premises were not in a reasonably safe condition for the use of business invitees. Such proof creates a rebuttable presumption sufficient to avoid a summary judgment or directed verdict, and “shifts the burden of proving the absence of negligence, i.e., the exercise of reasonable care, to the party who invited the injured customer to its business premises.” *Bartley v. Educ. Training Sys.*, 134 S.W.3d 612 (Ky. 2004). The ruling in *Lanier* is also recommended for some cases where items have fallen off of shelves and injured plaintiffs. See 2-141 *Caldwell’s Kentucky Form Book Form* 141.08.

The Kentucky Supreme Court has declined to extend the rule in *Lanier*, discussed above, to apply in cases of temporary conditions caused by a contractor working on the premises. *Brewster v. Colgate-Palmolive Co.*, 279 S.W.3d 142 (Ky. 2009). Rather, the court has explicitly limited the rebuttable presumption of negligence under *Lanier* to cases involving customers or clients or patrons suffering “slip and falls” or other injuries resulting from transient dangerous conditions on a business owner’s premises, but which should be corrected by the landowner within a reasonable time. *Id.*

In the case of a contractor, the landowner has a duty to warn of a hidden danger only if it possesses actual knowledge of the presence of the danger, and the injured party has neither actual nor constructive knowledge of such danger.

3) Weather

Kentucky has recently changed its stand on snow and ice cases in the 2015 case of *Carter v. Bullitt Host, LLC*, 2013-SC-000325. Previously, if a weather-created condition was an open and obvious condition, the defendant owed no duty to the plaintiff who chose to proceed against it (regardless if natural or unnatural). *Rogers v. Professional Golfers Ass’n*, 28 S.W.3d 869, 873 (Ky. App. 2000). This is a major shift in how Kentucky treats snow and ice cases.

Not all natural conditions outdoors are equally apparent to landowners and invitees. When a landowner plowed a parking lot, creating a sense of a safe environment, it was held to be a jury question whether the adjoining icy sidewalk should also have been cleared to be consistent. *Estep v. B.F. Saul Real Estate Inv. Trust*, 843 S.W.2d 911 (Ky. Ct. App. 1992) (remanding as issue of fact whether ice under snow was a trap for the unwary customer once the parking lot was cleared).

Items Falling Off Shelves

Recent changes in tort law will generally put all cases into a comparative fault analysis. However, until specifically reversed, examples may still exist for unique cases.

Defendant was not liable where plaintiff suffered injuries resulting from items falling off a shelf and hitting him on the foot while shopping at a Wal-Mart. *Pollard v. Wal-Mart*; 2001 KY Trial Ct. Rev. LEXIS 2712. To prevail, plaintiff had to prove: (1) Wal-Mart’s retrieval of the shredder created an unreasonably dangerous condition and (2) as a result, the candle box fell injuring her. There was an issue as to causation because a witness claimed to have seen plaintiff cause the box to fall. The jury found for defendant in 16 minutes. *Id.* 2-141 *Caldwell’s Kentucky Form Book Form* 141.08 recommends using *Lanier* 99 S.W.3d 431 (Ky. 2003) for cases where items have fallen off shelves and injured plaintiffs.

In *Kroger*, Appellee alleged in her petition that her injuries were caused by ‘The negligence of the defendants in insecurely packing and storing said merchandise on said shelf.’ *Kroger Grocery & Baking Co. v. Stevenson*, 244 S.W.2d 732(Ky.1951). Appellants contend that it is established by the evidence that the bottles of Clorox exploded before they fell, and that appellee failed to prove any negligence in the stacking of the bottles. *Id.* Because Appellee pled negligence in specific terms, he could not rely on the principle of *res ipsa loquitur* except for the purpose of establishing those specific acts of negligence. *Id.* Appellee’s jury verdict was \$500 was upheld because the facts were determined to have supported the jury finding.

While riding a train, a man carrying a leather crupper for a horse put the item in a rack for packages. Plaintiff changed her seat and happened to take the seat immediately under

the rack containing the crupper. The package fell out of the rack and struck appellee on the head and shoulder, injuring her, as she claimed, quite severely. When a package like the one described in this case is caused to fall out of the rack by the ordinary movement of the car, this circumstance of itself, in connection with a description of the rack and the package, is sufficient to take the case to the jury on the issue relating to the sufficiency of the rack. *Louisville & I. R. Co. v. Rommele*, 152 Ky. 719 (Ky. 1913)

Parking Lot Defects

Suits brought due to parking lot defects are governed by premises liability. Under recent changes, older case law will support comparative fault arguments, rather than present a complete bar. In a case arising out of the thefts of wire wheels from plaintiff's car, the rule that a parking garage was a bailee that was obligated to exercise the care of a reasonable man with respect to his own property was no longer viable. *Central Parking System v. Miller*, 586 S.W.2d 262 (Ky. 1979). Instead, the court held that when a person parked his automobile in a garage, received a ticket from an automated machine, chose his own space, and took his keys with him, the garage was not a bailee and was not liable in the absence of negligence. *Id.*

Summary judgment against plaintiff estate's complaint for wrongful death of the decedent in a one-car vehicular accident wherein a car fell into a river was affirmed because the decedent had sufficient room to maneuver without encountering an embankment; evidence demonstrated that there was no indication that the decedent attempted to apply the brakes; the placement of the parking spaces was not a cause-in-fact of the accident; the design of the parking lot was not a substantial factor in causing the accident; and it was not reasonably foreseeable that the design created a risk of injury from falling into the river. *Lewis v. B&R Corp.*, 56 S.W.3d 432 (Ky. App. 2001).

The daughter of Plaintiff parked their car in the space designated by the attendant. *Downing v. Drybought*, 249 S.W.2d 711 (Ky. 1952). Plaintiff got out of the car and instead of going to the aisle through which she had entered, she started toward the aisle on the opposite side of the section. *Id.* Before reaching the aisle she stumbled on the division strip, fell, and broke her arm. *Id.* It is common knowledge that many parking lots have the same aisles and concrete strips and that people use them without injury or inconvenience. Plaintiff testified it was dark in the lot, "and that's how come me to fall." *Id.* *Downing* was remanded to decide if the lot was well-lit because there was no warning sign or directions to guide Plaintiff, and could not say, as a matter of law, she was guilty of negligence in electing to depart through one aisle instead of the other.

Plaintiff sustained bodily injury when she tripped over one of several concrete humps used to divert water in B&E's parking lot (or speed bump). *Stone v. Cummins*, 2003 Ky. App. Unpub. LEXIS 96 (Ky. Ct. App. Oct. 31, 2003). Defen-

dant did not owe any duty to Dorothy because she admitted that she was aware of and saw the concrete humps as she crossed the parking lot to enter B&E. *Id.*

Dram Shop

By statute, it is the consumption of intoxicating beverages rather than the serving, furnishing, or sale of such beverages that is the proximate cause of any injury (including death and property damage) inflicted by an intoxicated person upon himself or another person. KRS § 413.241(1). The intoxicated person is held to be primarily liable with respect to injuries suffered by third persons. KRS § 413.241(3).

Any person holding a permit under KRS Chapters 241 to 244, or any agent, servant, or employee of the person, who sells or serves intoxicating beverages to a person over the age for the lawful purchase will NOT be liable to that person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises including but not limited to wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served, unless a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving. KRS § 413.241(2).

Any person holding a permit under KRS Chapters 241 to 244, or any agent, servant, or employee of the person, who sells or serves intoxicating beverages to a person over the age for the lawful purchase will NOT be liable to THAT person or to the estate, successors, or survivors of either for any injury suffered off the premises including but not limited to wrongful death and property damage, because of the intoxication of the person to whom the intoxicating beverages were sold or served. Third party claims turn on what a reasonable person under the same or similar circumstances should know in regards to whether the person served is already intoxicated when served. KRS § 413.241(2).

A minor has valid claim against a dram shop that sells him alcohol in violation of liquor laws, thereby causing or contributing to his injuries. See *Sixty-Eight Liquors, Inc. v. Colvin*, 118 S.W.3d 171 (Ky. 2003).

Assault

Premises liability in Kentucky also governs assault cases from time to time. In *Murphy v. Second Street Corp*, 48 S.W.3d 571 (Ky. App. 2001), the Court held that a Plaintiff seeking to recover from injuries caused by a business patron must show either (1) that the business had knowledge that one of his patrons was about to injure plaintiff and he failed to exercise ordinary care to prevent such injury, or (2) that the conduct of some of the persons present was such as would lead a reasonably prudent person to believe that they might injure other guests." *Murphy v. Second Street Corp*, 48 S.W.3d 571 (Ky. App. 2001).

In *Martin*, Elkins, an adult landowner who was aware that minors were imbibing in alcohol on his property, had a

special relationship with those minors. *Martin v. Elkins*, 2012 Ky. App. Unpub. LEXIS 1004 (Ky. Ct. App. Aug. 31, 2012). Where minors and alcohol are concerned, the scope of foreseeability is expanded.

However, the alleged tortious conduct in this case was an assault by Byrd on Martin, an act which occurred at another location and due to an automobile fender bender. This conduct was beyond the scope of reasonable foreseeability by Elkins. Persons are generally entitled to assume that third parties will not commit intentional criminal acts. *Id.* Indeed, even the Dram Shop statutes, which are intended to be more stringent as they apply to businesses rather than individual social hosts, place the primary liability for injuries to third parties upon the intoxicated person rather than the

business establishment. *Id.*

The *Wilkerson* Court held that a social host could not foresee that a drunken party guest would punch another guest in the face. *Wilkerson v. Williams*, 336 S.W.3d 919 (Ky. App. 2011). The *Isaacs* Court stated that, in the dram shop context, a night club owner could not foresee that a bar patron who got into a shouting match with another patron would later in the evening draw a weapon and shoot the other patron. *Isaacs v. Smith*, 5 S.W.3d 500, 46 8 Ky. L. Summary 46 (Ky. 1999). The law is clear that intentional torts against third parties, such as bar fights, assaults, and shootings, are not foreseeable to social hosts or bar owners. *Martin v. Elkins*, 2012 Ky. App. Unpub. LEXIS 1004 (Ky. Ct. App. Aug. 31, 2012).

LOUISIANA



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Johnson, Yacoubian & Paysse is a civil litigation firm which was formed in 1991 by three local defense attorneys having combined experience of over seventy years in the private practice of law. The firm represents large insurance underwriters and major corporations in complex litigation as well as small corporations and individuals. We strive to strike a balance between the traditional one-to-one relationship of attorney and client and the demands of today's increasingly complex legal problems that often require the combined attention of several lawyers.

Johnson, Yacoubian & Paysse's offices, which are located in downtown New Orleans, are in close proximity to the United States District Court for the Eastern District of Louisiana, the United States Fifth Circuit Court of Appeals, the Louisiana Supreme Court and several Louisiana State District and Appellate Courts. The size and composition of the firm affords clients personal service that is not always available with larger law firms. The firm also maintains a paraprofessional staff, computerized research, document indexing and retrieval systems and advanced word processing systems. Modern technology enables us to provide quality legal services in a prompt and efficient fashion.

Practice Areas: Admiralty and Maritime; Automobile Liability; Commercial Litigation; Energy/Offshore Litigation; Federal and State Workers' Compensation; General Casualty; Insurance Defense and Coverage Litigation; Medical Malpractice; Premises Liability; Products Liability; Toxic Torts; Trucking and Transportation Litigation.

Slip & Fall In General

A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage. *Dickerson v. Winn-Dixie, Inc.*, 816 So.2d 315 (La. App. 1 Cir. 2002).

In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, and in addition to all other elements of his cause of action, that:

- (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable;
- (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence; and
- (3) The merchant failed to exercise reasonable care. [La. Rev. Stat. 9:2800.6 (2015)]

Slip & Fall On Snow/Ice

Supermarket, in the maintenance of its premises, owed a duty to exercise ordinary and reasonable care in maintaining its sidewalks and parking lot during severe weather conditions precipitated by ice storm. *Keller v. Odin Management, Inc.*, 762 So.2d 657 (La. App. 2 Cir. 2000).

Louisiana enacted a comparative negligence statute which reduces a plaintiff's recovery by the degree of her own fault. The victim's own recklessness is an affirmative defense that must be shown by the defendant. *Id.*

Shopping mall acted reasonably during icy weather conditions and did not breach its duty of care where mall recognized, after maintenance employees spread salt on sidewalks, that salt was insufficient to prevent development of further icy conditions and decided to close early, and mall distributed notices to all tenants advising them that the mall would be shutting down, at which time main entrances were locked and customers and employees cleared out, but tenant decided to remain open. *Id.*

Items Falling Off Shelves

A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.

In a suit for damages by a person who has suffered damages as the result of a hazardous condition while on the merchant's premises, the person must prove that the accident was caused by a hazardous condition. The burden of

proof then shifts to the merchant to prove that he acted in a reasonably prudent manner in exercising the duty of care he owed to the person to keep the premises free of any hazardous conditions. *Crandell v. Winn-Dixie Louisiana, Inc.*, 580 So. 2d 967, 968 (La.App. 5 Cir. 1991) quoting La. Rev. Stat. 9:2800.6 (2015).

Parking Lot Defects

It is common for the surfaces of streets, sidewalks, and parking lots to be irregular. It is not the duty of the party having garde of the same to eliminate all variations in elevations existing along the countless cracks, seams, joints, and curbs. These surfaces are not required to be smooth and lacking in deviations, and indeed, such a requirement would be impossible to meet. Rather, a party may only be held liable for those defects which present an unreasonable risk of harm. *Llorence v. Broadmoor Shopping Center*, 76 So.3d 134 (La. App. 3 Cir. 2011).

In determining whether a defect presents an unreasonable risk of harm, the fact finder must balance the gravity and risk of harm against the cost and feasibility of repair, social utility, and individual and societal rights and obligations. *Id.*

The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. *La. Civ. Code Art. 2317.1 (2015).*

Assault

While landowner has duty to discover any unreasonably dangerous conditions on the premises and to either correct conditions or warn of the danger, that duty refers to existing dangerous "conditions," meaning physical conditions which exist on the premises and are unknown to person who ventures on land; "conditions" does not mean intangible dangers of third-party criminal conduct that may happen in the future. *Dye v. Schwegmann Bros. Giant Supermarkets, Inc.*, 627 So.2d 688 (La. App. 4 Cir. 1993).

Grocer does not owe duty to warn potential customers that they may be victim of crime while on the business premises; danger of crime is matter well within knowledge of any resident. *Id.*

Grocer does not have duty to protect shoppers from unarticulated criminal conduct that may be committed by unnamed and unknowable third persons at some indefinite and unknown time in the future since grocers and their customers do not have unique relationship; customers have not placed their safety in hands of grocer who, in turn, has assumed responsibility for their welfare. *Id.*

General rule is that business establishment is not insurer of welfare of its patrons. *Id.*

MAINE

PETRUCCELLI, MARTIN & HADDOW, LLP

Petrucelli, Martin & Haddow, LLP, one of Maine's premier law firms, has been providing successful, aggressive and innovative legal representation in a wide variety of matters for over 30 years in Portland, Maine.

Founded as a general practice firm in 1980, we have been effectively representing and advocating for individual, corporate, and small business clients in matters ranging from complex litigation to estate planning, and from personal injury to land use regulation. We are appellate and trial lawyers with wide experience in both state and federal courts. We also regularly advise our clients with regard to business formation and governance, contract drafting and interpretation, real estate transactions, employment and environmental issues. We take pride in our devotion to listening carefully to our clients' needs and rendering sound legal advice in a cost effective and efficient manner.

Practice Areas: Insurance Law; Professional Liability; Product Liability; Business Litigation; Employment Law; Environmental Law; Personal Injury; Contract and Commercial Law; Corporate and Business Organization; Bankruptcy; Appeals; Intellectual Property; Estate Planning and Probate; Administrative and Municipal Law; Alternative Dispute Resolution (ADR); Real Estate and Land Use.

Slip & Fall In General

When a foreign substance on floor causes member of public to sustain injuries, injured party ordinarily bears burden of proving defendant's negligence by establishing that defendant caused the substance to be there, or that defendant had actual knowledge of the existence of the foreign substance, or that the foreign substance was on the floor for such a length of time that defendant should have known about it; Maine does not follow "mode of operation" rule that imputes conduct of customers in self-service operation to owners. *Dumont v. Shaw's Supermarkets*, 664 A.2d 846 (1995)

A plaintiff does not have to prove that the store owner had actual notice of the specific condition giving rise to the injury if the plaintiff can establish that the store owner was aware of the risk of a recurrence of a hazardous condition of the premises; in those circumstances, a store owner may be chargeable with constructive notice of the existence of the specific condition at issue. *Id.*

The principle of foreseeability of a recurrent risk is distinct from the rejected "mode of operation" rule; pursuant to the latter rule, the conduct of customers is imputed to the store owner by reason of the store owner's choice of customer self-service as a mode of operation, whereas under the former rule a store owner who is aware of the existence

of a recurrent condition that poses a potential danger to invitees may not ignore that knowledge and fail reasonably to respond to the foreseeable danger of the likelihood of a recurrence of the condition. *Id.*

Slip & Fall On Snow/Ice

Business owners have a duty to reasonably respond to foreseeable dangers and keep premises reasonably safe when significant numbers of invitees may be anticipated to enter or leave the premises during a winter storm, and may not wait until after the storm to take any action, regardless of the risk posed to its invitees during the storm, although duty may be less rigorous if owner does not reasonably anticipate comings and goings of significant numbers of invitees while storm is in progress. *Budzko v. One City Center Associates Ltd. Partnership*, 767 A.2d 310 (2010).

[T]he owner of a building or premises has a duty to use reasonable care to maintain those premises in a reasonably safe condition. To recover in a case like this, the plaintiff must prove by a preponderance of the evidence that there was an accumulation of snow and/or ice on the premises that was the proximate cause for her injuries. She must prove by a preponderance of the evidence that the snow and ice condition had been present for a time of sufficient duration prior to her injury to enable a reasonably prudent person to discover and remedy it, and thirdly that the defendant knew

of the snow and/or ice condition and did not correct it or did not know of the snow and/or ice condition but in the exercise of reasonable care should have known about it and corrected it under the conditions that you heard about in this case. *Id.*

Items Falling Off Shelves

As a business invitee on supermarket premises one is owed the duty that store would exercise reasonable care to provide one with premises and installations which were reasonably safe for use. *Orr v. First National Stores, Inc.*, 280 A.2d 785 (1971).

In certain cases, possessor of land can and should anticipate that a dangerous condition will cause physical harm to an invitee notwithstanding its known or obvious danger; in such cases, the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection; rather, he is required to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm. *Isaacson v. Husson College*, 287 A.2d 98 (1972).

Parking Lot Defect

The store owner has no duty to insure safety to a business

invitee; he is, nevertheless, under legal obligation to use ordinary care to ensure that the premises and facilities are reasonably safe for all invitees, young children as well as adults. *Orr v. First National Stores, Inc.*, 280 A.2d 785 (1971).

Assault

An owner or occupier of land owes the same duty of reasonable care in all the circumstances to all persons lawfully on the land, regardless of whether they may be considered licensees or invitees. This duty does not require an owner or occupier to insure the safety of his lawful visitors, but rather requires only that the owner or occupier exercise reasonable care in providing reasonably safe premises for their use. *Be-lyea v. Shiretown Motor Inn*, 2010 ME 75, 2 A.3d 276, 279 [quoting *Poulin v. Colby College*, 402 A.2d 846, 851 (Me. 1979)].

In instances of nonfeasance rather than misfeasance, and absent a special relationship, the law imposes no duty to act affirmatively to protect someone from danger unless the dangerous situation was created by the defendant. Only when there is a "special relationship," may the actor be found to have a common law duty to prevent harm to another, caused by a third party. *Id.* [quoting *Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 1999 ME 144, 738 A.2d 839, 845)].

MARYLAND



Bacon, Thornton & Palmer L.L.P. provides experienced civil representation throughout the Baltimore-Washington corridor. The firm is AV rated by Martindale-Hubbell and included in the Martindale-Hubbell Bar Register of Preeminent Lawyers.

With decades of experience, and hundreds of jury verdicts exclusively in the area of civil litigation in the Federal and State courts of Maryland and the District of Columbia, the firm provides aggressive representation with efficient, personal case handling. Our clients include many Insurance and Fortune 500 companies, for which the firm provides representation in a wide array of practice areas.

Our founding partners have worked together for over 20 years, with numerous significant decisions reported in the Maryland Appellate Courts, District of Columbia Court of Appeals, and the United States Courts of Appeals for the Fourth Circuit and the District of Columbia Circuit. We appreciate having numerous clients of equal long-standing, a fact we attribute to our dedication in providing personal high quality legal representation at efficient costs.

Practice Areas: Product Liability; Retailer/Employer Liability; Insurance Coverage; Construction Defects and Accidents; Environmental Exposure; Creditor Rights and Liabilities; Employment Law and ERISA Claims; Motor Vehicle Accidents; Intentional Torts; Trademark; Copyright; Commercial Leasing; Corporate Structuring.

Slip & Fall In General

The basis for premises liability depends upon the injured person's status on the property. See *Baltimore Gas & Elec. Co. v. Flippo*, 112 Md. App. 75 684 A.2d 456 (1996), *AFF*, D, 348 Md. 680, 705 A.2d 1144 (1998).

Classifications of the Injured Persons Status on the property are as follows:

- Invitee: A person invited or permitted to be on another's property or purposes related to the owners business.
- Social Guest or Licensee by Invitation: A person who is permitted on the property of another for no business purpose of the owner but as the expressed or implied guest of the owner.
- Bare Licensee: A person on the property with the consent but not at the invitation of the owner, who is there to serve his or her own interests but not to serve any interest of the owner.
- Trespasser: A person who is on the property of another without the consent of the owner or occupier of the property.

The standard of care owed to the injured person depends on their status on the property.

- Duty to a Social Guest or Licensee by Invitation: The duty owed to a social guest or licensee by invitation is to exercise reasonable care to make the premises safe or to warn the guest of known dangers that cannot reasonably be discovered by the guest. See *Paquin v. McGinnis*, 246 Md. 569, 229 A.2d 86 (1967).
- Duty Owed to a Bare Licensee or Trespasser: The duty owed to a bare licensee or trespasser is only to refrain from willful injury or entrapment. A bare licensee or trespasser takes the property as it exists. See *Mech v. Hearst Corp.*, 64 Md. App. 422, 496 A.2d 1099 (1985).
- Duty to Invitee: Proprietor of a store owes a duty to an invitee to exercise ordinary care to keep the premises in a reasonably safe condition, and proprietor will be liable for injuries sustained in consequence of a failure to do so. *Maans v. Giant of Maryland*, 161 Md.App. 620 (2005).

Store's customer is entitled to assume that the proprietor will exercise reasonable care to ascertain the condition of the

premises, and if he discovers any unsafe condition he will either take such action as will correct the condition and make it reasonably safe or give a warning of the unsafe condition. *Id.*

The duties of a business invitor include the obligation to warn invitees of known hidden dangers, a duty to inspect, and a duty to take reasonable precautions against foreseeable dangers. *Id.*

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

1. 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
2. should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and fails to exercise reasonable care to protect them against the danger. *Id.*

The Maryland Court of Special Appeals recently reaffirmed Maryland's notice requirement for a business proprietor to be held liable for an injury to a business invitee due to a dangerous condition on the property, and rejected the "mode of operation" rule adopted by some other states. *Zilichikhis v. Montgomery County*, 223 Md. App. 158 (2015)

Slip & Fall On Snow/Ice

Landowner is subject to liability for harm caused by natural or artificial condition on his land if he knows or by exercise of reasonable care could discover the condition, if he should expect that invitees will not discover the danger or will fail to protect themselves against it, or if he invites entry upon land without making the condition safe or giving a warning. *Honolulu Ltd. v. Cain*, 244 Md. 590, 224 A.2d 433 (1966)

The word 'invitee' itself, conveys the idea that the place is held out to the visitor as prepared for his reception. The occupant does not, of course, become an insurer of the safety of those who accept his invitation. But when the public is led to believe that premises have been offered for its entry, the law is clear that the occupant assumes a duty of reasonable care to see that the place is safe for the purpose. The duty extends to those who are injured when they enter in response to the invitation. *Id.* at 595, 224 A.2d at 435.

Items Falling Off Shelves

Grocery store owner/operator has duty to exercise reasonable and ordinary care to see that its premises are in such a condition that its customers might safely use them while visiting store upon its invitation to buy its wares, and in performance of that duty, store owner/operator is required to exercise reasonable care to discover conditions which, if known to it, it should have realized involved an unreasonable risk to patrons, and any breach of that duty resulting in injury to invitee constitutes negligence, if, but only if, it knew, or by

exercise of reasonable care could have discovered, conditions which created peril, and had no reason to believe that its invitees would realize the risk involved therein. *Maans v. Giant of Maryland*, 161 Md.App. 620 (2005).

Parking Lot Defect

Landowner is subject to liability for harm caused by natural or artificial condition on his land if he knows or by exercise of reasonable care could discover the condition, if he should expect that invitees will not discover the danger or will fail to protect themselves against it, or if he invites entry upon land without making the condition safe or giving a warning. *Honolulu Ltd. v. Cain*, 244 Md. 590, 224 A.2d 433 (1966).

A licensee by invitation is a social guest to whom is owed the "duty to exercise reasonable care to warn ... of dangerous conditions that are known to the possessor but not easily discoverable." *Baltimore Gas & Elec. v. Flippo*, 348 Md. 680, 689 (1998).

Assault/Third Party Criminal Activities

In determining the existence of duty, as element of negligence, court considers, among other things, foreseeability of harm to plaintiff, degree of certainty that plaintiff suffered injury, closeness of connection between defendant's conduct and injury suffered, moral blame attached to defendant's conduct, policy of preventing future harm, extent of burden to defendant and consequences to community of imposing duty to exercise care with resulting liability for breach, and availability, cost, and prevalence of insurance for the risk involved.

A "special relationship" between a party and a third person or between a party and an injured person, so that the party had a duty to protect the injured person from the third person's criminal act, means simply a relationship that gives rise to a duty to exercise reasonable care, and such definition should not be confused with those instances when the same or similar term is used to describe a greater duty than that of the usual duty to exercise reasonable care. *Restatement (Second) of Torts* § 314 *et seq.*

In determining whether measures taken by the landlord were sufficient, the landlord's acts can be measured only the criminal activities occurring on the landlord's property and of which the landlord knew or should have known and not by those criminal activities occurring generally in the surrounding neighborhood. See *Scott v. Watson*, 278 Md. 160, 359 A.2d 548 (1976).

It has been held that such a special relationship exists between an innkeeper and a customer. An innkeeper has a duty to take affirmative action to protect a guest from intentional actions of third parties if he knew or should have known that harm to the guest was imminent, well in advance to prevent the harm. See *Corinaldi v. Columbia Courtyard, Inc.*, 162 Md. App. 207, 873 A.2d 483, Cert. Granted, 388 Md. 404 879 A.2d 1086, Appeal Dismissed, 39 Md. 124, 883 A.2d 914 (205).

MICHIGAN



For more than four decades, Collins Einhorn Farrell PC has provided outstanding legal counsel to clients in diverse practice areas. Our representation of clients focuses on defense litigation in state and federal courts. We are committed to providing knowledgeable and responsive service to our clients. Since our founding in 1971, we have gained an unparalleled reputation for our work and results for both institutional and individual clients nationwide.

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Practice Areas: Professional Liability; Asbestos/Toxic Tort; Insurance Coverage; Medical Malpractice; Appellate; Fire and Explosion; General and Automobile Liability; Employment; Workers Compensation; Product Liability.

Slip & Fall In General

It is well settled in Michigan that in a premises liability action, "a plaintiff must prove the elements of negligence:

1. The defendant owed the plaintiff a duty,
2. The defendant breached that duty,
3. The breach was the proximate cause of the plaintiff's injury, and
4. The plaintiff suffered damages."

Benton v. Dart Props. Inc., 270 Mich.App. 437, 440, 715 N.W.2d 335 (2006).

The duty owed to a visitor by a landowner depends on whether the visitor was a trespasser, licensee, or invitee at the time of the injury. *Hoffner v. Lanctoe*, 492 Mich. 450, 460 n. 8, 821 N.W.2d 88 (2012).

A proprietor owes no duty to a "trespasser," i.e., a person who enters upon the property of another without consent, except for injuries caused by "willful and wanton" misconduct. *Stitt v. Holland Abundant Life Fellowship*, 462 Mich. 591, 596, 614 N.W.2d 88, 91 (2000).

A "licensee" is a person who enters upon the property by "virtue of the possessors consent," i.e., social guests who

assume the ordinary risk involved with their visit. *Id.* The proprietor has a duty to warn licensees only of "any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved." *Id.* The landowner in such a case has no duty to inspect or to insure the premises are in a safe condition. *Id.*

A "business invitee" on the other hand is "a person who enters the land upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises and make [it] safe for [the invitee's] reception." *Id.* The proprietor thus owes the invitee a duty of reasonable care to warn of any known dangers and to maintain the premises in a reasonably safe condition i.e., to inspect the property and make any repairs or warn of any known dangers. *Id.*

Whether a person receives "invitee" status depends on whether the person is entering the property of another for business purposes. The court has concluded that "owner's reason for inviting persons onto the premises is the primary consideration when determining the visitor's status: In order to establish invitee status, a plaintiff must show that the premises were held open for a commercial purpose." *Stitt*,

462 Mich. at 596 (Michigan holds that persons on church premises for purposes other than commercial, i.e. to pray, are licensees and not invitees).

A proprietor has breached his duty of care owed to an invitee when the possessor knows or should know of a dangerous condition on the premises of which the invitee has no knowledge of and fails to remedy it or warn of its presence. *Hoffner*, 492 Mich. at 460. However, the landowner has no duty to protect against those dangers which are “open and obvious.” *Id.* at 461. Whether a danger is open and obvious rests on whether an ordinary prudent person would reasonably discover the hazard upon casual inspection. *Id.* A limited exception exists where the “special aspects of a condition make even an open and obvious risk unavoidable.” *Id.* When such a condition exists the landowner must take reasonable steps to protect the invitee against that unreasonable risk of harm. *Id.*

Michigan follows the rule of comparative negligence. Under comparative negligence, where both the plaintiff and the defendant are culpable of negligence with regard to the plaintiff’s injury, this reduces the amount of damages the plaintiff may recover but does not preclude recovery altogether. Accordingly, it is important for courts in deciding summary disposition motions by premises possessors in “open and obvious” cases to focus on the objective nature of the condition of the premises at issue, not on the subjective degree of care used by the plaintiff. *Lugo v. Ameritech Corp., Inc.*, 464 Mich. 512, 523-24, 629 N.W.2d 384, 390 (2001).

The plaintiff has the burden of producing evidence sufficient to make out a *prima facie* case. *Snider v. Bob Thibodeau Ford, Inc.*, 42 Mich.App. 708, 712, 202 N.W.2d 727 (1972). The happening of an accident is not, in and of itself, evidence of negligence. The plaintiff must present some facts that either directly or circumstantially establish negligence. *Whitmore v. Sears, Roebuck & Co.*, 89 Mich.App. 3, 9, 279 N.W.2d 318 (1979). If the plaintiff fails to establish a causal link between the accident and any negligence on the part of the defendant, summary disposition is proper. *Pete v. Iron Co.*, 192 Mich.App. 687, 689, 481 N.W.2d 731 (1992).

Slip & Fall On Snow/Ice

In slip and fall cases on snow and ice, a landowner has a “duty to exercise reasonable care to diminish the hazards of ice and snow accumulation, requiring that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to a business invitee.” *Hoffner*, 492 Mich. at 463-64 (Michigan has rejected the common notion that ice and snow hazards are always open and obvious conditions.). A determination of whether such wintry conditions are open and obvious hinges on “whether the individual circumstances, including the surrounding conditions, render a snow or ice condition open and obvious such that a reasonably prudent person would foresee the danger.” *Id.* at 464. Thus if the wintry conditions are deemed open and obvious the plaintiff must prove spe-

cial aspects to the condition - i.e., unreasonable risk of harm or effectively unavoidable. *Id.*

Ice on privately-owned sidewalk in front of the only entrance to defendant’s fitness center, on which plaintiff slipped and fell injuring her back while trying to enter, was an avoidable open and obvious danger, such that center’s owners were not liable to member for her injuries. *Hoffner*, 492 Mich. at 481-82. Plaintiff observed ice at entrance to the fitness center, to which she desired to enter and admitted that she knew that the ice posed a danger, but that she saw the danger as surmountable and the risk as apparently worth assuming in order to take part in a recreational activity. She was not forced to confront the risk, and there was no evidence that risk of harm associated with the ice patch was so unreasonably high that its presence was inexcusable, even in light of its open and obvious nature. *Id.* at 480.

In a slip and fall case, as a matter of law, black ice in a parking lot without the presence of snow does not constitute an open and obvious danger. Finding, that an ordinary prudent person would not have been able to discover the black ice upon casual inspection given the invisible, or nearly invisible quality of black ice. *Slaughter v. Blarney Castle Oil Co.*, 281 Mich. App. 474, 760 N.W.2d 287 (2008).

Plaintiff, who fell on a snowy sidewalk when attempting to retrieve personal belongings from a private home, argued that the slippery condition was unavoidable because the homeowner had refused to provide a rug for traction and would not allow the plaintiff to enter the house through an alternative means. *Joyce v. Rubin*, 249 Mich. App. 231, 241-42, 642 N.W.2d 360, 366 (2002). The court held in favor of defendant finding no evidence that the condition was so unreasonably dangerous that it would create a risk of death or severe injury, and although invitee claimed that she had no choice but to use walkway to remove personal items from house, invitee could have avoided using walkway by returning another day, or refused to pass over the iced walkway until defendant let her use the garage door. *Id.*

Similarly, plaintiff who fell on icy steps outside his dormitory was not entitled to any relief since the court found that the steps were not unavoidable and the plaintiff had a choice whether to confront the hazardous conditions. *Corey v. Davenport Coll. of Bus.*, 251 Mich. App. 1, 649 N.W.2d 392 (2002).

Slip & Fall On Foreign Substance

The possessor of premises has a general duty to protect invitees against an unreasonable risk of harm due to a dangerous condition on the premises unless the condition is so open and obvious that an invitee could be expected to discover it. *Bertrand v. Alan Ford, Inc.*, 449 Mich. 606, 609-610, 537 N.W.2d 185 (1995).

“It is the duty of a storekeeper to provide reasonably safe aisles for customers and he is liable for injury resulting from an unsafe condition either caused by the active negligence

of himself and his employees or, if otherwise caused, where known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have had knowledge of it.” *Serinto v. Borman Food Stores*, 380 Mich. 637, 640-641, 158 N.W.2d 485 (1968).

Evidence that check-out lane had been closed for about an hour before customer fell walking through it into the store was sufficient to create a jury question as to whether dangerous condition caused by grapes that were scattered on floor of lane, which condition led to customer’s injury, existed for a sufficient period of time to put store on constructive notice of the condition. *Clark v. Kmart Corp.*, 465 Mich. 416-17, 634 N.W.2d 347 (2001). This case is distinguishable from those in which defendants have been held entitled to directed verdicts because of the lack of evidence about when the dangerous condition arose. See, e.g., *Goldsmith v. Cody*, 351 Mich. 380, 387-389, 88 N.W.2d 268 (1958); *Filipowicz v. S S Kresge Co.*, 281 Mich. 90, 94-95, 274 N.W. 721 (1937); *Whitmore v. Sears, Roebuck & Co.*, 89 Mich.App. 3, 9-10, 279 N.W.2d 318 (1979); *Suci v. Mirsky*, 61 Mich.App. 398, 402-403, 232 N.W.2d 415 (1975); *Galloway v. Sears, Roebuck & Co.*, 27 Mich.App. 348, 349-351, 183 N.W.2d 354 (1970).

Plaintiff’s testimony that she had fallen on a wet spot on the floor within defendant’s store, that she observed the floor after her fall and noted it was streaky, like floors she had mopped in the past, and that there were no signs or warnings that the floor was wet, and she later saw an employee of the defendant, near the rear of the store, with a mop and bucket, were sufficient to raise a logical inference that defendant’s employees had mopped the floor on which plaintiff had fallen and that they had failed to post adequate warning signs. *Berryman v. K Mart Corp.*, 193 Mich. App. 88, 93, 483 N.W.2d 642, 646 (1992). Plaintiff established that defendant owed her a duty, and that defendant breached that duty by creating a condition that was dangerous, that the condition created caused her injury, and that she suffered damages. *Id.* at 93-94.

Testimony of grocery store customer that she had been in store 45 or 50 minutes without hearing any sound resembling a jar breaking prior to the time she slipped and fell on broken jar of mayonnaise in aisle was insufficient to justify submitting to jury the question of whether store owner had constructive notice of existence of broken jar on aisle floor. *Serinto v. Borman Food Stores*, 380 Mich. 637, 643-44, 158 N.W.2d 485, 488 (1968).

Items Falling Off Shelves

“A premises owner owes, in general, a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.” *Kenny v. Kaatz Funeral Home*, 264 Mich.App. 99, 105, 689 N.W.2d 737 (2004), rev’d on other grounds 472 Mich. 929, 697 N.W.2d 526 (2005). “The care required extends to instrumentalities on the premises that the invitee

uses at the invitation of the premises owner.” *Eason v. Coggins Mem. Christian Methodist Episcopal Church*, 210 Mich. App. 261, 264, 532 N.W.2d 882 (1995).

A genuine issue of material fact existed as to whether retail store breached a duty of care to patron by failing to secure shelf merchandise in a sturdy manner, thereby precluding summary disposition on patron’s premises liability claim. *Cerrito v. K-Mart Corp.*, 294660, 2011 WL 1519649 *5 (Mich. Ct. App. Apr. 21, 2011). Plaintiff testified that while bending down to look at merchandise, another unit of merchandise fell off the overhead shelf and injured her. Except for the item that fell similar merchandise on the shelf were secured and a store manager stated that the unit that fell on plaintiff should have been secured as well. The court found that a reasonable juror could conclude that the store’s failure to secure the merchandise to the shelf created an inherently unstable display that presented an unreasonable risk of injury. *Id.* at 1.

Where plaintiff, an invitee, was removing an item from a shelf and the shelf above it fell down and struck her, the court held that plaintiff failed to show the existence of a defect in the shelves or shelving unit that made them prone to collapse. *Studaker v. Target Corp.*, 266678, 2006 WL 891081 (Mich. Ct. App. Apr. 6, 2006), reasoning that plaintiff merely speculated that shelf supports were not securely fastened, and after admitted she might have jostled the shelf when she was removing merchandise. *Id.*

Plaintiff was examining hunting goods in an aisle on defendant’s premises when a suitcase displayed on a shelf in an adjacent aisle fell and hit him on the shoulder, causing injury. In the incident report plaintiff claimed that customers in the adjacent aisle pushed the suitcase off the shelf. *Borchak v. Meijer, Inc.*, 265728, 2006 WL 448729 *1 (Mich. Ct. App. Feb. 23, 2006). Held, “there was no evidence that defendant breached its duty and caused [plaintiff’s] injury. [Plaintiff] testified that he did not know how the suitcase was positioned on the shelf before it struck him, and that he assumed that customers in the adjacent aisle caused the suitcase to fall from the shelf. Speculation does not create an issue of fact regarding causation.” *Id.* at 2.

Plaintiff sustained an injury to her right ring finger while shopping in defendant’s store when she reached above her head to grasp the plastic binding around a box of ceramic tile and pulled the box forward to remove it from the shelf, at which time the box fell on her hand. *Smith v. Home Depot U.S.A., Inc.*, 207277, 2000 WL 33522345 *1 (Mich. Ct. App. Mar. 7, 2000). The court held that the trial court properly apportioned plaintiff’s comparative negligence at ten percent primarily because, although plaintiff made a reasonable effort to find someone to help, she perhaps could have made a greater effort. *Id.* at 4.

Parking Lot Defects

In general, a premises possessor owes a duty to an invitee

to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Bertrand*, 449 Mich. 606, 609, 537 N.W.2d 185 (1995). However this duty does not apply to those dangers which are open and obvious that the invitee might reasonably discover them unless special aspects exist. *Lugo v. Ameritech Corp., Inc.*, 464 Mich. 512, 517, 629 N.W.2d 384, 387 (2001).

Plaintiff, a church visitor who slipped on motor oil in defendant's (church) parking lot, was found to be a "licensee" as opposed to an "invitee," and thus church had no duty to warn visitor unless defendant knew of hidden, unreasonably dangerous condition of premises. *Sanders v. Perfecting Church*, 303 Mich. App. 1, 840 N.W.2d 401 (2013). Although visitor had spent money at church on previous occasions, and although plaintiff intended to purchase a meal from the church cafe after religious service, the church's primary purpose in having people attend its premises was for religious services, and any commercial aspect was purely ancillary to main religious purpose and was minimal in scope. *Id.* at 405.

Telephone company did not owe customer a duty, under the open and obvious doctrine, to protect her against falling into a common pothole in its parking lot. *Lugo*, 464 Mich. 512, 629 N.W.2d 384 (2001). Potholes in pavement are an "everyday occurrence" that ordinarily should have been observed by a reasonably prudent person. *Id.* at 523. In addition there is little risk of severe harm because unlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury. *Id.* at 520. Further, the evidence did not allow a reasonable inference that pothole was obscured by debris at the time of fall, and customer testified that she did not see pothole because she "wasn't looking down." *Id.* 521.

Similarly, in *Maurer*, defendant was not liable where plaintiff slipped and fell on an "unmarked cement step" as she was leaving a rest room area at a park. The plaintiff alleged that the defendant was negligent for not marking the step with a contrasting color or warning of the existence of the step, however the court held that "because steps are the type of everyday occurrence that people encounter, under most circumstances, a reasonably prudent person will look where he is going, will observe the steps, and will take appropriate care for his own safety. Under ordinary circumstances, the overriding public policy of encouraging people to take reasonable care for their own safety precludes imposing a duty on the possessor of land to make ordinary steps "foolproof." Therefore, the risk of harm is not unreasonable." *Bertrand v. Alan Ford, Inc.*, 449 Mich. 606, 616-17, 537 N.W.2d 185, 189 (1995).

Neither landowner nor its employees breached any duty and was not liable to invitees, licensees or trespassers by

placing substance in dumpster located on its property which resulted in oily liquid leaking from dumpster, that caused injuries to plaintiff when he fell from ladder as it slipped in that oily substance. *Hampton v. Waste Mgmt. of Michigan, Inc.*, 236 Mich. App. 598, 601 N.W.2d 172 (1999). Reasoning that where there was no evidence that landowner or employees had any knowledge of such substance ever leaking from dumpster in past, or should have had anticipated that anything placed in dumpster would have caused such leakage, or that landowner or employees knew or should have known of alleged presence of oily substance at time of visitor's fall. *Id.* at 605.

Assault

In general, there is no duty to aide or protect an individual against the criminal activity of another. *Williams v. Cunningham Drug Stores, Inc.*, 429 Mich. 495, 499, 418 N.W.2d 381 (1988). However, because of the special relationship a merchant has with its invitees, a narrow duty to protect against criminal activity can arise. *Id.* Michigan law also recognizes that a special relationship exists between "[o]wners and occupiers of land [and] their invitees," including between a landlord and its tenants and their invitees and between a merchant and its invitees. *Bailey v. Schaaf*, 494 Mich. 595, 604, 835 N.W.2d 413, 419 (2013).

Therefore landlords and merchants "have a duty to use reasonable care to protect their identifiable invitees from the foreseeable criminal acts of third parties." *Mason v. Royal Dequindre, Inc.*, 455 Mich. 391, 405, 566 N.W.2d 199 (1997). The duty is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee. Whether an invitee is readily identifiable as being foreseeably endangered is a question for the jury. *Id.* at 404-405.

Michigan law imposes a duty on a merchant or landowner only upon notice that a third party's criminal acts pose a risk of imminent and foreseeable harm to an identifiable invitee. In such a situation, the merchant's duty to that invitee is limited to reasonably expediting involvement of the police. *Bailey*, 494 Mich. at 599.

Allegations that security guards at apartment complex failed to call police once a tenant informed them that there was a man on the premises waving a gun and threatening to shoot guests at party in common area of the complex, were sufficient to state a claim for negligence against apartment complex owner by tenant's guest who was shot by the man. *Bailey*, 494 Mich. at 618-19.

By having police already present, owner of outdoor amphitheater discharged duty to respond reasonably to sod throwing by audience members that allegedly caused injuries to spectators at two concerts. *MacDonald v. PKT, Inc.*, 464 Mich. 322, 345-46, 628 N.W.2d 33, 41 (2001).

MINNESOTA



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Slip & Fall In General

In order to establish a *prima facie* case of negligence, the plaintiff has the burden of proving: (1) a duty owed by the defendant; (2) a breach of that duty; (3) causation; and (4) injury. *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn.1982).

As such, the first inquiry in a negligence case is to determine whether the landowner owed a duty to the entrant. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). Note that, Minnesota has abolished the distinction between invitees and licensees in determining the degree of care owed. *Id.*

Thus, a landowner owes a duty «to use reasonable care for the safety of all such persons invited upon the premises, regardless of the status of the individuals.» *Id.*

Pursuant to the Court's decision in *Peterson*, "the extent of the duty of the owner to inspect, repair, or warn those who come upon the land as licensees or invitees will be decided by the test of reasonable care." *Id.* at 320-21.

Among the factors that might be considered in determining liability are "the circumstances under which the entrant enters the land (licensee or invitee); foreseeability or possibility of harm; duty to inspect, repair, or warn; reasonableness of inspection or repair; and opportunity and ease of repair or correction." *Id.* at 321 (quoting *Peterson*, 294 Minn., at 174.).

In addition, when determining whether a dangerous condition is foreseeable, the Court takes into consideration whether "the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility." *Whiteford by Whiteford v. Yamaha Motor Corp., U.S.A.*, 582 N.W.2d 916, 918 (Minn. 1998). The question of foreseeability of harm is to be determined by a jury, however, when the issue is clear a court can make such a determination as a matter of law. *Id.*

Therefore, it is well-settled under Minnesota law that a property owner owes a duty of reasonable care to protect other individuals from any foreseeable dangerous conditions on the premises, unless the risk of harm is "known or obvious." *Peterson v. W.T. Rawleigh Co.*, 274 Minn. 495, 497, 144 N.W.2d 555, 557-58 (1966). "Reasonable care includes the duty to inspect and repair the premises and, at a minimum, to warn persons using the premises of unreasonable risks of harm." *Sullivan v. Farmers & Merchants State Bank of New Ulm*, 398 N.W.2d 592, 594-95 (Minn.App.1986).

A landowner does not owe a duty to warn about conditions that are either known or obvious. *Louis v. Louis*, 636 N.W.2d 314, 321 (Minn. 2001). The question of whether the plaintiff knows of the danger is a subjective standard, requiring "both awareness of the condition and appreciation of its dangerousness." *Presbrey v. James*, 781 N.W.2d 13, 18

(Minn. Ct. App. 2010). In contrast, whether a danger is obvious “supposes an objective test, and the question is whether the danger was in fact observable.” *Id.*

“The test for obviousness is not whether the injured person actually saw the danger, but whether in fact it was visible.” *Rinn v. Minnesota State Agr. Soc.*, 611 N.W.2d 361, 364 (Minn. Ct. App. 2000). Accordingly, “the key consideration is the nature of the condition, and not the injured party’s perception.” *Id.* A condition is observable if “both the condition and the risk are apparent to and would be recognized by a reasonable man in the position of the visitor, exercising ordinary perception, intelligence and judgment.” *Louis*, 636 N.W.2d at 321.

However, even though a danger may be known and obvious, landowners may still owe a duty to entrants if they “should anticipate the harm despite such knowledge or obviousness.” *Sutherland*, 570 N.W.2d at 7.

Reason to anticipate harm may occur if the landowner “has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.” *Sutherland v. Barton*, 570 N.W.2d 1, 7 (Minn. 1997). Similarly, a landowner should anticipate that an entrant could be harmed “where there is some distraction or other reason which will excuse the failure to see that which is in plain sight.” *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 206, 203 N.W.2d 841, 845 (1973).

Further, although property owners owe a duty of care to those on the premises, they are not insurers of absolute safety. *Wolvert v. Gustafson*, 275 Minn. 239, 241, 146 N.W.2d 172, 173 (1966). A property owner who does not create a dangerous condition may nonetheless be liable if the property owner had actual or constructive knowledge of the dangerous condition. *Messner v. Red Owl Stores*, 238 Minn. 411, 413, 57 N.W.2d 659, 661 (1953).

Constructive knowledge may be established through evidence that the hazardous condition was present for sufficient length of time that the property owner, through reasonable care, should have discovered the hazard. *Anderson v. St. Thomas More Newman Ctr.*, 287 Minn. 251, 253, 178 N.W.2d 242, 243-44 (1970).

Mere speculation or conjecture, without any direct or circumstantial evidence, as to who caused the dangerous condition, or how long it existed, is insufficient to avoid summary judgment for the defendant. *Bob Useldinger & Sons, Inc., v. Hangsleben*, 505 N.W.2d 323, 328 (Minn.1993). “A party need not show substantial evidence to withstand summary judgment. Instead, summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents sufficient evidence to permit reasonable persons to draw different conclusions.” *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn.2006).

A visitor to commercial property, in particular, is “entitled to

expect that the possessor will take reasonable care to discover the actual condition of the premises and either make them safe or warn him of dangerous conditions.” *Mourning v. Interlachen Country Club*, 280 Minn. 94, 100, 158 N.W.2d 244, 249 (1968).

A landlord has a continuing duty to use reasonable care to inspect, discover, and to repair hazardous conditions on the property that the landlord controls, i.e., the common areas, in a reasonably safe condition for the tenants and their guests. There is a duty of reasonable care to inspect, discover, and repair hazardous conditions. *Nubbe v. Hardy Cont’l Hotel Sys. of Minn.*, 225 Minn. 496, 499, 31 N.W.2d 332, 334 (1948).

Slip & Fall On Foreign Substance

Defendant bank was not liable to plaintiff for injuries sustained as a result of a slip and fall on water in defendant’s entrance way. *Otis v. First Nat. Bank of Minneapolis*, 292 Minn. 497, 195 N.W.2d 432 (1972). The “circumstances of time and condition were not such as to impose upon defendant bank, which had been open only 20 minutes at time plaintiff entered, a duty to have discovered and removed puddle of water shed from clothing or umbrellas of one or more persons who preceded plaintiff into bank.” *Otis*, 195 N.W.2d at 433.

Evidence presented jury question as to negligence in suit for wrongful death from alleged fall on floor, where plaintiff introduced evidence showing: accident site was store in Minnesota in mid-December, weather records indicated snowfall, evidence showed rug was normally kept at accident site because water accumulated there, and rug was not present at time of accident. *Bahl v. Country Club Mkt., Inc.*, 410 N.W.2d 916, 919-20 (Minn. Ct. App. 1987).

“[T]he jury reasonably could infer that appellant knew of the danger that would result from the rapid accumulation of water near the door and the need to place a rug in that area. The jury also could reasonably infer that after the water-filled rug had been removed, a sufficient amount of water could accumulate within ten to fifteen minutes to create a dangerous condition, particularly during the busiest time of the day.” *Id.*

Where plaintiff, a spectator, brought action against defendant and sponsor of horse show for injuries sustained when she fell in a puddle on coliseum stairs during horse show, “lapse of 30 minutes from time spectator climbed stairs until she descended them was not sufficient time to give State Agricultural Society or horse show’s sponsor constructive notice of the late-night puddle.” *Rinn v. Minnesota State Agr. Soc.*, 611 N.W.2d 361, 365 (Minn. Ct. App. 2000).

Defendant, a self-service grocery store, was not liable to customer for injuries sustained as a result of a slip and fall on a banana peel, because “evidence that banana peels were ‘kind of shriveled up and dark brown’” was insufficient to warrant an inference that banana peels had been on floor

so long as to put the defendant on notice. Further, there was no evidence that banana peels were in any different condition than when they fell on the floor and there was nothing to rule out the possibility that they had been knocked or dropped on the floor by another customer just before plaintiff fell. *Messner v. Red Owl Stores*, 238 Minn. 411, 57 N.W.2d 659, 660 (1953).

Action by husband and wife for injuries sustained by wife in fall on wet floor in defendant's store, plaintiffs were not entitled to recover where the dimensions of the pool of water were such that the hazard was obvious. *Munoz v. Applebaum's Food Mkt., Inc.*, 293 Minn. 433, 196 N.W.2d 921 (1972) (finding the pool of water was approximately 20 feet square and 1/4 of an inch deep).

Slip & Fall On Snow/Ice

A landowner's duty of reasonable care to others entering the land "is not violated, absent extraordinary circumstances, when a landowner waits a reasonable time after the end of a storm before removing ice and snow." *Johnson v. Alford & Neville, Inc.*, 397 N.W.2d 591, 593 (Minn. Ct. App. 1986).

Although the landowner may wait until the end of a storm before removing snow and ice, the landowner will be able to avoid "liability only if the hazardous condition did not pre-exist the storm." *Id.* If the dangerous condition is pre-existing, it would come within the "extraordinary circumstances" exception to the rule. *Id.*

In a clear-cut slip and fall case (i.e., precipitation has ceased and then injury occurred) although it is "unquestionable that a possessor of land owes a duty to clear dangerous situations from its property," the issue of "what constitutes an exercise of reasonable care under the circumstances is a jury question, absent compelling circumstances. *Frykman v. Univ. of Minnesota-Duluth*, 611 N.W.2d 379, 381 (Minn. Ct. App. 2000).

"In cases where the parameters of the weather event [whether the storm has ceased] are less than clear, it is not improper to present this question to a jury." *Id.*

Items Falling Off Shelves

It is well settled that a storekeeper owes customers and invitees a duty to exercise reasonable or ordinary care for their safety commensurate with the circumstances involved. The shopkeeper is not an insurer of the safety of its customers or invitees and is not liable for injuries unless they are caused by his negligence or fault. *Jepson v. Country Club Mkt., Inc.*, 279 Minn. 28, 29, 155 N.W.2d 279, 280 (1967). However, a storeowner must guard against consequences which may be reasonably anticipated in the normal course of events. *Bisher v. Homart Development Co.*, 328 N.W.2d 731, 733 (Minn.1983).

In a self-service store, "it is comprehended that the customers devote their major attention to the selection of merchandise in a setting where the owner should anticipate that, throughout the day's business, his employees and the shoppers, who

are in a sense both clerks and customers, might disarrange displays of merchandise to such an extent that some of the offered goods contained in glass or metal containers might fall upon the invitees in the aisle when triggered by the slightest disturbance." *Jepson*, 155 N.W.2d at 280.

Therefore, "the jury could properly find, as it apparently did, that defendant supermarket failed to use reasonable care in the manner in which they arranged the display of bottled goods. The inverted boxes upon which the display rested provided a weak and insubstantial base. The display was not attached to permanent shelving. The inadequate dividers and the loose bottles on the top layer contributed to its rickety structure. It should have been readily foreseeable under the circumstances that shoppers, using shopping carts which are not always easily maneuverable, might run the risk of contacting the display and disturbing its balance. Moreover, we are satisfied that the jury could conclude that plaintiff was not negligent in failing to perceive the flimsy structure of the display and to detect the hazard which it presented." *Id.* at 281.

Parking Lots

Where a pothole was clearly visible and "it [was] undisputed that appellant was in fact aware of the pothole and took steps to avoid it. A reasonable person exercising ordinary judgment would have perceived that he could be injured if he stepped in the pothole and tripped and fell while carrying furniture. Thus, as a matter of law, the danger was obvious." *Aronson v. McDowall*, A10-221, 2010 WL 3000709 (Minn. Ct. App. Aug. 3, 2010).

Where a parking lot had been plowed several times, the plaintiff knew that it was necessary to be careful when walking in parking lots in the winter, she saw a small patch of ice that could have been avoided, and she chose to walk on the ice, the defendants could not have anticipated that the plaintiff would have suffered any harm. *Weiland v. Centro Properties Grp.*, A12-0557, 2012 WL 3263914 (Minn. Ct. App. August 13, 2012).

Where a plaintiff saw snow and ice in a parking lot on her way into a shopping mall, and two people in the mall warned her about the icy conditions in the parking lot, the mall could not have foreseen that the plaintiff would fall on the ice when she walked back to her car. *Wienbar v. Westridge Mall Ltd. Partnership*, A13-1946, 2014 WL 2689575 (Minn. Ct. App. June 16, 2014).

Sidewalks

In Minnesota, "the duty of keeping a sidewalk in a reasonably safe condition for travel is upon the city or municipality and not on the abutting owners or occupants, and the abutting owner or occupant is not liable for any defect therein ... unless they created the defect or dangerous condition or were negligent in maintaining in a dangerous and defective condition facilities erected on the sidewalk for their convenience or for the benefit of their building. Persons who own or occupy property abutting on a sidewalk are not liable to

pedestrians for injuries sustained in consequence of stumbling or slipping on ridges or hummocks of snow and ice which form from natural causes on the sidewalk.” *Jones v. Evenstar Book Store, Inc.*, A05-863, 2006 WL 52263 *1 (Minn. Ct. App. Jan. 10, 2006).

But, “where the accumulation [of snow/ice] ... is due to artificial causes, the landowner may become liable ... [if the landowner] increased the hazard that normally existed.” *Lenz v. City of Minneapolis*, 283 Minn. 180, 183, 167 N.W.2d 22, 25 (1969). Snow melting and dripping off of various features of a building, which results in freezing ice on the sidewalk, can be an artificial condition making the building owner or occupant liable for the resulting sidewalk hazard. *Jones*, A05-863, 2006 WL 52263 *3 (Minn. Ct. App. Jan. 10, 2006).

In addition, “[W]here an abutting owner or occupant makes an extraordinary use of a sidewalk for his own convenience, he owes a duty to the public to exercise due care in seeing that the affected portion of the sidewalk is maintained in a safe condition for the passage of pedestrians.” *Graalum v. Radisson Ramp, Inc.*, 245 Minn. 54, 71 N.W.2d 904 (1955). To be extraordinary, the use must be of “such a nature, in kind or in degree, that a condition is created which interferes with, and is in derogation of, normal use of the sidewalk by the public.” *Graalum*, 71 N.W.2d at 909.

An extraordinary use may “arise from acts which, though intrinsically consistent with the usual function of a sidewalk or driveway when conducted in a normal manner and context, lose their customary status because they are performed in such unusual volume and under such conditions that they unduly interfere with a safe and normal use of the affected portion of the sidewalk. Vehicular travel over a sidewalk to an abutting occupant’s place of business may, periodically or otherwise, become so heavy that a sidewalk ceases to perform its normal function as a reasonably safe route for pedestrian travel.” *Id.*

In addition, landowners have a duty to maintain safe access to buildings on their property. See, *McIlrath v. College of Saint Catherine*, 399 N.W.2d 173, 174 (Minn.App.1987) (stating that a landowner’s exercise of “reasonable care” includes the duty to provide and maintain suitable access to and from buildings on the land). However, this duty of providing safe access to entrants does not mean that the property owner has a duty to keep abutting municipal property free of hazards. *Jones*, A05-863, 2006 WL 52263 *6 (Minn. Ct. App. Jan. 10, 2006).

Conditions that have been held to constitute an extraordinary use include direct interference with the “sidewalk’s normal function as an aid to travel,” such as when the abutting land owner/occupant installs a manhole or “private cellarway” in the sidewalk or creates a “raised approach or passageway” on the sidewalk. *Id.* at *5. In addition, extraordinary use was established where 570 cars crossed a public sidewalk to access defendant’s parking ramp. *Id.*

The owner of property responsible for defective conditions

existing on a sidewalk adjacent to his property is not necessarily relieved of liability merely by leasing the premises. Thus, “if an owner maintains on a public sidewalk a facility for the convenience of a building abutting such sidewalk, and permits such facility to become defective and dangerous, and passes such condition on to the lessee, he may become liable for injuries caused by such condition.” *Shepstedt v. Hayes*, 221 Minn. 74, 82, 21 N.W.2d 199, 203 (1945).

The tenant also may be held liable under circumstances where the tenant maintained the dangerous condition created by the owner. “Control is the determining factor, and liability must rest upon the extent and degree of control demonstrated by possession of the particular part of the premises, the terms of the lease, and other surrounding facts and circumstances. *Scott v. Vill. of Olivia*, 260 Minn. 346, 353-54, 110 N.W.2d 21, 27 (1961).

In addition, the Minnesota Supreme Court has also recognized that an abutting owner has the duty of exercising reasonable care in conducting activities upon his property so that the acts committed upon the property will not expose a member of the public to the risk of bodily harm while passing by on the sidewalk. *Connolly v. Nicollet Hotel*, 254 Minn. 373, 380, 95 N.W.2d 657, 663 (1959) (“It is recognized that one who assembles a large number of people upon his premises [sidewalk] for the purpose of financial gain to himself assumes the responsibility for using all reasonable care to protect others from injury from causes reasonably to be anticipated.”).

Assault

“A landowner is required to use reasonable care in carrying on activities on the land and to maintain the property’s physical condition to ensure entrants on its land are not exposed to unreasonable risks of harm.” *Rasivong v. Lakewood Community College*, 504 N.W.2d 778, 783 (Minn. Ct. App. 1993), rev. denied (Minn. Oct. 19, 1993). “A landowner has no duty, however, to protect an entrant on its land from a third party’s criminal activities because a criminal act committed by an unknown person ‘is not an activity of the owner and does not constitute a condition of the land.’” *Id.* at 783-84

There are exceptions to this rule, and whether one owes a duty to protect another from a third party’s misconduct rests on whether a special relationship exists between the parties and the foreseeable risk of injury involved. *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168-69 (Minn.1989); *Pietila v. Congdon*, 362 N.W.2d 328, 332 (Minn. 1985) (“The question is not simply whether a criminal event is foreseeable, but whether a duty exists to take measures to guard against it”); Restatement (Second) of Torts § 314A, 324A (special relationships).

A special relationship exists under Restatement (Second) of Torts §314A when a person voluntarily takes “custody of another person under circumstances in which that other person is deprived of normal opportunities for self-protec-

tion." *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn.1993). The plaintiff in a section 314A relationship is "typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare." *Id.* at 474.

"A special relationship can be found to exist under any one of three distinct scenarios. The first arises from the status of the parties, such as "parents and children, masters and servants, possessors of land and licensees, [and] common carriers and their customers." *Bjerke v. Johnson*, 289 N.W.2d 479, 483-84 (Minn. 1980); Restatement (Second) of Torts §§ 314A, 315 (1965).

The second arises when an individual, whether voluntarily or as required by law, has "custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection." *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn.1993); Restatement (Second) of Torts § 314A (1965). The third arises when an individual assumes responsibility for a duty that is owed by another individual to a third party. For example, one has a duty to act when he "undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things," and liability will be imposed if (1) his failure to act increases the risk of harm; (2) he undertook a duty owed by the other to the third party; or (3) the harm is suffered because the other or the third person relied on the undertaking." *Bjerke v. Johnson*, 289 N.W.2d 479, 483-84 (Minn. 1980).

"If the law is to impose a duty on A to protect B from C's criminal acts, the law usually looks for a special relationship between A and B, a situation where B has in some way entrusted his or her safety to A and A has accepted that entrustment. This special relationship also assumes that the harm represented by C is something that A is in a position to protect against and should be expected to protect against." *Erickson*, 447 N.W.2d at 168.

For example, "the relationships upon which a duty has traditionally been imposed include those of an innkeeper and a guest, a common carrier and a passenger, and a hospital and a patient, but that the unique characteristics peculiar to a parking ramp also led to the conclusion that 't[he] operator or owner of a parking ramp facility has a duty to use reasonable care to deter criminal activity on its premises which may cause personal harm to customers.'" *H.B. By & Through Clark v. Whittemore*, 552 N.W.2d 705, 707 (Minn. 1996).

Section 324A imposes liability when a defendant undertakes for another, gratuitously or for consideration, to perform a duty owed by the other to a third person. *Erickson*, 447 N.W.2d at 170 (adopting section 324A). The extent of the duty owed under section 324A is defined by the extent of the undertaking. *Id.* But, "to impose liability under section 324A(b), one who undertakes a duty owed by another to a third person must completely assume the duty." *Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus*, 801 N.W.2d

193, 202 (Minn. Ct. App. 2011).

A special relationship exists under, Restatement (Second) of Torts § 314A, when a person voluntarily takes "custody of another person under circumstances in which that other person is deprived of normal opportunities for self-protection." *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn.1993). The plaintiff in a section 314A relationship is "typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare." *Id.* at 474.

In determining whether a risk is foreseeable, "courts look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility." *Whiteford v. Yamaha Motor Corp.*, 582 N.W.2d 916, 918 (Minn.1998). Speculative risks are insufficient to create a duty of care. *Larson v. Larson*, 373 N.W.2d 287, 288 (Minn.1985).

"The operator or owner of a parking ramp facility has a duty to use reasonable care to deter criminal activity on its premises which may cause personal harm to customers. The care to be provided is that care which a reasonably prudent operator or owner would provide under like circumstances. Among the circumstances to be considered are the location and construction of the ramp, the practical feasibility and cost of various security measures, and the risk of personal harm to customers which the owner or operator knows, or in the exercise of due care should know, presents a reasonable likelihood of happening. In this connection, the owner or operator is not an insurer or guarantor of the safety of its premises and cannot be expected to prevent all criminal activity. The fact that a criminal assault occurs on the premises, standing alone, is not evidence that the duty to deter criminal acts has been breached." *Erickson*, 447 N.W.2d at 169-70.

Tavern owners [innkeepers] "have the duty to exercise reasonable care under the circumstances to protect their patrons from injury." *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn.1986).

"In order to establish an innkeeper's liability, a plaintiff must prove four elements: (1) the proprietor must be put on notice of the offending party's vicious or dangerous propensities by some act or threat, (2) the proprietor must have an adequate opportunity to protect the injured patron, (3) the proprietor must fail to take reasonable steps to protect the injured patron, and (4) the injury must be foreseeable. Foreseeability is a threshold issue and is more properly decided by the court prior to submitting the case to the jury."

Boone v. Martinez, 567 N.W.2d 508, 510 (Minn.1997).

"Notice" is a prerequisite to foreseeability of injury. *Id.* If the tavern owner had no notice of the person's violent tendencies, then the court must find that no duty to protect existed because the assault would not have been foreseeable to a reasonable bar owner. *Alholm*, 394 N.W.2d at 491 n. 5 (finding "foreseeability of injury" is to be decided by the Court).

MISSISSIPPI



Anderson, Crawley & Burke, PLLC is a Mississippi law firm headquartered in Jackson, Mississippi. ACB's attorneys represent businesses, the insurance community, and governmental entities throughout Mississippi in a broad spectrum of practice areas. The commitment of its members to excellence, fairness, and honesty is the basis for the success of the firm's attorneys and for the recognition they have achieved in their careers.

ACB views its mission as that of a strategic partner with its clients in managing the risk associated with litigation, and that vision has solidified the relationships between ACB's attorneys and the firm's clients.

The firm was founded in 2003, but the roots of the firm's history run to the 1970's when Jim Anderson, ACB's Managing Member, entered the world of workers' compensation first as a Claims Professional and then as a Claims Supervisor/Administrative Assistant with the Mississippi Workers' Compensation Commission. His career has remained focused primarily on workers' compensation issues involving the defense of employers and carriers in litigation, mediation of disputes.

Tim Crawley graduated from Duke University in 1982, and the University of Mississippi law school in 1985, and his legal career began on the Mississippi Gulf Coast in the mid-1980's, before moving to Jackson, MS, in 1998. Tim has appeared in court in 69 of Mississippi's 82 counties, has over 40 reported decisions to his credit, and has handled virtually every kind of case for which liability or risk is covered by insurance.

Practice Areas: Workers' Compensation; General Liability; Medical Device Liability; Premises Liability; Products Liability; Professional Liability; Director and Officer Liability; Health Care, Nursing & Pharmacy Liability; Government Torts & Public Liability; Defense Litigation Management; Longshore and Harbor Workers' Act; Personal Injury; Administrative Law; Appellate Advocacy; Transportation Law; Business Planning and Operations; Construction Law; Governmental Relations; Insurance Regulation Labor and Employment Law.

Premises Liability In General

Mississippi still employs the traditional Common Law distinctions between Invitees, Licensees and Trespassers, and the duty owed by a premises' owner/occupant to an individual present on the premises is dependent, in the first instance, on which category that individual falls into. The duty owed to an invitee is reasonable care; a premises owner/occupant is not an insurer of the invitee's safety, but does owe that duty of reasonable care. *Double Quick, Inc. v. Lymas*, 50 So.3d 292 (Miss. 2010)

Slip & Fall In General

The owner or operator of business premises owes a duty to an invitee to exercise reasonable care to keep the premises in a reasonably safe condition and, if the operator is aware of a dangerous condition which is not readily apparent to the invitee, he is under a duty to warn the invitee of such condition. *Waller v. Dixieland Food Stores, Inc.*, 492 So.2d 283 (Miss.1986)

For plaintiff to recover in slip and fall case, he or she must

show proprietor had actual knowledge of dangerous condition, or dangerous condition existed for sufficient amount of time to establish constructive knowledge, and that proprietor should have known of condition, or dangerous condition was created through negligent act of proprietor or his or her employees. *Munford, Inc. v. Fleming*, 597 So.2d 1282 (1992).

Slip & Fall On Snow/Ice

Supermarket not responsible for natural accumulation of ice and snow in grocery store's parking lot as a result of a winter storm; there must be an artificial condition created by supermarket. *Blanton v. Gardner's Supermarket*, 45 So.3d 1223 (Miss. App. 2010).

A plaintiff must prove the defendant created or aggravated the hazard, caused the hazard to be substantially more dangerous than it would have been in its natural state. Plaintiff must also prove, the defendant knew or should have known of the condition. *Id.*

Similarly, a restaurant was not responsible for a plaintiff's slip and fall on accumulated snow/ice in its parking lot, not immediately adjacent to its entrance. *Fulton v. Robinson Indus., Inc.*, 664 So.2d 170 (Miss. 1995). Had the fall occurred in an area immediately adjacent to the entrance, however, a jury question would have been presented as to the openness and obviousness of the danger.

Items Falling Off Shelves

As business invitees, supermarket owed customers "the duty to keep the premises reasonably safe, and when not reasonably safe, to warn only where there is hidden danger or peril that is not in plain and open view." *Farmer v. Sam's East*, 253 Fed.Appx. 352 (2007) (applying Mississippi law).

To show that a store owner negligently breached his duty to his customers, a plaintiff may rely on one of three theories. Plaintiff must:

1. show that some negligent act of the defendant caused his injury; or
2. show that the defendant had actual knowledge of a dangerous condition and failed to warn the plaintiff; or
3. show that the dangerous condition existed for a sufficient amount of time to impute constructive knowledge to the defendant, in that the defendant should have known of the dangerous condition. *Id.*

In exercising the duty of reasonable care, a store owner/occupant can be held liable to a business invitee for falling stock, if the jury finds that duty was breached. *Sears, Roebuck & Co. v. Burke*, 44 So.2d 448 (Miss. 1950); *White v. Great Atlantic & Pacific Tea Co.*, 257 So.2d 513 (Miss. 1972).

Parking Lot Defects

The established law in this state is that the owner, occupant or person in charge of premises owes to an invitee or business visitor a duty of exercising reasonable or ordinary care to keep the premises in reasonably safe and suitable

condition or of warning invitee of dangerous conditions not readily apparent which owner knows or should know of in the exercise of reasonable care. *Downs v. Corder*, 377 So.2d 603 (Miss.1979)

It would appear that a tenant/lessee/occupier of premises owes a duty of reasonable care to its invitees for the demised property and such necessary incidental areas substantially under its control (as the parking lot) and which he invites the public to use, notwithstanding a maintenance agreement with the landlord. *Wilson v. Allday*, 487 So.2d 793 (1986)

Grocery store owes duty of ordinary and reasonable care to its invitees upon shopping center parking lot if lessee's use was tantamount to possession and control. *Id.*

Where the lessor reserves control over a designated area for common use of tenants and is negligent, lessor is liable for resulting injury. However, the lessor must have actual or constructive knowledge of the defect and a sufficient opportunity to repair the same. *Turnipseed v. McGee*, 236 Miss. 159, 109 So.2d 551 (1959).

A mere difference in height uniformity of a parking lot's surface is not necessarily proof of a dangerous condition. *Penton v. Boss Hogg's Catfish Cabin, LLC*, 42 So.3d 1208 (Miss.App. 2010)

Assault

Landowner owes invitee the duty to keep the premises reasonably safe and, when not reasonably safe, to warn only where there is hidden danger or peril that is not plain and open to view, and included in that duty is exercise of reasonable care to protect invitees from criminal attacks. *Lyle v. Mladinich*, 584 So.2d 397, 399 (Miss.1991).

If dangerous situation was created by someone not associated with the operation of the shopping mall, patron, who was attacked in the mall's parking lot by unknown assailant, had to produce evidence demonstrating that shopping mall owner had actual or constructive knowledge of the condition for purposes of patron's premises liability claim. *Downs v. Choo*, 656 So.2d 84, 86 (Miss.1995).

Although not an insurer of an invitee's safety, a premises owner owes a duty to exercise reasonable care to protect the invitee from reasonably foreseeable injuries at the hands of another. In premises liability cases, foreseeability may be established by proving the premises owner/occupant had (1) actual or constructive knowledge of the assailant's violent nature, or (2) actual or constructive knowledge that an atmosphere of violence exists on the premises. *Double Quick, Inc. v. Lymas*, 50 So.3d 292 (Miss. 2010).

Evidence of the "atmosphere of violence" may include the overall pattern of criminal activity prior to the event in question that occurred in the general vicinity of the involved business premises, as well as the frequency of criminal activity on the premises. *Gatewood v. Sampson*, 812 So.2d 212 (Miss. 2002).

MISSOURI



Rynearson, Suess, Schnurbusch & Champion is a litigation firm that defends clients in complex litigation. The firm's partners represent over one hundred years of litigation experience. RSS&C can handle the most complex litigation and at the same time give our client's smaller matters the attention they need to be handled properly. But experienced does not mean behind the times. The firm is formed with a commitment to the future and being the most technologically advanced, efficient law firm it can be.

Rynearson, Suess, Schnurbusch & Champion is an AV rated civil liability firm defending personal injury, products liability, premises liability, workers' compensation matter, and contractual and other disputes. We were honored recently as one of the most "winningest" defense firms in Missouri. We practice primarily in Missouri and Illinois before state, federal and appellate.

Practice Areas: Transportation Law; Premises Liability; Products Liability; Workers' Compensation; Insurance Coverage Law; Employment Law; Research and Appellate Practice; Guaranty Association Law; Subrogation; Corporate; Family and Domestic Relations; Estate Planning and Probate; Commercial Litigation; Real Estate Litigation; Workers' Compensation; Retail and Restaurant Defense; Unemployment and Social Security Appeals.

Slip & Fall In General

Under Missouri law, if the owner of a business has actual or constructive notice of dangerous or foreseeable condition, he has the duty to prevent injuries resulting from that condition. *Hople v. Wal-Mart Stores*, 219 F.3d 823 (8th Cir. 2000). In *Sheil v. T.G.&Y. Stores Co.*, 781 S.W.2d 778 (Mo. banc.1990), the Supreme Court of Missouri held that owners of modern self-service convenience stores must anticipate and must exercise due care on behalf of customers to guard against dangers from articles left in aisles by other customers. In that case, the Plaintiff was injured when he tripped over a box of merchandise on the floor of the Defendant's store. The Court reasoned that in self-service stores, "customers are invited to traverse the aisles and to handle the merchandise. The store owner necessarily knows that customers may take merchandise into their hands and may then lay articles that no longer interest them down in the aisle." *Id.*, at 780. The Court also noted that the amount of time a dangerous item has been in the area in which an injury occurs is not as important as the method of merchandising and the nature of the article causing the injury. *Id.* In other words, in a self-service store, when an

injury results from merchandise of a type handled by the store, such injury is foreseeable, and there is no longer a need to prove constructive notice.

Thus, in self-service stores, Missouri case law has all but eliminated the notice requirement in premises liability cases. See *Hople, supra*. An owner/occupier is considered to have notice if it has actual or constructive notice of a dangerous or foreseeable condition. For constructive notice, the length of time the dangerous condition existed is irrelevant. If the owner/occupier could foresee the risk of a dangerous condition, it has a duty to protect invitees against it.

Missouri is a "mode of operation" state which allows notice to be implied from the method of merchandising of the store, i.e. self-service stores. The courts have held that the primary issue in premises cases becomes the foreseeability of the risk and the reasonableness of the precautions employed by the defendant. The practical effect of this rule is that plaintiffs can make their case without proving actual notice of a condition, especially for falls which occur inside a store. Other factors which are used to evaluate the notice issue are prior occurrences, the existence of floor mats, and

the existence of warning signs. The store owner is generally deemed to have actual notice if it is affirmatively shown that an agent of defendant created, was aware of, or should have known of the hazardous condition. *Breckenridge v. Meierhoffer-Fleeman Funeral Home, Inc.*, 941 S.W.2d 609, 612 (Mo.App.1997).

Along similar lines, there are cases which have held that a retailer is on notice of water on the floor of restrooms if it provides tap water for use by customers in the restroom. *Love v. Hardee's Food Systems, Inc.*, 16 SW 3d 739 (Mo.App.E.D. 2000). It has also been held that when the retailer creates the condition, i.e. through the stacking or placement of merchandise, that a notice defense is not available.

Slip & Fall On Snow/Ice

Generally, an invitor has no duty to remove snow or ice on outside areas where the snow or ice accumulated naturally as a result of general conditions within the community; such rule is same for landlords, municipal corporations, inviters, and employers. *Otterman v. Harold's Supermarkets*, 65 S.W.3d 553 (Mo. Ct. App. WD 2001).

However, even if a possessor of land has no duty to an invitee to remove snow or ice that has accumulated naturally and is a condition general to the community, there is an exception to such rule where the possessor assumes a duty to remove snow and ice from common areas; such exception arises where the duty is assumed by a course of conduct or agreement. *Id.*

The owner/occupier must exercise ordinary care if he attempts to remove the ice and snow and may assume a duty simply by attempting to remove the ice and snow from a portion of the property. Generally in snow and ice cases, a duty to remove snow and ice has been found where the conditions on an invitor's premises have been altered. *Gorman v. Wal-Mart Stores, Inc.*, 19 S.W.3d 725 (Mo. Ct. App. W.D. 2000).

Items Falling Off Shelves

"The general duty owed to an invitee by the owner of the premises is the exercise of reasonable and ordinary care in making the premises safe." *Rycraw v. White Castle Systems, Inc.*, 28 S.W.3d 495, 499 (Mo.App.2000); *Luthy v. Denny's, Inc.*, 782 S.W.2d 661, 662 (Mo.App. W.D.1989).

To make a submissible case as an injured invitee, a plaintiff must show that the defendant knew or, by using ordinary care, should have reasonably known of the dangerous condition and failed to use ordinary care to remove it, barricade it, or warn of it, and that plaintiff sustained damage as a direct result of such failure. *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439, 443-44 (Mo. banc 1998).

A store owner's actual knowledge of a dangerous condition is shown if an agent or employee of the owner knew of the dangerous condition. *Bynote v. Nat'l Super Mkts., Inc.*, 891

S.W.2d 117, 120 (Mo. banc 1995). However, in the context of self-service stores, as noted above, constructive notice is essentially established by virtue of the store's mode of operation.

Another theory of liability recognized in Missouri in these cases is the doctrine of *Res Ipsa Loquitur*, which is based upon circumstantial evidence. The doctrine permits a jury to infer negligence without proof of specific negligent conduct on the part of the defendant. In Missouri, we apply the doctrine and, thus, permit the inference when (1) the incident resulting in injury is of the kind which ordinarily does not occur without someone's negligence; (2) the incident is caused by an instrumentality under the control of the defendant; and (3) the defendant has superior knowledge about the cause of the incident. *McCloskey v. Koplar*, 329 Mo. 527, 46 S.W.2d 557, 559 (Mo.banc 1932).

The second element of "control" focuses on the defendant as the possible negligent actor. As in any case of negligence, in order to make a submissible case, plaintiff must show that it was more probable than not that defendant was the cause of the negligence. See, *McCloskey*, *supra* at 563. If plaintiff shows defendant was in exclusive control of the instrumentality which caused the accident, he has inferentially focused any negligence upon defendant. If plaintiff does not show defendant's exclusive control of the instrumentality, he still may fix defendant with responsibility for the negligence by showing defendant had the right or power to control the instrumentality and the opportunity to exercise it. See, *McCloskey*, *supra* at 560.

However, if plaintiff merely shows this constructive control by defendant, the inference that defendant's negligence caused the accident does not necessarily follow. Plaintiff must, therefore, adduce additional evidence to show defendant's responsibility. See, *Hart v. Emery, Bird, Thayer Dry Goods Co.*, 233 Mo.App. 312, 118 S.W.2d 509, 511 (1938).

Plaintiff need not exclude every possible source of the negligence except defendant, but he must show it was more probable than not that defendant was the source of the negligence. *Id.* at 511. When plaintiff simply shows it was at least equally probable that the negligence was due to another, plaintiff has not made a submissible case. *Id.* at 511-512.

Parking Lot Defects

Liability of an owner or possessor of land to an invitee is based primarily on his superior knowledge of a danger which he knows or should know of under such circumstances that he should expect that invitee would not discover or realize danger. *Cunningham v. Bellerive Hotel*, 490 S.W.2d 104 (1973).

In *Cunningham*, the Court stated that where there was clearly some kind of a significant hole or depression in paving of defendant's parking lot which had been there for at least six years and which was obviously less noticeable at night than in the daytime, regardless of the lighting, it could not

be said that defect was so obvious under circumstances that defendant could safely assume that plaintiff as a business invitee on premises would discover it and realize danger, and statements made by plaintiff that if he had been looking down immediately in front of him he probably would have seen condition and that he was not concentrating on pavement were insufficient to remove defendant from liability for injuries sustained by plaintiff after stepping in hole. *Id.*

Plaintiff, who was a business invitee on defendant's property at time he fell and sustained injuries after stepping in a hole in a parking lot, was only required to walk and look as an ordinarily careful person would and was not required to peer down at paving in front of him at each step when he had no reason to anticipate danger. *Id.* Defendant, as owner of parking lot where plaintiff business invitee was injured after stepping in a hole, had a positive duty to light premises adequately. *Id.*

For spills that occur outside of a store in the parking lot, Missouri courts have somewhat departed from the mode of operation rule applied within the stores. *Gatley v. Wal-Mart Stores, Inc.*, 16 SW 3rd 711 (Mo Ct App 2000). In cases involving spills outside the store, the Court will look to whether or not employees of the store are regularly in the parking lot and if they could have seen the spill prior to the fall. *Id.*, at 714. It has been held that, in these cases, it is necessary that the defendant have some opportunity to observe the dangerous condition before the defendant can be held liable.

Assault

The general rule in Missouri is that an owner does not have a duty to protect business invitees from the deliberate criminal attacks of an unknown, third person as such activities are rarely foreseeable. *Wood v. Centermark Properties, Inc.*, 984 S.W.2d 517, 523-24. Exceptions to this general principle include obligations arising from "special relationships" or "special facts and circumstances," such that an act or omission exposes a person to an unreasonable risk of harm through the conduct of another. *Keenan v. Miriam Foundation*, 784 S.W.2d 298, 302 (Mo.App.E.D.1990).

The special facts and circumstances exception arises in one of two ways: "(1) an intentional infliction of injury by known and identifiable third persons; or (2) frequent and recent occurrences of violent crimes against persons on the premises by unknown assailants." *Id.* For the prior occurrences exception to apply, Plaintiff must show prior specific instances of violent crimes on the premises that are sufficiently recent, numerous, and similar to the incident in the present matter to put defendant on notice that there is a likelihood third persons will endanger the safety of its invitees. *Wood*, 984 S.W.2d at 524. The touchstone for the creation of a duty is foreseeability. *L.A.C.*, at 257. Hence, the issue becomes, are there recent, numerous, and similar prior crimes on the property to put the business operator on notice that its invitees would fall victim to a crime.

NEBRASKA



Shively & Lannin, P.C., L.L.O. in Lincoln, Nebraska specializes in civil defense litigation and alternative dispute resolution. We handle cases in Lancaster County and throughout Nebraska. The attorneys at Shively & Lannin, P.C., L.L.O. have more than 90 combined years of legal experience successfully litigating cases and delivering exceptional results to our clients. Our attorneys are skilled in the efficient delivery of high quality legal services through our comprehensive case evaluation, adept understanding of medical background and injuries, and knowledge of what appeals to a juror's sensibility. Our firm's AV rating is a testament to our ethical standards and legal abilities.

The attorneys at Shively & Lannin recognize that our purpose as attorneys and counselors at law is to advocate for our clients and guide them through uncertain times. As attorneys, we use our analytical ability and extensive experience to direct our clients through each step of the legal process. As counselors, we focus on developing relationships of trust and support with each and every client to better understand their goals and objectives.

Practice Areas: Insurance Defense; Insurance Coverage; Insurance Subrogation; Product Liability; Trucking and Transportation; Premises Liability; Professional Negligence; Commercial Litigation; Governmental Liability; Workers' Compensation; Mediation.

Slip & Fall In General

In Nebraska premises liability cases, an owner or occupier is subject to liability for injury to a lawful visitor resulting from a condition on the owner or occupier's premises if the lawful visitor proves (1) that the owner or occupier either created the condition, knew of the condition, or by exercise of reasonable care would have discovered the condition; (2) that the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) that the owner or occupier should have expected that the visitor either would not discover or realize the danger or would fail to protect himself or herself against the danger; (4) that the owner or occupier failed to use reasonable care to protect the visitor against the danger; and (5) that the condition was a proximate cause of damage to the visitor. *Hodson v. Taylor*, 290 Neb. 348, 359 (Neb. 2015)

Nebraska premises liability law follows the longstanding rule that a duty of reasonable care for all lawful visitors is imposed on owners and occupiers of land. This rule places the focus on the foreseeability of the injury, rather than on allowing the duty in a particular case to be determined by the status of the person who enters upon the property. It imposes the standard of reasonable care in the maintenance

of premises, and the nonexclusive factors to be considered are: (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant enters the premises; (3) the time, manner, and circumstances under which the entrant enters the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection. However, it is also for the fact finder to determine, on the facts of each individual case, whether or not such factors establish a breach of the duty of reasonable care. *Herrera v. Fleming Cos.*, 265 Neb 118 (2003)

Slip & Fall On Snow/Ice

In slip and fall cases where the parking lot was icy or snow packed, if a plaintiff's knowledge of the lot's condition is equal to or greater than that of the defendant, a court will direct a verdict in favor of the defendant due to the plaintiff's knowledge. These cases follow the rule that "there is no liability on the part of an inviter owner to protect a customer against hazards which are known to the customer and are so apparent that he may reasonably be expected to discover

them and be able to protect himself.” *Brandert v. Scottsbluff Nat’l Bank & Trust Co.*, 194 Neb. 777 (1975).

In *Herrera*, a plaintiff entered a public restroom in a grocery store and slipped on a water which was on the floor just inside the doorway. Here, the court found that there was simply no evidence as to how long the water was on the floor prior to the individual’s fall or whether the employees of the building had actual or constructive knowledge of the condition, and therefore found summary judgment in favor of the defendant was proper. *Herrera v. Fleming Cos.*, 265 Neb. 118 (2003)

Slip & Fall On Foreign Substance

Where foreign substances on the floor of a store used by customers create a hazardous condition, the storekeeper is ordinarily liable if the condition was created by the storekeeper or his employees. *Jeffries v. Safeway Stores, Inc.*, 176 Neb. 347, 351 (1964). In cases involving a slip and fall as the result of a slippery or foreign substance on the floor ..., a plaintiff must establish either actual or constructive notice of the condition which caused the fall. *Richardson v. Ames Ave. Corp.*, 247 Neb. 128, 132 (1995). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it. Thus, although a storekeeper has a duty to use due care to keep the premises reasonably safe for use of an invitee, a storekeeper is not an insurer of the safety of customers patronizing the place of business. *Richardson*, 247 Neb. at 132 (1995). In the absence of evidence to support an inference of the possessor’s actual or constructive knowledge of the hazardous condition, Nebraska courts have refused to allow the jury to speculate as to the possessor’s negligence. *Id.* at 133.

For example, where the evidence shows that plaintiff discovered chewing gum on the heel of her shoe after slipping and falling, and there is evidence that gum was found on the floor which had been scuffed over as if done by a person slipping upon it, the jury can properly infer that the gum deposit was the proximate cause of her fall. *Taylor v. J. M. McDonald Co.*, 156 Neb. 437, 438 (1953)

Items Falling Off Shelves

It is a storekeeper’s responsibility to exercise due care to see that merchandise is stacked in a reasonably safe manner on his shelves, and where he or his employees know of a dangerous condition, or if it has existed for such a period of time that they should know of it, then liability attaches. *Bahe v. Safeway Stores, Inc.*, 186 Neb. 228, 228 (1970). In *Bahe*, a plaintiff-patron of the defendant’s store received a foot injury while reaching for the soda pop stacked on the gondola when another soda bottle fell and struck her foot. There was no evidence that the bottles were improperly stacked, and the defendant was held not guilty of actionable negligence as a matter of law, since there was no showing of an unreasonable risk of harm to the plaintiff and, if there was, there

was also no evidence that the defendant knew of it or in the exercise of reasonable care could have discovered it.

Parking Lot Defects

In cases when a lawful visitor claims that he or she was injured by a condition on the owner or occupier’s premise, the owner or occupier is subject to liability if the lawful visitor proves (1) the owner or occupier either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the owner or occupier should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the owner or occupier should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the owner or occupier failed to use reasonable care to protect the lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the lawful visitor. *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 802 (2004).

Generally, when the danger posed by a condition is open and obvious, the owner or occupier is not liable for harm caused by the condition. See *Tichenor v. Lohaus*, 212 Neb. 218 (1982). However, “despite the fact that the danger may be open and obvious or known, the possessor of the land may owe the duty if he should expect that the [lawful visitor] will fail to protect himself against the hazard.” *Id.* at 222.

Assault

A landlord is under a duty to exercise reasonable care to protect his patrons. Such care may require giving a warning or providing greater protection where there is a likelihood that third persons will endanger the safety of the visitors. *Ericksen v. No-Frills Supermarkets*, 246 Neb. 238, 241 (1994).

However, in *Harvey*, no liability attached to the owner of a bar where the appellant, a patron, was assaulted by a third party while in the bar. The assailant had not been present in the bar, but had entered the bar suddenly, went straight for the appellant, and struck him. The assailant had been violent in the establishment on one prior occasion a year or more prior to the incident at issue. We stated that the possessor of the premises was not bound to anticipate the unforeseeable independent acts of third persons, nor did she have a duty to take precautionary measures to protect against such acts, because those acts could not be reasonably anticipated. *Harvey v. Van Aelstyn*, 211 Neb. 607 (1982)

Another court denied recovery against a restaurant owner where a patron suffered injuries from an assault by another patron. This court noted that there was no history of any fights in the establishment and that the assault occurred suddenly and unexpectedly where no precautionary measures would have prevented the assault. *Hughes v. Coniglio*, 147 Neb. 829 (Neb. 1946)

Exceptions to Premises Liability

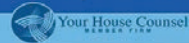
Under the Nebraska Recreation Liability Act, Neb. Rev. Stat. §§ 37-729 through 37-736 (Reissue 2008), an owner of land owes no duty of care to keep the premises safe for entry or use by others for **recreational purposes** or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes. Therefore, when the Act applies, the Act only bars liability for premises liability actions. *Hodson v. Taylor*, 290 Neb. 348,

350 (2015)

Established Nebraska law provides that the rule in open and obvious cases is no longer that there is no liability on the part of an inviter owner to protect a customer against hazards which are known to the customer and are so apparent that he may reasonably be expected to discover them and be able to protect himself. *Warner v. Simmon*, 288 Neb. 472 (2014).

NEW JERSEY

SHAFER GLAZER, LLP



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Practice Areas: Alternative Dispute Resolution; Appellate Practice; Attorney Malpractice; Automobile Liability; Commercial and Business Litigation; Construction Liability; Corporate Counsel; Directors and Officers Liability Defense; Employment Practices Liability; Environmental/Toxic Tort; General Liability; Insurance Coverage; Labor and Employment; Premises Liability; Products Liability Defense; Professional Liability Defense; Security Company Liability; Workers' Compensation Defense.

Slip & Fall In General

In New Jersey, the common law approach to premises liability requires an initial classification of the person on the property at the time of the injury as an invitee, a licensee, or a trespasser. *Rowe v. Mazel Thirty, LLC*, 209 N.J. 35, 43 (N.J. 2012). A person is classified as an invitee if they "come[] by invitation, express or implied, generally for some business purpose of the owner." *Id.* A landowner owes the invitee «a non-delegable duty to use reasonable care to protect invitees against known or reasonably discoverable dangers.» *Kane v. Hartz Mountain Indus.*, 278 N.J. Super. 129 (App. Div.

1994), *aff'd*, 143 N.J. 141 (N.J. 1996). The "proprietor" of premises has a duty to execute reasonable care to ensure the invitee has a reasonably safe place to do that which is in the scope of the proprietor's invitation. *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 433 (N.J. 1993); Rest. 2d of Torts § 343 (1965).

This duty of care requires a business owner to discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe. *O'Shea v. K. Mart Corp.*, 304 N.J. Super. 489, 492-93 (App. Div. 1997). This "standard of

care encompasses the duty to conduct a reasonable inspection to discover latent dangerous conditions.” *Id.* Additionally, a business owner must not “create any condition which renders the premises dangerous.” *Id.*

Defining an individual as an invitee versus a licensee requires a determination of «whether entry upon the premises was for a purpose directly or indirectly connected with the business carried on there by the occupier, or was of interest or advantage to the occupier, or was in pursuance of an interest or advantage which is common or mutual to the occupier and to him who enters.» *Barnard v. Trenton-New Brunswick Theatres Co.*, 32 N.J. Super. 551, 555 (App. Div. 1954). Such an invitation may be liberally implied as well.

New Jersey extends this view to persons entering a premises “with a vague purpose of buying,” (*MacDonough v. F. W. Woolworth Co.*, 91 N.J.L. 677), to a child entering with his parent who intends to make a purchase for the child (*Feingold v. S. S. Kresge Co.*, 116 N.J.L. 146), to a child who accompanies a parent on a mission connected with the business of the occupier but in which the child had no direct interest (*Smigielski v. Nowak*, 124 N.J.L. 235), or where the interest being served by the presence of the child and parent in the store is that of the family as well as the merchant (*Murphy v. Kelly*, 15 N.J. 608). It has also been broadly stated that the implied invitation includes “persons who enter on a business having a potentiality for pecuniary profit to the merchant” (*Lewin v. Ohrbach’s, Inc.*, 14 N.J. Super.).

For example, the question arose as to whether a plaintiff could be considered an invitee where she entered into a movie theatre to inquire as to movie times and tripped over a ladder in the lobby. *Barnard v. Trenton-New Brunswick Theatres Co.*, 32 N.J. Super. 551 (App. Div. 1954). Although the movies had not begun yet, plaintiff was considered to be an invitee because entering the lobby served an end reasonably related to the theatre owner’s conduct of business. *Id.* at 556. «A reasonable person with the plaintiff’s knowledge of the situation might well be interested in ascertaining the time to facilitate her appearance as an intending patron.» *Id.*

An injured plaintiff who seeks to assert breach of duty of due care by a business owner must first prove that the owner had actual or constructive knowledge of the dangerous condition that caused the accident. *Nisivoccia v. Glass Gardens, Inc.*, 175 N.J. 559 (N.J. 2003). To prove that an owner had constructive notice, a particular condition must have existed for such a period of time that the owner of the premises should have discovered its existence in the exercise of reasonable care. *Id.* Therefore, an owner is considered to be on “constructive notice” when unsafe conditions exist for such a period of time that a person of reasonable diligence would have discovered them. *Schwing-Dzuir v. Kohl’s Department Stores, Inc.*, 2008 N.J. Super. Unpub. LEXIS 2345.

The mere existence of a dangerous condition does not, in and of itself, establish constructive notice of that condition. *Sims v. City of Newark*, 244 N.J. Super. 32, 42 (App.

Div.1990). “A proprietor generally is not liable for injuries caused by defects of which he had no actual or implied knowledge or notice, and no reasonable opportunity to discover.” *Brown v. Racquet Club of Bricktown*, 95 N.J. 280, 291 (N.J. 1984).

However, where a defendant’s “mode of operation” has an inherent risk of foreseeable injury, the plaintiff is relieved of showing actual or constructive notice when asserting a negligence claim, and the plaintiff is entitled to an inference of negligence. The burden of proof then shifts to the defendant to prove that its mode of operation was that of a reasonably prudent person under the same or similar circumstances. *Nisivoccia*, 818 A.2d at 317.

The mode of operation doctrine is outlined in Model Civil Jury Charge 5.20F(11) - Notice Not Required When Mode of Operation Creates Danger. These model instructions explain that if a hazardous condition was likely to result from a business’s mode of operation, and a defendant failed to take reasonable measures to prevent the hazardous condition, the defendant is liable to the plaintiff for injuries resulting from the hazardous condition.

The mode of operation doctrine is limited to accidents that occur in the business’s “self-service” areas. *Prioleau v. Kentucky Fried Chicken, Inc.*, 434 N.J. Super. 558 (App. Div. 2014). In *Prioleau*, the plaintiff approached the restroom and allegedly slipped on a wet and greasy floor. *Id.* The Supreme Court held that the record did not adequately establish that she was engaged in any self-service activity at the time of the alleged accident, such as: “filling a beverage cup at a restaurant soda machine, selecting items from a condiment tray, or . . . carrying drinks or food to the restroom area.” *Id.* Accordingly, the mode of operation rule did not apply.

The mode of operation rule is not solely limited to cases where a customer’s negligence created the dangerous condition; it also applies to self-service areas where “the injury may have resulted from the manner in which employees handled the business’s products or equipment.” *Id.* Similarly, in situations where “the nature of the business, the property’s condition, or a demonstrable pattern of conducts or incidents” caused the hazard, the requisite notice requirement may be presumed as well. *Nisivoccia* at 316.

The New Jersey Supreme Court has discussed mode of operation liability in a variety of different cases. In *Bozza v. Vornado*, the plaintiff was injured when she slipped on a foreign substance on an already littered cafeteria floor. *Bozza v. Vornado, Inc.*, 42 N.J. 355, 361 (1964). The Court stated that in a self-service cafeteria context, spillage by customers was an inherent risk in that business’s mode of operation, and absent proper precautions, the plaintiff was relieved of proving either actual or constructive notice. *Id.* at 780.

In *Ryder v. Ocean Cty. Mall*, the Court applied the «mode of operation» doctrine where customers slipped on food and drink that was carried to a common area but purchased elsewhere in the building. *Ryder v. Ocean Cty. Mall*, 340 N.J.

Super. 504, 509-510 (App. Div.), *cert. denied*, 170 N.J. 88 (2001). Citing *Bozza*, the Court ruled that “the practice of allowing patrons to carry food and drink within the confines of the defendant’s mall rendered it ‘the functional equivalent of a cafeteria.’” *Id.*

The Court recently extended a “mode of operation” jury charge where a plaintiff slipped on cheesecake that dropped from a free food sample table that was setup on a retail premises. *Walker v. Costo, Wholesale Warehouse*, 2016 N.J. Super. LEXIS 48. The Court recognized that the “self-service” fact patterns in *Bozza* and *Ryder* involved food and beverage items that were purchased by customers on the premises, but the Court discerned “no legal significance in whether the edible items are offered within a defendant’s establishment for free or instead for sale.” *Id.* Free samples are advantageous to a business; they promote the product and encourage the customer to make a purchase. *Id.*

The *Walker* Court also noted that a Plaintiff must demonstrate a reasonable nexus between the store’s self-service activity and the dangerous condition allegedly producing the injury. See, e.g., *Troupe v. Burlington Coat Factory Warehouse Corp.*, 443 N.J. Super. 596 (App. Div. 2016). This is a factual matter a jury must evaluate.

In *Smith v. First Nat. Stores*, the plaintiff was injured when the defendant’s employees tracked sawdust and grease onto a stairway located near the produce and meat departments. *Smith v. First Nat. Stores, Inc.*, 94 N.J. Super. 462, 465, 228 A.2d 874, 876 (App. Div. 1967). In this case neither actual nor constructive notice was deemed necessary because defendant created, “through its agents and employees[,]...a dangerous condition.” *Id.* at 466; see also *Brody v. Albert Lifson & Sons*, 17 N.J. 383, 390 (1955) (inferring notice where the intrinsic nature of the materials used to construct the floor made it highly susceptible to “slipperiness” when wet, coupled with defendant’s failure to take proper precautions in light of this virtue); see also *Parmenter v. Jarvis Drug Store, Inc.*, 48 N.J. Super. 507, 511 (App. Div. 1957) (inferring notice where it was not beyond ordinary experience that a wet linoleum floor would be slippery, and it did not take an expert to prove it).

In a situation where a plaintiff is injured by the actions of an independent contractor, the law provides that “where the work to be done is not per se a nuisance and injury results from the negligence of an independent contractor or his servants in the execution of it, the contractor alone is liable unless the owner is in default in employing an unskillful or improper person as the contractor.” *Barnard*, 108A.2d at 876 (citing *Terranella v. Union Bldg. & Const. Co.*, 3 N.J. 443, 446-47 (1950)). Note, however, if the “owner had any knowledge or notice of the presence” of a hazardous condition, it follows that the owner “could be held responsible for their employee’s negligence.” *Id.*

Slip & Fall On Ice/Snow

The commercial landowner may be liable to a pedestrian

who was injured as a result of a dangerous condition, irrespective of the fact that the dangerous condition was caused by nature or a third person. Maintaining a public sidewalk in reasonably good condition may require removal of snow or ice or reduction of risk, depending upon the circumstances. *Mirza v. Filmore Corp.*, 92 N.J. 390 (1983).

This rule exists to impose a duty upon commercial landowners to ensure the sidewalks of their property are in a reasonably good condition. *Stewart v. 104 Wallace St., Inc.*, 87 N.J. 146 (1981). Commercial landowners are liable to pedestrians injured as a result of their negligent failure to do so. The injured person is able to recover damages for injuries sustained on the sidewalk in front of the store as well as those sustained inside the store. *Id.* The test is whether a reasonably prudent person, who knows or should have known of the condition, would have within a reasonable period of time thereafter caused the public sidewalk to be in reasonably safe condition. *Id.*

Landowners must protect an invitee from foreseeable harm, and so must maintain and repair their property to prevent the occurrence of foreseeable injuries. *Id.* A landowner owes a duty to a business invitee to exercise reasonable care to clear the property of a dangerous condition or to warn the invitee about its presence. *Kingett v. Miller*, 347 N.J. Super. 566 (App. Div. 2002).

Items Falling Off Shelves

Property owners owe business invitees a duty of reasonable care to provide a reasonably safe place to perform that which is within the scope of invitation. *O’Shea v. K. Mart Corp.*, 304 N.J. Super. 489 (App. Div. 1997). This duty is an affirmative one; it requires a proprietor to not only discover and eliminate any possible dangerous condition or circumstance, but to also keep premises reasonably safe and not create any condition which renders the premises dangerous. *Id.*

A proprietor of a self-service store has a duty to take reasonable measures to guard against injuries that may result when customers remove or replace shelved merchandise. If customers are generally careless in the process, the duty placed on the proprietor to take precautions is correspondingly heavier. *Id.*

If it can be shown that the proprietor created the dangerous condition, notice does not have to be proven for the proprietor to be held liable for injuries sustained by a customer by an item that fell during their attempt to remove it from a shelf. *Id.*

Parking Lot Defects

A public entity can be liable for injury caused by a dangerous condition on its property if the plaintiff can establish that there was a dangerous condition on the property at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was

incurred, and that either:

*A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

*A public entity had actual or constructive notice of the dangerous condition under § 59:4-3 of the New Jersey Revised Statutes a sufficient time prior to the injury to have taken measures to protect against the dangerous condition. See, N.J.S.A. 59:4-2.

A commercial landowner owes a duty to its invitees to maintain their land in a safe condition, to inspect it, and to warn of hidden defects whether within the landowner's power to correct it or not. *Monaco v. Hartz Mountain Corp.*, 178 N.J. 401 (2004) Landowners must protect an invitee from foreseeable harm, and so must maintain and repair their property so as to prevent foreseeable injuries. *Stewart v. 104 Wallace Street*, 87 N.J. 146 (1981).

Parking lots are an essential aspect of many businesses. Therefore, reasonable measures should be taken to ensure proper lighting. Accordingly, New Jersey posits that business owners, exercising reasonable care, should be able to anticipate the presence of customers in their parking lot, and should therefore take reasonable measures to see that the area is properly lighted. *Nelson v. Great Atl. & Pac. Tea Co.*, 48 N.J. Super. 300, 307 (App. Div. 1958) (attributing plaintiff's fall in parking lot to inadequate lighting). "Negligence may consist in the failure so to light the premises as to protect from injury by reason of dangerous conditions which would not reasonably be discovered in the absence of such light, as for example, in the case of the...difference in floor

levels." *Id.*

Assault

Business owners and landlords have a duty to protect patrons and tenants from foreseeable criminal acts of third parties occurring on their premises. *Braitman v. Overlook Terrace Corp.*, 68 N.J. 368 (1975).

To determine if a business owner has a duty to protect its customers against criminal acts of third parties on its premises, the question is whether «a reasonably prudent person would foresee danger resulting from another's voluntary criminal acts. . . .» *Butler v. Acme Markets, Inc.*, 89 N.J. 270, 276 (1982).

A Court is required to balance four more specific factors: "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." *Jenkins ex rel. Jenkins v. Anderson*, 191 N.J. 285, 295 (2007).

In evaluating foreseeability, the New Jersey Supreme Court has held that a "totality of the circumstances approach" is to be applied which considers "the actual knowledge of criminal acts on the property and constructive notice based on the total circumstances." *Clohesy v. Food Circus Supermarkets, Inc.*, 149 N.J. 496, 516 (1007). The Court further explained that "foreseeability can stem from prior criminal acts that are lesser in degree than the one committed against a plaintiff ... [or] from prior criminal acts that did not occur on defendant's property, but instead occurred in close proximity to the defendant's premises." *Id.*

NEW YORK – Downstate



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NEW YORK – Rochester

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Slip & Fall In General

As with landowners generally, a shopkeeper has a duty to keep the premises reasonably safe for persons on it. For example, it has the duty to keep floors clear of slippery substances. *Granillo v Toys "R" Us, Inc.*, 72 A.D.3d 1024 (N.Y. App. Div. 2d Dep't. 2010).

A store owner is not liable for injuries to a person who slips on a floor unless the plaintiff establishes that the owner or its employees caused the slippery condition, or that the owner had actual or constructive knowledge of the condition. *Navedo v. 250 Willis Ave. Supermarket*, 290 A.D.2d 246 (N.Y. App. Div. 1st Dep't. 2002.)

An owner should be held liable for the creation of a dangerous or defective condition on property if a reasonable person in the owner's position would have known, or would have had reason to know, of the danger created, or would have had such knowledge imputed by operation of law. *Walsh v. Super Value, Inc.*, 76 A.D.3d 371 (2d Dep't. 2010).

The mere fact that a floor contains a slippery liquid substance does not establish that the substance was visible and apparent. *Lowrey v. Cumberland Farms, Inc.*, 162 A.D.2d 777 (N.Y. App. Div. 3d Dep't. 1990). The fact that, after a slip and fall, the plaintiff closely examines the floor and discovers the substance does not indicate that the substance was visible and apparent. In fact, the plaintiff's slipping on the substance and discovering it only after the fall is often an indication that the condition was not apparent. *Collins v. Grand Union Co.*, 201 A.D.2d 852 (N.Y. App. Div. 3d Dep't. 1994).

Similarly, even if the plaintiff establishes that the substance was visible, the mere fact that one or more employees of the owner were in the vicinity of the substance before the accident does not establish constructive knowledge. Unless the plaintiff also demonstrates that the substance was already on the floor when the employees were in the area, liability is not established. *Benware v. Big V Supermarkets, Inc.*, 177 A.D.2d 846 (N.Y. App. Div. 3d Dep't. 1991).

There is no legal requirement that property owners provide

a constant remedy to the problem of water being tracked into a building in rainy weather. There is no obligation to continually mop up all tracked in water, and there is no obligation to put down floor mats when it rains. *Zerilli v Western Beef Retail, Inc.*, 72 A.D.3d 681 (N.Y. App. Div. 2d Dep't. 2010).

An independent contractor cleaned the sidewalks by hosing them down. While reasonable care does not require an owner to completely cover a lobby floor with mats to prevent injury from tracked-in water, it may require the placement of at least some mats. There was an issue of fact as to whether defendants used reasonable care. *DiVetri v. ABM Janitorial Serv., Inc.*, 119 A.D.3d 486 (N.Y. App. Div. 1st Dep't. 2014).

A plaintiff in a personal injury action is not required to prove that a defendant knew or should have known of the existence of a particular defect where he or she had actual notice of a recurrent dangerous condition in that location. *Phillips v Henry B's, Inc.*, 85 A.D.3d 1665 (N.Y. App. Div. 4th Dep't. 2011).

Regular mopping and placement of mats on the floor are deemed reasonable precautions to remedy wet conditions. *Ford v. Citibank, N.A.*, 11 A.D.3d 508 (N.Y. App. Div. 2d Dep't. 2004). Although the storm-in-progress doctrine may obviate a landowner's duty to correct snow and ice conditions that develop outdoors during the course of a winter storm, it does not completely remove the duty of ensuring the interior of a building remains adequately safe, even during the course of a storm. Generally, the storm-in-progress doctrine's effect on a landowner's liability in a slip and fall case is determined by consideration of the nature of the storm in conjunction with what could be done to remedy a hazardous condition thereby created. The storm-in-progress doctrine diminishes a landowner's duty during an ongoing rainstorm to the extent that the landowner is not required to take extraordinary or unreasonable precautions, such as covering all floors with mats or continuously mopping the water brought in from outside precipitation. But issues of material fact as to whether a reasonable landowner should have been aware of the hazardous condition of a private school's wet floors during a storm, and whether placement of two floor mats in entryway of school was adequate to prevent injury to visitors precluded building owner's summary judgment. *Kuznicki v. Beth Jacobs Teachers Seminary of Am. Inc.*, 39 Misc. 3d 286 (Sup. Ct. Kings Co. 2013)

With regard to plaintiff's comparative negligence, the open and obvious nature of an allegedly dangerous condition is relevant to the issue of comparative fault of plaintiff and does not preclude a finding of liability for negligence against landowner. *Id.*

Proof of regular inspections and maintenance of the area in question, including an inspection and any remedial action just prior to the incident, is ordinarily sufficient to satisfy a defendant's burden of showing no notice of a dangerous condition. *Compare Stewart v. Canton-Potsdam Hosp.*

Found., Inc., 79 A.D.3d 1406 (N.Y. App. Div. 3d Dep't. 2010), with, *Williams v New York City Hous. Auth.*, 119 A.D.3d 857 (N.Y. App. Div. 2d Dep't. 2014).

While plaintiff is entitled to inspect tapes to determine whether the area of an accident is depicted and should not be compelled to accept defendant's self-serving statement concerning the contents of the destroyed tapes, this principle does not obligate a defendant to preserve hours of tapes indefinitely each time an incident occurs on its premises in anticipation of a plaintiff's request for them. That obligation would impose an unreasonable burden on property owners and lessees. *Duluc v AC & L Food Corp.*, 119 A.D.3d 450 (N.Y. App. Div. 1st Dep't. 2014).

Slip & Fall On Ice/Snow

A landowner has a duty of reasonable care to persons on the land to remedy conditions created by precipitation. *Byrd v. Church of Christ Uniting*, 192 A.D.2d 967 (N.Y. App. Div. 3d Dep't. 1993).

A landowner must remedy dangerous conditions created by snow, rain, or ice within a reasonable time of receiving actual or constructive notice of the conditions. *Id.* This duty applies to:

- Walkways (*Simmons v. Metropolitan Life Ins. Co.*, 84 N.Y.2d 972 (1994)),
- Entranceways (*Falina v. Hollis Diner, Inc.*, 281 A.D. 711 (N.Y. App. Div. 2d Dep't. 1952)),
- and *Parking Lots* (Byrd).

It is unreasonable to expect a property owner to remedy the conditions created by a storm during the pendency of the storm. Such a requirement could endanger the owner and require him or her to needlessly engage in repetitive activity. Thus, an owner need not normally remove ice or snow until the cessation of the storm. *Byrd*.

In *Amodeo*, where a plaintiff fell during a snowfall on an icy step of a stairway leading from an elevated railroad platform to the street, the court found that plaintiff established a *prima facie* case at trial that should have gone to the jury. *Amodeo v. New York City Tr. Auth.*, 10 A.D.2d 982 (2d Dep't 1960), *affd.* 9 N.Y.2d 760 (1961). The stairway was covered on the top but was open at the sides, and snow had fallen for 36 hours accumulating to 6.8 inches. At the time of plaintiff's fall, the stairs were covered with three to four inches of packed-down ice from people walking down the steps. There was no evidence that any measures had been taken during the day to alleviate the condition due to the unusual severity of the snowstorm, or because sleet and snow turned to ice as soon as it reached the ground (e.g. *Falina v. Hollis Diner, Inc.*, *supra*). Also, the condition of the stairway had existed long enough to charge the defendant with notice of the danger. *Id.*

An owner's duty to remove precipitation from locations where persons walk or ride does not impose a duty to en-

sure that the precipitation will never cause harm. The owner need only act reasonably under the circumstances.

For example, an owner who clears the walkway of recently fallen snow does not incur liability merely because, a week later, someone slips when snow on the lawn melted and turned to ice on the walkway. In order to establish a *prima facie* case of negligence in such circumstances, the plaintiff must establish that the owner had actual or constructive notice of the ice and had sufficient time to remove it. *Simmons*.

Liability may also attach, when a pedestrian is struck by a vehicle because a property owner fails to comply with a statutory duty to clear a sidewalk of ice and snow, thereby forcing the pedestrian to walk in the street rather than on the obstructed sidewalk. *DiNatale v. State Farm Mut. Auto. Ins. Co.*, 5 A.D.3d 1123 (N.Y. App. Div. 4th Dep't. 2004).

When a property owner hires a contractor for snow removal, the contractor usually owes no duty of reasonable care to prevent foreseeable harm to a third party if the contract is not a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property. *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136 (2002).

However, a contractor may be liable if the third party detrimentally relies upon the contractor's continued performance of his contractual obligations or if the contractor's actions advanced to such a point so as to have launched a force or instrument of harm. *Bugiada v. Iko*, 274 A.D.2d 368 (N.Y. App. Div. 2d Dep't. 2000).

A duty of care on the part of a managing agent may arise where there is a comprehensive and exclusive management agreement between the agent and the owner that displaces the owner's duty to safely maintain the premises. The managing agent's failure to submit a copy of the written management failed to establish *prima facie* that the managing agent owed no duty of care to the plaintiff. *Calabro v. Harbour at Blue Point Home Owners Assn., Inc.*, 120 A.D.3d 462 (N.Y. App. Div. 2d Dep't. 2014).

Items Falling Off Shelves

Supermarket must demonstrate in personal injury action that property had been maintained in a reasonably safe condition, its employees did not create allegedly dangerous condition, and it did not have actual nor constructive notice of such condition. *Fontanelli v. Price Chopper Operating Co., Inc.*, 89 A.D.3d 1176 (N.Y. App. Div. 3d Dep't. 2011).

In this case (water bottle cases fell on customer), it was proven by showing employees would not have stocked items in that way, items had not fallen off shelves before, employees continually monitored shelves to ensure that they were properly stocked, and manager had inspected that area five minutes before accident and did not observe any dangerous conditions. *Id.*

Testimony in personal injury action establishing precarious placement of items on supermarket shelving established

only that items had been placed on shelf by someone in unsafe manner, not that supermarket had maintained property in dangerous and unsafe manner. *Id.*

The evidentiary doctrine of *res ipsa loquitur* may be invoked to allow the fact finder to infer negligence from the mere happening of an event; for the doctrine to apply, a plaintiff must show, among other things, that the defendant had exclusive control over the agency or instrumentality causing the event. *Id.*

While a plaintiff is not required to eliminate all other possible causes of the injury, in order for the *res ipsa loquitur* doctrine to apply, he or she nonetheless must demonstrate that the likelihood of causes other than the defendant's negligence is so reduced that the greater probability lies at the defendant's door, rendering it more likely than not that the injury was caused by the defendant's negligence. *Id.*

As is the case with other property owners, a store owner has no duty to warn or guard shoppers against obvious dangers. Thus, for many years, a shopkeeper was relieved of liability if the hazardous condition in the aisle was open and obvious. *Schulman v. Old Navy/Gap, Inc.*, 45 A.D.3d 475 (N.Y. App. Div. 1st Dep't. 2007).

However, in a recent line of cases, the Appellate Divisions for the First, Second, and Third Departments have ruled that, only the property owner's duty to warn is negated by the open and obvious nature of the dangerous condition on the property; the landowner may still be liable for failure to maintain the property in safe condition. *Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69 (N.Y. App. Div. 1st Dep't. 2004). After *Westbrook*, the "open and obvious" doctrine has been held to apply to:

- Natural geographic phenomena such as a whirlpool area in a state park where four camp counselors drowned. *Cohen v. State*, 50 A.D.3d 1234 (3d Dep't 2008), lv. denied 10 N.Y.3d 713 (2008).
- A ten-foot cliff over which an infant plaintiff rode his bike. *Comack v. VBK Realty Assoc., Ltd.*, 48 A.D.3d 611 (2d Dep't 2008).
- A ravine in a county park into which plaintiff fell. *Cramer v. County of Erie*, 23 A.D.3d 1145 (4th Dep't 2005).
- And a waterfall that was a natural feature of the landscape which had a wet, slippery ledge. *Melendez v. City of New York*, 76 A.D.3d 442 (1st Dep't 2010).

A landowner has no duty to warn of an open and obvious condition that is readily observable by the normal use of one's senses, which applies to adults and minors alike, but a landowner has a duty to warn against even known or obvious dangers where he or she "has reason to expect or anticipate that a person's attention may be distracted, so that he or she will not discover what is obvious, or will forget what he or she has discovered, or fail to protect himself or herself against it. *Jankite v. Scoresby Hose Co.*, 119 A.D.3d 1189 (N.Y. App. Div. 3d Dep't. 2014).

Defendants contended that, even if they created the condition at issue, they were entitled to judgment as a matter of law because the pallet jack in the aisle was an open and obvious condition, and not inherently dangerous. But viewing the evidence in the light most favorable to the plaintiff, defendants failed to eliminate all triable issues of fact as to whether the pallet jack was inherently dangerous, and failed to establish prima facie that they maintained the premises in a reasonably safe condition. *Russo v Home Goods, Inc.*, 119 A.D.3d 924 (N.Y. App. Div. 2d Dep't. 2014).

Parking Lot Defect

One who falls because of a defect in a shopping center parking lot must prove notice, either actual or constructive, of the parking lot defect. *Farrar v. Teicholz*, 173 A.D.2d 674 (N.Y. App. Div. 2d Dep't. 1991).

A shopping center customer, who becomes entangled in a plastic bag in the shopping center parking lot, and falls, cannot recover from the shopping center owner absent evidence that the shopping center owner knew of or should have known of the existence of the plastic bag. But a shopping center owner may be found liable for an entrant's fall over a broken curb in the shopping center which existed for a sufficient length of time prior to the fall as to permit the owner or its employee to discover and remedy it. *Ferlito v. Great South Bay Associates*, 140 A.D.2d 408 (N.Y. App. Div. 2d Dep't. 1988).

As a general rule, a parking lot owner or operator is under a duty to exercise reasonable care under the circumstances to keep the premises safe for business patrons and others who are on the premises lawfully. *Byrd*.

The owner or operator of a parking lot breaches the duty of reasonable care by creating, or allowing to exist, an unreasonable risk of harm to parking lot users, such that injury should have been reasonably foreseen or expected. On the other hand, a parking lot owner or operator will not be held liable for injuries to a business patron or other person lawfully on the premises where the injury was caused by unexpected and unforeseeable circumstances. *Dumont v. P. S. Griswold Co.*, 246 A.D.2d 879 (N.Y. App. Div. 3d Dep't. 1998).

The owner or operator of commercial premises may be found negligent for failing to properly maintain a parking area intended for the use of customers or others to whom the owner owes a duty of reasonable care. However, owners and operators of commercial premises are not required to keep their parking lots and other such areas free from irregularities and trifling defects. Thus, a parking lot owner or operator is not under a duty to provide a smooth surface by eliminating all variations in elevations existing along countless cracks, seams, joints, and curbs; rather, the owner or operator may only be held liable for those defects which present an unreasonable risk of harm. Furthermore, the mere presence of a dangerous condition on the premises does not ipso facto make the parking lot owner or operator liable

for resulting injuries, since there must be some evidence of negligence on his part. *Ciaschi v. Taughannock Constr.*, 204 A.D.2d 883 (N.Y. App. Div. 3d Dep't. 1994).

Triable issues of fact existed as to whether defendant property owner was liable for allowing third parties to operate remote control cars on its parking lot which injured a motorcyclist to avoid them. Such as whether it had the knowledge, authority, or opportunity to control the conduct of the third parties operating the radio remote control cars in the subject parking lot, and as to whether the conduct of the third parties in the parking lot posed a reasonably foreseeable risk of harm to others.

Tiranno v. Warthog, Inc., 119 A.D.3d 772 (N.Y. App. Div. 2d Dep't. 2014).

There is no clear rule regarding the barriers a shopkeeper must erect in its parking lot. Shopkeepers often provide parking facilities where some of the customers are invited to park facing, and only a short distance from, the store's walkway or glass door or facade. The cases are not clear as to a shopkeeper's duty to protect persons in the store or on the outside walkway from parking cars that overshoot their destination.

The Fourth Department has held that a store owner is not liable where an unlicensed driver jumps a two-inch curb and strikes a pedestrian in the walkway. The Court reasoned that such a curb is a sufficient barrier, and that an owner need not foresee that persons who have no ability to operate a car will attempt to park in the lot. *Grandy v. Bavaro*, 134 A.D.2d 957 (N.Y. App. Div. 4th Dep't. 1987).

The Second Department has taken the position that a shopkeeper is liable where a parking driver mistakenly steps on the accelerator instead of the brake, crashes through the storefront, and injures a customer inside. The court explained that an owner must foresee such a situation and erect appropriate barriers to deal with it. *Arena v. Ostrin*, 134 A.D.2d 306 (N.Y. App. Div. 2d Dep't. 1987).

Assault

As with other landowners, a shopkeeper has a duty to control the tortious actions of persons on the premises when it is aware of the actions and has the ability to control them. *Banayan v. F.W. Woolworth Co.*, 211 A.D.2d 591 (N.Y. App. Div. 1st Dep't. 1995).

Similarly, a store owner has a duty to take minimal precautionary security measures, and may have a duty to take more intense measures if it has knowledge of prior criminal activity in or around the store. *Id.*

The scope of duty to provide security depends on such factors as the cost of security, the risk of harm and prior knowledge of past criminal acts. *Ward v. Pyramid Co.*, 11 A.D.3d 1012 (N.Y. App. Div. 4th Dep't. 2004). An owner of a small grocery store cannot be expected to employ security guards or to intervene during the course of an armed robbery of a customer. *Amarante v. Rothschild*, 171 A.D.2d 633 (N.Y. App.

Div. 2d Dep't. 1991).

On the other hand, an owner of a chain department store with knowledge of prior criminal activity in the store must provide adequate security to deter attacks on customers and to respond to them when they arise. This is especially so during the Christmas shopping season, when the incidence of crimes against customers rises. (*Banyan*). Similarly, where

a department store owner is so aware of thefts from its own cash registers that it has taken precautionary measures with respect thereto, the store must, at the very least, provide warnings to customers at cash-only checkout counters that there is a danger of theft. *Lacelle v. Hills Dep't Store*, 535 N.Y.S.2d 1014 (City Ct.1988).

NORTH CAROLINA



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Slip & Fall In General

In North Carolina, a landowner owes its licensees and invitees a duty "to exercise reasonable care to provide for the safety of all lawful visitors on his property." *Lorinovich v. K Mart Corp.*, 516 S.E.2d 643, 646 (N.C. Ct. App. 1999). Thus, a property owner's duty of care is that of a reasonably prudent person under similar circumstances, and requires defendant to take "reasonable precautions to ascertain the condition of the property and to either make it reasonably safe or give warnings as may be reasonably necessary to inform the invitee of any foreseeable danger." *Id.* at 646-47. However, there is no duty to protect against dangers which are either known to the visitor or are so open and obvious that they are reasonably expected to be discovered. *Id.* at 646.

It is well settled that a person is contributorily negligent if he

or she knows of a dangerous condition and voluntarily goes into a place of danger. *Dunnevant v. R.R.*, 83 S.E. 347, 348 (N.C. 1914).

In slip and fall cases in a retail establishment, the defendant has a "duty to exercise ordinary care to keep its aisles and passageways where she and other customers are expected to go in a reasonably safe condition, so as not unnecessarily to expose her and them to danger, and to give warning of hidden dangers or unsafe conditions of which it knows or in the exercise of reasonable supervision and inspection should know." *Morgan v. Great Atl. & Pac. Tea Co.*, 145 S.E.2d 877, 882 (N.C. 1966)

When a plaintiff customer slips or falls on an object and is injured, the "plaintiff must show that the defendant either (1) negligently created the condition causing the injury, or (2) negligently failed to correct the condition after actual or con-

structive notice of its existence.” *Roumillat v. Simplistic Enters., Inc.*, 414 S.E.2d 339, 342-43 (N.C. 1992) citing *Hinson v. Cato’s, Inc.*, 157 S.E.2d 537, 538 (N.C. 1967).

Defendant was held liable where plaintiff slipped and fell on liquid detergent that had leaked from a container on the shelves onto the floor. *Furr v. K-Mart Corp.*, 543 S.E.2d 166, 168-69 (N.C. Ct. App. 2001). Evidence that the detergent had dried and become pink at the time of plaintiff’s fall was “sufficient to raise an inference that the liquid detergent had been leaking for a sufficient length of time that defendant should have known of its existence in time to have removed the danger or to have given proper warning of its presence.” *Id.* at 169.

Similarly, evidence that grapes on the floor of a grocery store aisle were “full of lint and dirt” was sufficient to raise the inference that the owner had constructive notice of the grapes. *Long v. Food Stores*, 136 S.E.2d 275, 278-79 (N.C. 1964).

Slip & Fall On Snow/Ice

A landowner is not an insurer of his invitee’s absolute safety. Rather, the duty owed to business invitees is described as the duty to warn of or make safe concealed, dangerous conditions, the presence of which the landowner has express or implied knowledge. *Norwood v. Sherwin-Williams Co.*, 279 S.E.2d 559, 562 (N.C. 1981).

Hazardous conditions which are open and obvious do not create a liability for a landowner. *Grayson v. High Point Dev. Ltd. P’ship*, 625 S.E.2d 591, 592 (N.C. Ct. App. 2006).

Therefore, defendant was not liable to plaintiff for injuries sustained as a result of a slip and fall on ice in a mall parking lot where “[p]laintiff’s own testimony demonstrates that she knew of the hazardous condition and, therefore, there exists no issue of genuine fact that defendant owed her no duty.” *Id.* at 594.

Similarly, where plaintiff slipped and fell on the steps to the entrance to defendants’ business, evidence was insufficient to establish that defendants breached a duty of care owed to plaintiff since fact that the steps and patio were icy was obvious to plaintiff. In this case plaintiff’s testimony showed that “she knew the steps were covered with ice as she entered defendants’ shop; that she knew rain and sleet had continued to fall while she was inside; and that she knew conditions were at least as bad if not worse when she emerged from the shop to leave.” *Southerland v. Kapp*, 295 S.E.2d 602 (N.C. Ct. App. 1982).

Items Falling Off Shelves

A land owner is liable for any injuries caused to his invitee when the land owner (1) negligently creates “the condition causing the injury” or (2) negligently fails “to correct the condition [causing the injury] after notice, either express or implied of its existence.” *Hinson v. Cato’s, Inc.*, 157 S.E.2d 537, 538 (N.C. 1967).

Prior incidents of injury to other patrons to be considered when determining breach of a duty. *Lorinovich v. K Mart Corp.*, 516 S.E.2d 643, 646 (N.C. Ct. App. 1999) citing *Williams v. Walnut Creek Amphitheater Partnership*, 468 S.E.2d 501, 503 (N.C. Ct. App. 2006). In addition, evidence showing the manner in which other stores in the area stack their merchandise may be considered as well. *Id.*

Where plaintiff was injured by falling cans of salsa as she attempted to obtain can of salsa from the display six feet from floor. Genuine issue of material fact existed as to whether it was reasonable to stack the cans in such a manner, whether the display constituted an open and obvious condition, as well as whether a reasonable person under the circumstances would have waited for assistance from store employees or ask another shopper for help - i.e., whether plaintiff was contributorily negligent. *Id.* at 647.

Parking Lot Defects

It is well recognized that the owner of the parking lot owes to all lawful visitors “a duty to maintain the premises in a condition reasonably safe for the contemplated use and a duty to warn of hidden dangers known to or discoverable by [defendant].” *Dowless v. Kroger Co.*, 557 S.E.2d 607, 609 (N.C. Ct. App. 2001) quoting *Branks v. Kern*, 359 S.E.2d 780, 782 (N.C. 1987).

Questions of fact existed as to whether a pothole in a parking lot, which caused grocery store patron to be injured when the wheel of her shopping cart fell into the hole, would have been obvious to one using ordinary care for her own safety under similar circumstances, thus precluding summary judgment for parking lot’s owner in patron’s negligence action. *Id.* at 610. The fact that the shopping cart that the plaintiff was returning partially blocked her view of the pothole and that the plaintiff was focused on the heavy traffic in the parking lot in which the pothole was situated raised question as to whether the hazard was “obvious.” *Id.*

Sidewalks

Our Supreme Court has also stated that “‘if [a] step is properly constructed and well lighted so that it can be seen by one entering or leaving the store, by the exercise of reasonable care, then there is no liability.’” *Garner v. Atlantic Greyhound Corp.*, 108 S.E.2d 461, 467 (N.C. 1959) quoting *Tyler v. F.W. Woolworth Co.*, 41 P.2d 1093, 1094 (Wash. 1935).

In determining the issue of liability “the facts must be viewed in their totality to determine if there are factors which make the existence of a defect in a sidewalk, in light of the surrounding conditions, a breach of the defendant’s duty and less than ‘obvious’ to the plaintiff.” *Currin v. Rex Healthcare, Inc.*, COA13-515, 2014 WL 636973 (N.C. Ct. App. Feb. 18, 2014).

Defendant was not negligent where plaintiff fell on steps in front of defendant’s store entrance where, the weather was clear, the entryway was not crowded, and only a few people were on the sidewalk. *Garner*, 108 S.E.2d at 468. This Court

decided that the slope of the entryway and sidewalk and the drop-off of varying height at the sidewalk did not alone constitute negligence. *Id.* Further, because the step was obvious, being in plain view in broad daylight, the defendant had no duty to warn or to provide handrails. *Id.*

The mere presence of a double step in front of a store was insufficient to constitute negligence as to patron who fell on second step, absent some special circumstance, such as poor construction of the step, poor lighting, or diversion of attention created by storekeeper. *Freundlich v. Vaughan's Foods of Henderson, Inc.*, 307 S.E.2d 412, 415 (N.C. Ct. App. 1983). The facts that plaintiff was carrying two bags of groceries at time of accident did not affect the outcome because her view was not obstructed. *Id.*

There was no hidden danger from the varying contour of a shopping center sidewalk in the parking lot and, therefore, shopping center owner was not negligent in failing to warn invitee of the obvious condition. *Stoltz v. Burton*, 316 S.E.2d 646 (N.C. Ct. App. 1984). Plaintiff's view was unobstructed, she entered and exited the shopping center using the same sidewalk, and when leaving she followed behind her companion who only moment before used the same step providing an opportunity to discover its varied height. *Id.*

Assault

"A store owner's duty to invitees to maintain the premises in a reasonably safe condition extends to the manner in which the store owner deals with the criminal acts of third persons." *Jones v. Lyon Stores*, 346 S.E.2d 303, 304 (N.C. Ct. App. 1986), disc. review denied, 318 N.C. 506, 349 S.E.2d 861 (N.C. 1986).

Generally, a property owner is "not liable for injuries to his invitees which result from the intentional, criminal acts of third persons. It is usually held that such acts cannot be reasonably foreseen by the owner, and therefore constitute an independent, intervening cause absolving the owner of liability." *Foster v. Winston-Salem Joint Venture*, 281 S.E.2d 36, 38 (N.C. 1981).

"Foreseeability" is, therefore, the test for determining a store owner's duty to safeguard his customers from the acts of third persons. *Id.* at 40. Under the Foster rule, the quantity and quality of criminal acts are to be considered when determining the issue of foreseeability. *Id.* at 42 (issue of foreseeability must be determined by the jury where plaintiff submitted evidence of "thirty-one incidents of criminal activity reported on defendants' premises" in the year prior to her assault); e.g., *Murrow v. Daniels*, 364 S.E.2d 392, 398 (N.C. 1988) (evidence of one-hundred incidents of criminal activity in five years at intersection where defendant motel was located held "sufficient to raise a triable issue of fact

as to whether the attack on the plaintiff was reasonably foreseeable"); *Sawyer v. Carter*, 322 S.E.2d 813 (N.C. Ct. App. 1984), disc. review denied, 329 S.E.2d 393-94 (N.C. 1985) (evidence of single robbery of convenience store five years earlier, coupled with evidence of occasional robberies of other convenience stores and businesses at unspecified locations over extended period of time, insufficient evidence of foreseeability and duty to survive defendant's summary judgment motion); *Brown v. N.C. Wesleyan College*, 309 S.E.2d 701, 703 (N.C. Ct. App. 1983) ("scattered incidents of crime through a period beginning in 1959 were not sufficient to raise a triable issue as to whether the abduction and subsequent murder of plaintiff's intestate was reasonably foreseeable" by defendant college); *Urbano v. Days Inn*, 295 S.E.2d 240, 242 (N.C. Ct. App. 1982) (evidence of forty-two episodes of criminal activity taking place on motel premises during three-year period prior to plaintiff's injury, twelve in the three and a half month period immediately prior to incident, raised triable issue of reasonable foreseeability).

Defendant was not negligent in failing to take adequate measures, including the lack of security guards and failure to install a security surveillance or burglar alarm system, to protect its customers from the criminal acts of third persons, the forecast of evidence failed to show how the foregoing actions, or any other measures, would have prevented plaintiff's assault. *Liller v. Quick Stop Food Mart, Inc.*, 507 S.E.2d 602, 606 (N.C. Ct. App. 1998). Expert's statement that attack "came as a direct result of a lack of security" was insufficient, on motion for summary judgment, to raise genuine issue of material fact as to whether lack of security was proximate cause of that attack. *Id.* at 606-07.

Defendant did not breach its duty to plaintiff to safeguard its customers from the acts of third persons, where plaintiff was injured when car driven by shoplifter struck him in store's parking lot. *Betts v. Jones*, 702 S.E.2d 100, 103 (N.C. 2010). It was not foreseeable, especially since no employee chased the shoplifter, that when store's loss prevention officer confronted the shoplifter, she would flee the store, enter her vehicle parked 20 feet from store entrance, speed through parking lot, turn down traffic aisle where patron was standing, and strike patron. *Id.*

Where plaintiff, a tenant of an apartment complex, sued her landlord as the result of personal injuries suffered during a sexual assault at gunpoint in the complex parking lot. Evidence of crimes committed at the same complex wherein a passkey was used to break into apartments was held inadmissible because the burglaries "had nothing to do with this attack in the parking lot." *Shepard v. Drucker & Falk*, 306 S.E.2d 199, 202 (N.C. Ct. App. 1983).

OHIO



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Slip & Fall In General

The owner has the duty to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition. *Presley v. Norwood*, 303 N.E.2d 81 (Ohio 1973); *Light v. Ohio University*, 502 N.E.2d 611 (Ohio 1986).

However, a property owner is under no duty to protect a business invitee from hazards that are so obvious and apparent that the invitee is reasonably expected to discover and protect against them himself. *Armstrong v. Best Buy Co.*, 99 Ohio St. 3d 79, 80, 2003-Ohio-2573, 788 N.E.2d 1088.

In order for plaintiff to recover damages from slip and fall accident as business invitee, plaintiff must establish that defendant through its officers or employees was responsible for hazard complained of, or that at least one of such persons

had actual knowledge of hazard and neglected to give adequate notice of its presence or remove it promptly, or that such danger had existed for sufficient length of time reasonably to justify inference that failure to warn against it or remove it was attributable to want of ordinary care. *Combs v. First Nat'l Supermarkets*, 105 Ohio App. 3d 27, 663 N.E.2d 669 (Ohio Ct. App. 1995).

In slip and fall case brought by business invitee, evidence of how long hazard existed is mandatory in establishing defendant's duty to exercise ordinary care. *Id.*

Slip & Fall On Snow/Ice

Generally, an owner or occupier of land owes no duty to business invitees to remove natural accumulations of ice and snow from sidewalks on the premises, or to warn invitees of

the dangers associated with natural accumulations of ice and snow. *Norton v. Marion Gen. Hosp.*, No. 9-06-04, 2006-Ohio-3535, citing *Brinkman v. Ross*, 623 N.E.2d 1175 (Ohio 1993).

One exception to the general no duty rule is where the land owner or occupier is shown to have actual or implied notice "that the natural accumulation of snow and ice on his premises has created there a condition substantially more dangerous to his business invitees than they should have anticipated by reason of their knowledge of conditions prevailing generally in the area[.]" *Debie v. Cochran Pharmacy-Berwick, Inc.*, 227 N.E.2d 603 (Ohio 1967).

Another exception to the general no duty rule exists where the owner or occupier of land negligently causes or permits an unnatural accumulation of ice or snow. *Norton*, 2006-Ohio-3535, citing *Lopatkovich v. City of Tiffin*, 503 N.E.2d 154 (Ohio 1986). An accumulation of ice and snow is unnatural if it has been created by causes and factors other than meteorological forces of nature such as low temperature, strong winds, and drifting snow. *Id.*, citing *Porter v. Miller*, 468 N.E.2d 134 (Ohio Ct. App. 1983). In other words, an unnatural accumulation is one that is "man-made" or "man-caused." *Id.*

Concerning removal of natural accumulations of ice and snow, "Ohio law clearly provides that the plowing of a parking lot to remove a natural accumulation of snow and ice does not automatically change the nature of that accumulation from natural to unnatural." *Bosh v. Mathews-Kennedy Ford Lincoln Mercury, Inc.*, No. 9-90-80, 1991 WL 216898 (Ohio Ct. App. Oct. 10, 1991), citing *Coletta v. Univ. of Akron*, 550 N.E.2d 510 (Ohio Ct. App. 1988). Additionally, numerous courts have concluded that run-off from melting piles of plowed snow that creates icy patches upon refreezing typically does not constitute an unnatural accumulation of ice. See, *Davis v. the Timbers Owners' Assoc.*, No. C-990409, 2000 WL 43709 (Ohio Ct. App. Jan. 21, 2000).

Items Falling Off Shelves

"A shopkeeper owes business invitees a duty of ordinary care in maintaining the premises in a reasonably safe condition so that its customers are not unnecessarily and unreasonably exposed to danger. See, *Campbell v. Hughes Provision Co.*, 90 N.E.2d 694 (Ohio 1950).

A shopkeeper is not, however, an insurer of the customer's safety. Further, a shopkeeper is under no duty to protect business invitees from dangers 'which are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them.' *Sidle v. Humphrey*, 233 N.E.2d 589 (Ohio 1968).

Parking Lot Defects

Owner of premises must exercise reasonable or ordinary care for business invitee's safety and protection; although owner is not to be held as insurer against all forms of risk,

owner has duty to maintain premises in reasonably safe condition and to warn invitee of latent or concealed defects of which possessor has or should have knowledge. *Paschal v. Rite Aid*, 480 N.E.2d 474 (Ohio 1985).

"[I]n order to impose liability for injury to an invitee because of a dangerous condition of the premises, the condition must have been known to the owner or occupant, or have existed for such a time that it was the duty of the owner or occupant to know of it." *Tiberi v. Fisher Bros. Co.*, 121 N.E.2d 694 (Ohio Ct. App. 1953). See also, *Presley v. City of Norwood*, 303 N.E.2d 81 (Ohio 1973).

Assault

A business "may be subject to liability for harm caused to a business invitee by the conduct of third persons that endangers the safety of such invitee" because of the special relationship between a business and its customer. *Howard v. Rogers*, 249 N.E.2d 804 (Ohio 1969).

However, a business is not an insurer of the safety of its patrons while they are on its premises. *Id.* Thus, the duty to protect invitees from the criminal acts of third parties does not arise if the business "does not and could not in the exercise of ordinary care, know of a danger which causes injury to [its] business invitee." *Id.* The existence of a duty will, therefore, depend upon the foreseeability of harm. *Menifee v. Ohio Welding Prods., Inc.*, 472 N.E.2d 707 (Ohio 1984).

As a general rule, an owner or occupier of land is shielded from liability for injuries caused by the criminal conducts of a third person. *McKee v. Gilg*, 96 Ohio App. 3d. 764 (Ohio Ct. App. 1994). The preclusion is based on the premise that criminal behavior is an unforeseeable, intervening act which breaks the causal link between the owner or occupier, and any injuries suffered by an invitee. *Id.*

When liability is asserted against a landowner for the criminal acts of third parties, the burden is upon the plaintiff to establish that the owner knew or should have known that the attack upon the plaintiff was imminent. *Id.*

The existence of a duty therefore will depend upon the foreseeability of harm. *Reitz v. May Co. Dep't Stores*, 583 N.E.2d 1071 (Ohio Ct. App. 1990). The foreseeability of criminal acts, examined under the test of whether a reasonably prudent person would have anticipated any injuries were likely to occur, will depend upon the totality of the circumstances, considering:

- Prior similar incidents,
- The propensity of criminal activity to occur on or near the location of the business, and
- The character of the business. *Id.*

Because criminal acts are largely unpredictable, the totality of the circumstances must be somewhat overwhelming in order to create a duty. *Id.*

OKLAHOMA



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Slip & Fall In General

It is well established that a person who goes on land to conduct business is a business invitee for the purposes of establishing liability. Therefore, an invitor has a duty to exercise reasonable care to prevent injury to a business invitee. However, an invitor is not an insurer of the safety of others and is not required to prevent all injury occurring on the property i.e., those that are open and obvious. Accordingly, an invitor will only be held liable where it be shown that the invitor had actual or constructive notice "or could be charged with gaining knowledge of the condition in time sufficient to effect its removal or to give warning of its presence." *Taylor v. Hynson*, 856 P.2d 278, 281 (Okla.1993).

Negligence may be established by circumstantial evidence, but inference of negligence or causal connection to be adopted must be based on something more than mere speculation and conjecture. *Beatty v. Dixon*, 408 P.2d 339,

340 (Okla.1965).

"To a trespasser, a landowner owes ... only a duty to avoid injuring him wilfully or wantonly. To a licensee, an owner owes a duty to exercise reasonable care to disclose to him the existence of dangerous defects known to the owner, but unlikely to be discovered by the licensee. This duty extends to conditions and instrumentalities which are in the nature of hidden dangers, traps, snares, and the like. To an invitee, an owner owes the additional duty of exercising reasonable care to keep the premises in a reasonably safe condition for the reception of the visitor." *Scott v. Archon Grp.*, P.3d 1207, 1211-12 (Okla.2008).

An independent contractor doing work on another's premises is an invitee under Oklahoma law. *Davis v. Whitsett*, 435 P.2d 592 (Okla. 1967).

Slip & Fall On Snow/Ice

"Where there is no act on the part of the owner or occupant of the premises creating a greater hazard than that brought about by natural causes, dangers created by the elements, such as the forming of ice and the falling of snow, are universally known, and all persons on the property are expected to assume the burden of protecting themselves from them." *Buck v. Del City Apartments, Inc.*, 431 P.2d 360, 366 (Okla. 1967).

There mere slipperiness of ice and snow and their natural accumulations does not give rise to liability. *Dover v. W.H. Braum, Inc.*, 111 P.3d 243, 246 (Okla. 2005). However, note that Oklahoma has consistently recognized that "Black ice" is not an ordinarily perceptible hazard, nor is it within ordinary knowledge such as an ordinary accumulation of ice and snow. *Brown v. Alliance Real Estate Grp.*, 976 P.2d 1043, 1045 (Okla. 1999).

Where plaintiff, a business invitee, slipped and fell on "black ice" outside the defendant's front door, plaintiff alleged that the owners were negligent in failing to clear the path and failed to protect the plaintiff from the slick condition of the path. The defendants argued on summary judgment that the ice was the result of a natural accumulation and that they had done nothing to enhance the accumulation of the ice. The plaintiff responded with evidentiary materials establishing both that the ice was invisible and that the defendants had knowledge of the hazardous condition because a person had fallen in that spot earlier in the day and had informed defendant of the ice. *Brown*, 976 P.2d at 1045.

Where a motel employee removed ice and snow that had accumulated in front of its rental cabins, and later in the day the plaintiff slipped and fell on ice accumulated in front of a cabin, the court found that the mere slipperiness of snow or ice in its natural state and accumulation does not give rise to liability. Holding that a motel owner had no legal duty to warn an invitee who knew or should have known the condition of the property against patent and obvious dangers because there was no evidence in that case that the usual hazard from the icy condition was in any way increased by an act of the defendant. *Buck*, 431 P.2d at 366.

In *Wood*, a woman brought suit against Mercedes-Benz of Oklahoma City for injuries she suffered after she slipped and fell on ice that had accumulated on sidewalks, pavement, and grass surrounding the automobile dealership. *Wood v. Mercedes-Benz of Okla. City*, No. 108555, 2014 Okla. LEXIS 91 (Okla. July 16, 2014). The Court held that the icy conditions were caused by Mercedes-Benz sprinkler system which activated during freezing temperatures and that the open and obvious doctrine is not absolute under Oklahoma case law. The Court found that the open and obvious doctrine is to be rejected where there is a hazardous accumulation of ice, caused or enhanced by a landowner, and determined the creation of such a dangerous condition would impose a legal duty on the owner to exercise care for the protec-

tion of third parties. *Id.* Mercedes-Benz had notice of the icy conditions surrounding the entire building and knew that Ned's Catering was sending its employees to the facility to cater the business' scheduled event. As such, it was foreseeable that Ned's Catering employees would encounter the icy hazards created by the sprinkler system and would likely proceed through the dangerous condition in furtherance of their employment. *Id.*

Slip & Fall On Foreign Substance

"A store owner was not an insurer of safety of customer who slipped on floor, but only owed duty to customer, as a business invitee, to exercise reasonable care to keep premises in reasonably safe and suitable condition so that when customer entered store upon invitation, she would not be necessarily or unreasonably exposed to danger. Unless it is established that customer slipped on store floor through negligence of store owner's employees, or because of condition of which owner had actual or constructive notice, there can be no recovery." *Safeway Stores, Inc. v. Feeback*, 390 P.2d 519, 521 (Okla. 1964).

Where the plaintiff had been many times in and on the defendants' premises and had used their storm cellar before, and, thus, should have been aware of the conditions during a rain storm, there was no duty to reconstruct or alter the premises, nor an obligation to warn plaintiff of the wet kitchen floor which was as well-known to her as to the defendants, and there was no actionable negligence in absence of a duty neglected or violated. *Beatty*, 408 P.2d at 343.

Defendant did not breach a duty to warn plaintiff against the wet floor, an open and obvious danger, where the plaintiff observed a hotel maid mopping the floor before he fell. *Williams v. Tulsa Motels*, 958 P.2d 1282, 1285 (Okla. 1998).

The court held the plaintiff knew or should have known the floor was potentially wet or could become slippery from her wet shoes during a rainstorm and that such hazards are "universally known by persons coming into a store from a parking lot wet with rain," and was therefore open and obvious. *Hatcher v. Super C Mart*, 24 P.3d 377, 378 (Okla. Civ. App. 2001). In this case, the plaintiff entered a store while it was raining outside, her shoes were wet from the parking lot, and she slipped after taking one or two steps into the store. The plaintiff testified she knew, before she fell, that if customers were going in and out of the store in the rain, the floor would be wet.

A puddle of water in a bathroom stall was open and obvious where it was undisputed that the plaintiff saw the puddle of water on the floor and had to step through it to reach the toilet, and while getting up from the toilet plaintiff thought she could see a dry spot on the floor, but when she took a step she fell and was injured. Further, plaintiff admitted she was cautious as she left the stall because of the water. The court concluded nothing hid the water from Plaintiff and the danger, and therefore was open and obvious. *Kastning v.*

Melvin Simon Assocs., Inc., 876 P.2d 239, 240 (Okla. 1994).

Where a plaintiff sued Walmart after she slipped on toothpicks in a store aisle, reasonable minds could differ “as to whether Walmart knew or should have known of a dangerous condition, or whether the aisles were checked often enough by Wal-Mart employees,” and thus whether defendant negligently failed to inspect the premises was a question of fact for the jury. *Ingram v. Wal-Mart Stores, Inc.*, 932 P.2d 1128, 1130 (Okla. 1997).

Where a customer slipped and fell on a grape in an aisle of a store, the store employee testified that they were instructed to “keep a constant lookout” for foreign objects on the floor and that although no policy was in place about how often the store should be swept, it was customary for employees to sweep “every opportunity they have.” Moreover, the employee testified he had been down the aisle where the plaintiff fell about thirty minutes prior to the incident and did not see anything on the floor. Accordingly, the court found “no evidence that the store had negligently failed to inspect the premises.” *Kassick v. Spicer*, 490 P.2d 251, 253-54 (Okla. 1971).

Items Falling Off Shelves

“Although the storekeeper is not an insurer of the safety of his customer while in the store, he does owe the customer the duty of maintaining the premises, such as the aisles and other portions thereof usually used by the customer, in a reasonably safe condition for such use, and to warn such customer of the dangerous conditions existing in such areas so used, said invitee having the right to assume that it is safe to walk in the aisles near the counters for the purpose of making a selection of that which he or she intends to buy.” *M & P Stores, Inc. v. Taylor*, 326 P.2d 804, 805-06 (Okla. 1958).

“In a civil action for damages for personal injuries, all the plaintiff is required to do in order to establish a case is to make it appear more probable that the injury resulted in whole or in part from the defendant’s negligence than from any other cause, which fact may be established by circumstantial evidence and the reasonable inferences that may be drawn therefrom.” *Pratt v. Womack*, 359 P.2d 223, 224 (Okla. 1961).

However, Oklahoma recognizes that some latitude must be afforded to a business owner to display goods in manner consistent with nature of goods and scope of the business. *Safeway Stores, Inc. v. Sanders*, 372 P.2d 1021, 1023 (Okla. 1962). For example, defendant was not liable to a customer who tripped over lawn chairs where the display of the lawn chairs taking up 24 inches in 80-inch-wide store aisle did not create an inherently dangerous condition, because it was visible and obvious to one acting in the exercise of due care. *Id.*; see also *Griffin v. Fletcher Hardware Co., Inc.*, 97 N.E.2d 744 (Mass. 1951)(declaring defendant was not liable where customer tripped over roll of wire displayed in plain view).

Defendant was liable to plaintiff for injuries suffered by falling canned goods, where plaintiff testified that at the time of the incident, she noticed that the canned goods were stacked haphazardly on the shelves, and were positioned higher than she could reach, additionally they were leaning in an “awkward and crooked manner” and that they had been stacked in such a manner on previous occasions. *Pratt v. Womack*, 359 P.2d 223, 225 (Okla. 1961)(holding sufficient evidence existed to make a prima facie case for negligence, finding that the cans were probably stacked by defendants’ employees and/or that defendants knew or should have known of the condition for a sufficient length of time to have remedied same).

Parking Lot Defects

A plaintiff seeking to introduce evidence of prior accidents to support her claim that allegedly dangerous condition was known to the defendant property owner must show that any such accident “happened at same place, while it was in same condition, under circumstances of similar nature to those of accident in litigation.” *Roper v. Mercy Health Ctr.*, 903 P.2d 314, 316 (Okla. 1995)(admitting evidence of prior accidents in the absence of such a showing is a reversible error).

Defendant was not liable to truck driver, an invitee, who was injured when a clearance beam at entrance ramp of parking garage fell on his truck after the truck struck the beam. *Scott v. Archon Grp., L.P.*, 191 P.3d 1207, 1208 (Okla. 2008). Finding that the clearance beam was an open and obvious hazard and could easily have been seen and avoided by plaintiff had he exercised ordinary due care. *Id.* at 1214.

Generally a speed bump constitutes an open and obvious danger that requires due care on the part of the invitee to avoid the hazard. *Billings v. Wal-Mart Stores, Inc.*, 837 P.2d 932, 933 (Okla. Civ. App. 1992). Controversy as to the color of a speed bump is not a material fact so long as the speed bump is readily observable. *Id.*

Whether a pothole in a store parking lot is a hidden defect is a question of fact for the jury. *Spirgis v. Circle K Stores*, 743 P.2d 682, 685 (Okla. Civ. App. 1987). In this case the court stated that, “although the [pothole] was in an open place, it was also in a place intended for pedestrian and vehicular traffic...[r]easonable men could differ as to whether the defect was patent and obvious or whether it was rendered a latent defect because of its location and the foreseeable traffic that could and perhaps did obscure it and divert Plaintiff’s attention from it.”

Similarly, in a tenant’s action against an apartment complex, a question of fact existed regarding whether sidewalk debris constituted an open and obvious hazard because photographs in the record tended to demonstrate that debris did not contrast noticeably from surface color of walkway, and the sidewalk was not directly illuminated. *Julian v. Secured Inv. Advisors*, 77 P.3d 604, 609 (Okla. Civ. App. 2003).

Where plaintiff tripped over a small light fixture installed in

the sidewalk, the court found that her claim that she was distracted by nearby pedestrian traffic created an issue of fact for determination by the jury. *Roper*, 903 P.2d at 314.

Assault

An invitor does not have a duty to protect invitees from criminal assaults by third persons unless the invitor knows or has reason to know "that the acts of the third person are occurring, or are about to occur." *Taylor*, 856 P.2d at 281 (citing Restatement (Second) of Torts § 344).

In addition if "[The possessor] may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection." *Bray v. St. John Health Sys., Inc.*, 187 P.3d 721, 723 (Okla. 2008).

"Section 344 of the Restatement (Second) of Torts explains the duty of a business owner to members of the public for the acts of third persons or animals. It provides:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable visitors to avoid the harm, or otherwise to protect them against it." *Id.* at 724.

In the landlord-tenant context the duty owed by the property owners is "a duty to use reasonable care to maintain the common areas of the premises in such a manner as to insure that the likelihood of criminal activity is not unreasonably enhanced by the condition of those common premises." *Lay v. Dworman*, 732 P.2d 455, 458 (Okla. 1986). Thus, by retaining control over aspects of the premises such as door and window locks or alarm devices which directly relate to security, the landlord faces potential liability when the circumstances are such that a reasonable man would realize that a failure to act would render one relying on those actions susceptible to criminal acts.

Material issues of fact as to whether the precautions hospital undertook were adequate to provide reasonable protection to its business invitees and whether hospital might have breached the duty of care that arose from its knowledge of past criminal activity in its parking garage by failing to provide reasonable protection precluded grant of summary judgment to hospital on negligence claim brought by business invitee, who was abducted from hospital's parking garage and raped. *Bray*, 187 P.3d at 725. The court found that defendant's knowledge of prior similar incidents in 2003, made the place and character of defendant's garage combined with the past experience of criminal activity on its property, gave rise to a duty to provide adequate precautions against criminal activity in its parking garage. *Id.*

RHODE ISLAND



Named in honor of two former partners of character, integrity and ability that present members of the firm aspire to emulate, Kirk Hanson and William A. Curran, Hanson Curran LLP has been part of the Rhode Island legal community since the early 1900's. Engaged in civil trial and appellate practice in Rhode Island state and federal courts, primarily in the defense of medical malpractice, worker's compensation, insurance coverage, maritime and other complex and serious personal injury litigation, Hanson Curran LLP is committed to providing its clients with the high level of service and expertise they expect.

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Slip & Fall In General

In order to establish "a claim for negligence, 'a plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage.'" *Willis v. Omar*, 954 A.2d 126, 129 (R.I. 2008) (quoting *Mills v. State Sales, Inc.*, 824 A.2d 461, 467 (R.I. 2003)).

It is well settled that a property owner has an affirmative duty to "exercise reasonable care for the safety of persons reasonably expected to be on the premises, and that duty includes an obligation to protect against the risks of a dangerous condition existing on the premises, provided the landowner knows of, or by the exercise of reasonable care would have discovered, the dangerous condition." *Tancrelle v. Friendly Ice Cream Corp.*, 756 A.2d 744, 752 (R.I. 2000)

(citing *Cutroneo v. F.W. Woolworth Co.*, 698, 315 A.2d 56, 58 (1974)).

In a slip and fall action, in order to hold a property owner (defendant) liable, the burden rests upon plaintiff to prove that the property owner knew or should have known of the hazardous condition, and failed to exercise reasonable due care in either warning the plaintiff of or curing the hazardous condition within a reasonable time upon its discovery. *Tancrelle*, 756 A.2d at 752. The standard of proof in such a case is a preponderance of evidence, "a plaintiff must introduce evidence from which a reasonable jury could conclude that the defendant more probably than not was negligent." *Mead v. Papa Razzi Rest.*, 840 A.2d 1103, 1107 (R.I. 2004) (citing *Massart v. Toys R. Us, Inc.*, 708 A.2d 187, 189 (R.I. 1998)).

Note, however, no duty exists on the part of the land owner

when the hazardous condition is open and obvious. *Tancrelle*, 756 A.2d at 752. Under such circumstances, the plaintiff has a duty to act as a reasonable and prudent person. *Id.*

Slip & Fall On Snow/Ice

In the seminal Rhode Island case regarding snow and ice removal, *Fuller v. Housing Authority of Providence*, the Court adopted the “Connecticut Rule” which provides that a landlord owes its tenants a duty “to exercise reasonable care to see that the common areas are kept reasonably safe from the dangers created by an accumulation of snow and ice which is attributed to purely natural causes.” *Fuller v. Hous. Auth. of Providence*, 279 A.D. 438 (1971). The Court has since expanded the application of the “Connecticut Rule” to apply to situations involving the business “invitor/invitee” context. *Terry v. Cent. Auto Radiators, Inc.*, 732 A.2d 713, 16 (R.I. 1999).

Therefore, as a general rule, any duty to clear a natural accumulation of ice and snow is not triggered before a reasonable time after the storm ends. *Besnaski v. Weinberg*, 899 A.2d 499, 503 (R.I. 2006). Under unusual circumstances, however, the duty to remove the accumulation may arise before the end of the storm. *Terry*, 732 A.2d at 717.

In *Terry*, the plaintiff was injured after slipping on ice traversing the parking lot in the rear of defendant’s automobile repair shop during a snow storm. *Terry*, 732 A.2d at 715. Although the plaintiff originally parked in front of the shop, her automobile was moved to the back of the rear lot after the defendant had completed repairs. *Id.* at 714-715. The Court found in favor of the plaintiff, reasoning that the defendant’s relocation of her vehicle to the back of the rear lot compelled the plaintiff to traverse over dangerous terrain thereby creating an “unusual circumstance” because it “exacerbated and increased the risk of the plaintiff’s falling.” *Id.* at 718.

In contrast, a more recent 2006 case, *Besnaski v. Weinberg*, the plaintiff slipped and fell on a snow covered road traversing to her car in an office park she was at for a meeting. *Besnaski*, 899 A.2d at 501. It was uncontested in this case that the snow fall had begun the night before, and had not ceased by the time of the incident. *Id.* The Court in this case found “nothing particularly unusual about these circumstances that warrant the acceleration of the defendant’s duty under *Terry*.” *Id.* at 503. Reasoning this was unlike *Terry*, where the heightened risk or “unusual circumstance” was created by the business invitor and left to exist resulting in injury to the plaintiff. *Id.* at 504.

Items Falling Off Shelves

It is undisputed that a property owner has a duty to exercise reasonable (ordinary) care for the safety of persons reasonably expected to be on the premises, which includes a duty to keep its premises in reasonably safe condition. *Tancrelle*, 756 A.2d at 752. Specifically, a storekeeper has a duty to

exercise reasonable care in displaying its products so that they will not fall and injure customers. *Motte v. First Nat’l Stores*, 70 A.2d 822 (R.I. 1950).

“Ordinary care” is such care as a person of ordinary prudence exercises under the circumstances of the danger to be apprehended. The greater the danger the higher the degree of care required to constitute ordinary care, the absence of which is negligence. It is a question of degree only. The kind of care is precisely the same.” *Leonard v. Bartle*, 135 A. 853, 854 (R.I. 1927)(quoting *Beerman v. Union R. Co.*, 52 A.1090, 1091 (R.I. 1902)).

“Ordinary care” is not an absolute term but a relative one; that is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances as shown by the evidence in this case. The amount of care exercised by a reasonably prudent person will vary in proportion to the danger known to be involved in what is being done, and it follows that the amount of caution required in the use of ordinary care will vary with the nature of what’s being done and all the surrounding circumstances shown by the evidence in the case. To put it another way: As the danger that should reasonably be foreseen increases, so the amount of care required by the law increase[s].” *Johnson v. Nat’l Sea Prods., Ltd.*, 35 F.3d 626, 632 (1st Cir. 1994).

However, the doctrine of *res ipsa loquitor* will apply when the merchandise was in the exclusive control of the storekeeper. *Motte*, 70 A.2d at 825. Where a plaintiff is injured by falling merchandise, a defendant will be held liable where it “knew that merchandise in its stores was often stacked in an unsafe manner, frequently causing that merchandise to fall from shelves and severely injure [Kmart’s] customers”, thereby breaching its duty of care to keep its premises safe for its customers. *Smith v. Kmart Corp.*, 177 F.3d 19, 23 (1st Cir. 1999).

Parking Lot Defects

For a premise-liability negligence claim, it is well settled that “a landowner or the owner of premises to which the public may be invited has a duty of maintaining the premises in reasonably safe condition for the benefit of those who may come upon the land or premises, but that individual is not an insurer of safety of the members of the public who are present on the land or premises. *O’Brien v. State*, 555 A.2d 334, 338 (R.I. 1989).

In the situation where the property is a common area (i.e., parking areas, roads, streets, drives, tunnels, passageways, landscaped areas, exterior ramps, and walks) between a lessor-lessee, the lessee generally has no duty to maintain the common areas. In this context, it is important to look at the terms of the lease which will indicate to whom the duty of reasonable care rests upon. *Morgan v. Great Atl. & Pac. Tea*, KC C.A. 93-797, 1995 WL 941402 (R.I. Super. Feb. 27, 1995)(holding that the Lease provided that landlord was responsible for maintaining the common area in good condi-

tion and repair).

However, this duty generally does not extend to public property located near or next to the land owner's property. It is a well-established legal principle that a landowner whose property abuts a public way, has no duty to maintain or repair it, and therefore owes no duty to any individual for the condition of the public way in the absence of evidence that the property owner created the dangerous condition. *Wyso v. Full Moon Tide, LLC*, 78 A.3d 747, 751 (R.I. 2013).

Furthermore, where a land owner owes no duty of care to an individual, that land owner also owes no duty to warn such individual. *Berman v. Sitrin*, 991 A.2d 1038, 1048 (R.I. 2010).

Assault

Generally, an individual has "no duty to protect another from harm caused by the dangerous or illegal acts of a third party," unless "a plaintiff and a defendant [have] a special relationship [with] each other." *Martin v. Marciano*, 871 A.2d 911, 915 (R.I. 2005)(citing *Luoni v. Berube*, 729 N.E.2d 1108,

1111 (2000)).

"A special relationship, when derived from common law, is predicated on a plaintiff's reasonable expectations and reliance that a defendant will anticipate harmful acts of third persons and that appropriate measures to protect the plaintiff from harm" will be taken. *Id.*

Possessors of property have certain obligations and responsibilities, one of which is the duty to "exercise reasonable care to prevent third persons that they allow to use their property from intentionally harming others or from creating an unreasonable risk of bodily harm to them - at least when the possessors have the ability to control the third person and should know of the need and opportunity to exercise such control." *Volpe v. Gallagher*, 821 A.2d 699, 718 (R.I. 2003). Foreseeability of such unreasonable risks should be determined by using a "totality of the circumstances" analysis, balancing the degree of foreseeable harm against the defendants duty to exercise due care. *Id.* at 716.

T E N N E S S E E



Since its founding in 1954, Arnett, Draper & Hagood, LLP attributes its ongoing success to the three I's: Integrity, Intelligence and Industry. While our society and the practice of law have certainly changed and evolved during the course of the firm's history, the firm's belief that integrity is the most important characteristic of a good lawyer has not changed. Additionally the longevity of Arnett, Draper & Hagood, LLP and the achievements of its lawyers, both past and present, are a testament to the firm's continued focus on the intelligence and industry necessary to effectively and successfully address the needs of its clients.

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Slip & Fall In General

It is a well-established principal of Tennessee law that business proprietors are not insurers of their patrons' safety. *Blair v. West Town Mall*, 130 S.W.3d 761, 764 (Tenn.2004). Life is filled with ordinary risks, and the law expects everyone to encounter ordinary risks and to exercise reasonable care for his or her own safety. *Riddell v. Great Atlantic and Pacific T. Co.*, 241 S.W.2d 406, 408 (Tenn.1951).

In order to recover under a theory of premises liability, Plaintiff must establish the elements of negligence, including: 1) a duty of care owed by Defendant to Plaintiff; 2) conduct below the applicable standard of care that amounts to a breach of that duty; 3) an injury or loss; 4) cause in fact; and 5) proximate, or legal cause. See *Rice v. Sabir*, 979 S.W.2d 305, 308 (Tenn.1998); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn.1995).

In addition, in order for an owner or operator of premises to be held liable for negligence in allowing a dangerous or defective condition to exist on its premises, the Plaintiff must prove, in addition to the elements of negligence, that: 1) the condition was caused or created by the owner, operator or his agent, or 2) if the condition was created by someone other than the owner, operator or his agent, that the owner or operator had actual or constructive notice that the condition existed prior to the accident. *Blair v. West Town Mall*, 130 S.W.3d 761, 764 (Tenn.2004) (citations omitted).

In a premises liability case, an owner or occupier of premises has a duty to exercise reasonable care with regard to social guests or business invitees on their premises. That duty includes the responsibility to remove or warn against latent or hidden dangerous conditions on the premises of which one was aware or should have been aware through the exercise of reasonable diligence. See *Blair v. Campbell*, 924 S.W.2d 75, 76 (Tenn.1996); *Eaton v. McLain*, 891 S.W.2d 587, 593-594 (Tenn.1994). The duty imposed on a premises owner or occupier does not include the responsibility to remove or warn against conditions from which no unreasonable risk was to be anticipated. *Rice v. Sabir*, 979 S.W.2d 305, 309 (Tenn.1998). The law imposes such duty on whoever has control of the premises. *Concklin v. Holland*, 138 S.W.3d 215, 220 (Tenn.Ct.App.2003). This often occurs where a landlord passes his or her duty to a tenant and is no longer in control of the premises. *Lethcoe v. Holden*, 31 S.W.3d 254, 256-258 (Tenn. Ct. App. 2000).

While a plaintiff has a duty to use reasonable care to see or be aware of conditions that are obvious or should be discovered through the use of reasonable care, a risk may still be deemed unreasonable and give rise to a duty on the part of a premises owner if the foreseeability and gravity of harm posed by a defendant's conduct, even if open and obvious, outweigh the burden upon the defendant to engage in conduct that would have prevented the harm. See *McCall v. Wilder*, 913 S.W. 2d 150 (Tenn. 1995); *Coln v. City of Savannah*, 966 S.W. 2d 34 (Tenn. 1998). Among the factors for

consideration on this issue are the foreseeable probability of the harm or injury occurring, the possible magnitude of the potential harm or injury, the importance or social value of the activity engaged in by the defendant, the usefulness of the conduct to the defendant, the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct, the relative usefulness of the safer conduct, and the relative safety of alternative conduct. *McCall*, at 153. Additional factors to be considered include whether the danger was known and appreciated by the plaintiff, whether the risk was obvious to a person exercising reasonable perception, intelligence and judgment, and whether there was some other reason for defendant to foresee the harm. *Coln*, at 42. Whether a defendant owed or assumed such a duty is a question of law for the Court to determine. *Downs ex rel v. Bush*, 263 S.W. 3d 812 (Tenn. 2008).

Slip & Fall On Snow/Ice

Dangerous conditions created by the natural accumulation of snow or ice are considered to be among the normal hazards of life, and accordingly, property owners are not required to keep their premises free of natural accumulations of snow and ice at all times. Property owners are expected, however, to take reasonable steps to remove natural accumulations of snow or ice within a reasonable time. *Clifford v. Crye-Leike Commercial, Inc.* 213 S.W.3d 849 (Tenn. Ct. App. 2006).

A property owner does not have a duty to constantly monitor weather forecasts or take steps to prevent or forestall possible accumulations of snow or ice. *Bowman v. State*, 206 S.W.3d 467 (Tenn. Ct. App. 2006).

Dangerous conditions caused by the natural accumulation of snow and ice are considered to be among the normal hazards of life, and accordingly, Tennessee's courts employ the same principles to determine the scope of a property owner's duty with regard to natural accumulations of snow and ice that they use to establish the property owner's duty with regard to other dangerous conditions. *Bowman v. State*, 206 S.W.3d 467 (Tenn. Ct. App. 2006).

Items Falling Off Shelves

While there does not appear to be any reported cases which specifically address the standard of care a premises owner must show with regard to preventing items from falling off of shelves, this particular danger would fall within the general duties a premises owner owes to its customers. A succinct discussion applicable is found in *Freemon v. Logan's Roadhouse, Inc.*, 2009 Tenn. App. LEXIS 267.

Prior court decisions have established the doctrines and rules of law governing the duties of an owner of a business premises and under what circumstances the owner does and does not owe a duty to a customer. Owners of business premises are not insurers of their customers' safety. *Psillas v. Home Depot, U.S.A., Inc.*, 66 S.W.3d 860, 864 (Tenn. Ct. App. 2001) (citing *McClung v. Delta Square Ltd. P'ship*, 937 S.W.2d 891, 902 (Tenn. 1996); *Shofner v. Red Food Stores*

(Tenn), Inc., 970 S.W.2d 468, 470 (Tenn. Ct. App. 1997)). Accordingly, owners of business premises do not owe a duty to protect their customers from any and all risks. Nevertheless, “premises owners have a duty to use reasonable care to protect their customers from unreasonable risks of harm.” *Id.* (citing *Rice v. Sabir*, 979 S.W.2d at 308; *Hudson v. Gaitan*, 675 S.W.2d 699, 703 (Tenn. 1984); *Jackson v. Bradley*, 987 S.W.2d 852, 854 (Tenn. Ct. App. 1998)).

This duty includes maintaining the premises in a reasonably safe condition either by removing or repairing potentially dangerous conditions or by helping customers and guests avoid injury by warning them of the existence of dangerous conditions that cannot, as a practical matter, be removed or repaired. *Id.* (citing *Blair v. Campbell*, 924 S.W.2d 75, 76 (Tenn. 1996); *Eaton v. McLain*, 891 S.W.2d 587, 593-94 (Tenn. 1994))

Parking Lot Defects

Owners and occupiers of parking lots in Tennessee must use due care under the circumstances. A parking lot plaintiff must show that the owner or operator (or an agent) caused the dangerous or defective condition or had actual or constructive notice that the condition existed before the accident. *Blair v. West Town Mall*, 130 S.W.3d 761, 764 (Tenn. 2004).

Constructive notice of the presence of a dangerous condition can be demonstrated by showing a pattern of conduct, a recurring incident, or a general or continuing condition indicating the existence of the condition. *Id.*

If the dangerous condition is open and obvious, the owner owes a duty to guests only if the owner should recognize that the mishap might occur, even though the condition is obvious and the guest knows about the hazard. *Boykin v. George P. Morehead Living Trust*, 2015 Tenn. App. LEXIS 413 at page 7, citing *Friedenstab v. Short*, 174 S.W.3d 217, 223 (Tenn. Ct. App. 2004). In *Boykin*, the height differential between an asphalt parking lot and a concrete landing was held to be an open and obvious condition, so that the owner did not breach its duty of care by failing to warn or correcting the condition. *Boykin* at page 11.

Assaults

Tennessee joins the majority of other states that have considered the issue and “impose a duty upon businesses to take reasonable measures to protect their customers from foreseeable criminal attacks.” *McClung v. Delta Square Ltd. P’ship*, 937S.W.2d 891, 898-99 (Tenn. 1996).

Tennessee adopts the following principles to be used in

determining the duty of care owed by the owners and occupiers of business premises to customers to protect them against the criminal acts of third parties:

(1) [The] business ordinarily has no duty to protect customers from the criminal acts of third parties which occur on its premises; (2) The business is not to be regarded as the insurer of the safety of its customers, and it has no absolute duty to implement security measures for the protection of its customers; (3) However, a duty to take reasonable steps to protect customers arises if the business knows, or has reason to know, either from what has been or should have been observed or from past experience, that criminal acts against its customers on its premises are reasonably foreseeable, either generally or at some particular time. *Id.* at 902.

“In determining the duty that exists, the foreseeability of harm and the gravity of harm must be balanced against the commensurate burden imposed on the business to protect against that harm.” *Id.*

“The degree of foreseeability needed to establish a duty of reasonable care is, therefore, determined by considering both the magnitude of the burden to defendant in complying with the duty and magnitude of the foreseeable harm.” *Id.*

“As a practical matter, the requisite degree of foreseeability essential to establish a duty to protect against criminal acts will almost always require that prior instances of crime have occurred on or in the immediate vicinity of defendant’s premises. Courts must consider the location, nature, and extent of previous criminal activities and their similarity, proximity, or other relationship to the crime giving rise to the case of action. To hold otherwise would impose an undue burden upon merchants.” *Id.*

With respect to injuries arising from drunk drivers in business parking lots, the Tennessee Supreme Court recently held in *Cullum v. McCool*, 432 S.W.3d 829, 837 (Tenn. 2013), “We are not ruling that businesses or their employees must ‘call 911 for every blowhard drunk.’ *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 777 (Tex. 2010). But, in some cases there may be a duty on the part of store employees to try to protect its patrons from known dangers. A reasonable factfinder could determine that the specific foreseeability of harm posed by an intoxicated, belligerent patron certainly could outweigh the minimal burdens placed on store employees to call the police or take another alternative course of action, as opposed to doing nothing.”

TEXAS – Dallas

TOUCHSTONE BERNAYS

ATTORNEYS AT LAW

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TEXAS – Houston



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At Doyen Sebesta, your business becomes our business. We represent local, regional, national, and international clients in a variety of commercial and business related matters and litigation. We are dedicated to providing each client with experienced, focused representation which emphasizes that client's business objectives and offers cost-effective solutions.

Practice Areas: Subrogation & Recovery; First Party Defense/Bad Faith; Insurance Coverage; Third Party Defense; Construction; Creditor Rights; Employment Law; Premises Liability; Product Liability; Real Estate; Transportation Liability; Real Estate Transactions; Mergers & Acquisitions; Entity Formation & Organization; Employment; Corporate Representation/Commercial Transactions; Banking & Lender Representation.

Slip & Fall In General

In slip and fall case where injury is caused by a foreign substance on floor which rendered it slippery, in order for plaintiff to raise a fact issue to go to the jury, he must introduce some evidence: that the defendant placed the foreign substance on the floor; or that defendant knew the foreign substance was on the floor and willfully or negligently failed to remove it; or that the foreign substance had been on the floor for such a period of time that it would have been discovered and removed by defendant in the exercise of ordinary care. *Sherwood v. Medical & Surgical Group, Inc.*, 334 S.W.2d 520 (Tex.Civ.App.-Waco 1960, writ ref'd).

Courts of this State have consistently held that the owner or occupier of the premises can be held liable where the

foreign substance has been on the floor for such a period of time that it should have been discovered and removed. Liquid, or semi-liquid substances, which by their nature in drying, have presented situations whereby their presence on the floor is indicative of the length of time they have been there. *Furr's, Inc. v. McCaslin*, Tex.Civ.App., 335 S.W.2d 284 (n.w.h.); *Furr's, Inc. v. Bolton*, Tex.Civ.App., 333 S.W.2d 688 (n.w.h.).

A substance, such as water, by reason of its appearance as having been swept through with a broom, has been held as indicative of knowledge by the owner that the substance was on the floor. *H.E.B. Food Stores v. Slaughter*, Tex.Civ.App., 484 S.W.2d 794.

Slip & Fall On Snow/Ice

A premises owner owes a duty to an invitee "to exercise reasonable care to protect against danger from a condition on the land that creates an unreasonable risk of harm of which the owner or occupier knew or by the exercise of reasonable care would discover." *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex.2000).

In slip and fall case involving business invitee, invitee must prove:

- actual or constructive knowledge of some condition on premises by owner/operator;
- that condition posed unreasonable risk of harm;
- that owner/operator did not exercise reasonable care to reduce or eliminate risk; and
- that owner/operator's failure to use such care proximately caused plaintiff's injuries

Wal-Mart Stores v. Surratt, 102 S.W.3d 437 (2003).

The Supreme Court recently concluded that "naturally accumulating mud" on a sidewalk near a business entrance does not pose an unreasonable risk of harm. See, *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 675-76 (Tex.2004).

Holding a landowner accountable for naturally accumulating [ice] that remains in its natural state would be a heavy burden because [precipitation] is beyond the control of landowners.... [A]ccidents involving naturally accumulating [ice] are bound to happen, regardless of the precautions taken by landowners. Generally, invitees are at least as aware as landowners of the existence of [ice] that has accumulated naturally outdoors and will often be in a better position to take immediate precautions against injury. *M.O. Dental Lab*, 139 S.W.3d at 676.

The natural accumulation of ice on a sidewalk near the entrance of a business does not pose an unreasonable risk of harm to invitees. *Gagne v. Sears Roebuck & Co.*, 201 S.W.3d 856 (2006).

Premises owner/operator does not have a duty to protect its invitees from conditions caused by a natural accumulation of frozen precipitation on its parking lot because such an accumulation does not constitute an unreasonably dangerous condition; this "no duty" is limited to the premises owner's/operator's parking lot. *Wal-Mart Stores v. Surratt*, 102 S.W.3d 437 (2003).

Items Falling Off Shelves

Cause in fact exists where the injury would not otherwise have occurred "but for" the defendant's act or omission. *Union Pump Co.*, 898 S.W.2d at 775.

Cause in fact does not exist where the defendant's negligence merely provided a condition that made the injury possible. *Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d at 477 (citing *Bell v. Campbell*, 434 S.W.2d 117, 120 (Tex.1968)).

"The evidence must go further, and show that such negligence was the proximate, and not the remote cause of resulting injuries ... [and] justify the conclusion that such injury was the natural and probable result thereof." *Id.* (quoting *Carey v. Pure Distrib. Corp.*, 133 Tex. 31, 124 S.W.2d 847, 849 (1939)).

Even where the plaintiff's injury would not have occurred "but for" the defendant's actions, "the nexus between the defendant and the plaintiff's injuries may be too attenuated to constitute legal cause." *Pinkerton's v. Manriquez*, 964 S.W.2d 39, 47 (Tex.App.-Houston [14th Dist.] 1997, writ denied).

In *Keetch v. Kroger*, 845 S.W.2d 262 (Tex.1992), the court explained that where the defendant creates the hazardous condition, it may support an inference that it had constructive knowledge of the condition itself. *Keetch*, 845 S.W.2d at 265. "However, the jury still must find that the owner or occupier knew or should have known of the condition." *Id.*

*The danger is foreseeable if the injury is of the type that "might reasonably have been anticipated." *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 551 (Tex.1985).

Parking Lot Defects

Generally, a landlord has no duty to tenants or their invitees for dangerous conditions on the leased premises. *Cadenhead v. Hatcher*, 13 S.W.3d 861, 863 (Tex.App.-Fort Worth 2000, no pet.).

There are several exceptions to this rule, such as where a lessor makes a negligent repair or where the injury arises from a defect on a portion of the premises that remains under the lessor's control. *Id.*, citing *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 514-15 (Tex.1978).

The duty owed by a landlord to its tenant is to use reasonable care to protect the tenant from injuries caused by an unsafe condition on the portion of the premises still under the lessor's control. *Id.*

The landlord owes this same duty to those who are on the premises with the tenant's consent. *Id.* This duty requires the landowner to exercise reasonable care to protect the invitee from risks that the owner is actually aware of, and also those risks that the owner should be aware of after a reasonable inspection. *Id.* at 863-64.

"A condition presenting an unreasonably risk of harm is one in which there is such a probability of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event as likely to happen." *Wyatt v. Furr's Supermarkets, Inc.*, 908 S.W.2d 266, 269 (Tex.App.-El Paso 1995, writ denied).

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

1. 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,
2. Should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
3. Fails to exercise reasonable care to protect them against the danger. Restatement (Second) of Torts § 353 (1965).

The occupier is under the further duty to exercise reasonable care in inspecting the premises to discover any latent defects and to make safe any defects or to give an adequate warning. Restatement (Second) of Torts § 343, Comment b (1965). It owes a duty to exercise ordinary care to warn the invitee of any dangerous conditions which the occupier knows or should know about and which are not reasonably apparent to the invitee. *Sun Oil Co. v. Massey*, 594 S.W.2d 125, 129 (Tex.Civ.App.-Houston [1st Dist.] 1979, writ ref'd n.r.e.).

Assault

One who controls the premises has a duty to protect invitees from the criminal conduct of third parties if it knows or has reason to know of an unreasonable and foreseeable risk of harm to an invitee. *Dailey v. Alberston's Inc.*, 83 S.W.3d 222 (2002).

In the context of a claim for negligence, "foreseeability" requires that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission. *Id.*

In the foreseeability inquiry in an action for negligence, it is not important whether the particular injury was foreseen, but that the injury was of such a general character as might reasonably have been anticipated, and that the injured party was situated with relation to the wrongful act that the injury to him or one reasonably situated was reasonably foreseen. *Id.*

WEST VIRGINIA



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Slip & Fall In General

In West Virginia premises liability cases, landowners and possessors owe a duty of reasonable care to any non-trespassing entrant, regardless of whether that person is an invitee or licensee. *Mallet v. Pickens*, 206 W. Va. 145, 155 (1999). To determine whether or not a landowner or possessor owes a duty to non-trespassing entrants, the ultimate test is found in the foreseeability that harm may result if care is not exercised. *Id.* “The test is, would the ordinary man in the defendant’s position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?” *Id.* (quoting *Sewell v. Gregory*, 179 W. Va. 585, 588 (1988)). The existence of a duty also involves policy concerns underlying the scope of

the legal duty. *Robertson v. LeMaster*, 171 W. Va. 607, 612 (1983). “Such considerations include the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.” *Id.*

To determine whether a defendant has met his or her burden of reasonable care, the trier of fact must consider: “(1) the foreseeability that an injury might occur; (2) the severity of injury; (3) the time, manner and circumstances under which the injured party entered the premises; (4) the normal or expected use made of the premises; and (5) the magnitude of the burden placed upon the defendant to guard against injury.” *Mallet*, 206 W. Va. at 156.

However, an owner or possessor owes no duty of care to protect against dangers that are obvious, reasonably apparent, or as well known to the injured person as they are to the owner or possessor. Therefore, a landowner or possessor may not be held liable for civil damages for any injuries sustained as a result of dangers that are open and obvious, even if the open and obvious dangers constitute a violation of state regulations or municipal ordinances. W. Va. Code § 55-7-28.

Slip & Fall On Foreign Substances

Owners and lessees warrant their invitees that they will exercise ordinary care to keep and maintain their premises, including the floors, in a reasonably safe condition. *Gilmore v. Montgomery Ward & Co.*, 133 W. Va. 342, 350 (1949). However, they do not become an insurer of the safety of their customers. *Id.*

In order to recover damages from a slip and fall upon the premises of defendant, caused by a slippery or foreign substance upon the floor of the premises, it must be established that the owner or possessor knew or had a reasonable opportunity to discover that the floor was in an unsafe condition. *Wendell v. G.C. Murphy, Co.*, 137 W. Va. 135, 139 (1952). But, if the floor is inherently defective, it is not necessary to show that the owner or lessee of the premises had actual knowledge thereof. *Id.*

An owner or lessee has the right to apply wax, oil, or a similar substance to his floors, but he may be liable for injuries resulting from the negligent application or use of such products. *Roach v. McCory Corp.*, 158 W. Va. 282, 285 (1974). An owner or lessee's application of such a product which creates a dangerous condition is sufficient to create notice to him that the condition exists. *Id.* To recover, therefore, the plaintiff must prove that the substance was negligently used or applied. *Id.*

Slip & Fall On Snow/Ice

There are few cases in West Virginia that deal with slip and falls caused by snow or ice. However, it seems that West Virginia courts will not impose liability for failure to timely remove snow and ice from parking lots unless there is an ordinance or statute imposing a duty. *Rich v. Rosenshine*, 131 W. Va. 30, 39 (1947) (holding that in the absence of ordi-

nance or statute, no duty for landowners to clear abutting sidewalks of ice and snow to protect passers-by from injurious falls). If there is an ordinance or statute imposing a duty, an occupying tenant can be held liable for failing to remove ice and snow within a certain time if that tenant negligently fails to comply with the ordinance or statute. *Id.*

Parking Lot Defects

Where the owner or possessor has actual or constructive knowledge that its invitees regularly use an adjacent property in connection with its business, the owner or possessor must be aware of the danger of injury to its invitees. *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 711 (1992). Therefore, when the owner or operator has actual or constructive knowledge of the danger, "the operator has a duty of reasonable care to protect its invitees from defective or dangerous conditions existing in the parking area which the operator knows or reasonably should know exist." *Id.*

In *Andrick*, a patron of the restaurant was injured when she fell on uneven pavement in the parking lot. It was not clear from the language of the lease whether the lessee or owner was responsible for maintaining the parking lot. However, the court held that regardless of whether the lessee was responsible for such maintenance, the lessee had a "duty to warn their patrons of any dangerous condition in the parking lot of which they had actual or constructive knowledge." *Id.* at 712.

Assault

Under the common law of torts, a landlord does not have a duty to protect tenants from criminal acts by third parties. *Miller v. Whitworth*, 193 W. Va. 262 (1995). But, unlike landlords, an owner or lessee who holds land open to the public to enter in response to his invitation has a duty to protect patrons on its premises against criminal acts of third parties. *Doe v. Wal-Mart Stores, Inc.*, 198 W. Va. 100, 106 (1996). This duty requires the owner or lessee to exercise ordinary care to protect patrons from foreseeable injury inflicted by third parties. *Id.* The Court has never precisely defined what is reasonable, but has said something is foreseeable when it can be "anticipated by the ordinary reasonable person." *Id.*

WISCONSIN

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Slip & Fall In General

Wisconsin's *Safe-Place Statute*, Wis. Stat. § 101.11, provides that every employer and owner must construct, repair, and maintain a place of employment or public building as safe as the nature of its business would reasonably permit. This obligation extends not only to employees, but also to "frequenters," which includes any person who may be present on the premises other than a trespasser. Wis. Stat. § 101.01(6).

"Safe" means such freedom from danger to the life, health, safety, or welfare of employees, frequenters, the public, tenants, or fire fighters as the nature of the premises will reasonably permit. Wis. Stat. § 101.01(12). A place is considered safe if it is as free from danger as the nature of the employment carried on there will reasonably permit when used in a customary or usual manner for the work intended, or in such a manner as an ordinarily prudent and careful person might anticipate it being used. *Olson v. Whitney Bros.*

Co., 150 N.W. 959, 965-56 (Wis. 1915). The term "safe" is relative, not absolute. *Gross v. Denow*, 212 N.W.2d 2, 6 (Wis. 1973).

The *Safe-Place Statute* does not create a cause of action. Rather, it establishes a standard of care in the same way as any safety statute, such as the rules of the road. That standard of care is a higher standard than the duty to exercise ordinary care under common law negligence. *Dykstra v. Arthur G. McKee & Co.*, 284 N.W.2d 692, 697 (Wis. Ct. App. 1979). A violation of the Safe-Place Statute constitutes negligence. *Krause v. V.F.W. Post 6498*, 101 N.W.2d 645, 648 (Wis. 1960). However, the Safe-Place Statute does not make the employer or owner an insurer. The statute does not require that the employer or owner of the premises make the place absolutely safe, *Zernia v. Capitol Court Corp.*, 124 N.W.2d 86, 88 (Wis. 1963), and the liability is not imposed simply because the place could have been made

safer. *Fitzgerald v. Badger Mut. Cas. Co.*, 227 N.W.2d 444, 447 (Wis. 1975).

The *Safe-Place Statute* addresses unsafe conditions of the premises. Therefore, the statute does not preclude a common law claim based on the employer or owner's negligent acts. *Megal v. Green Bay Area Visitor & Convention Bureau, Inc.*, 682 N.W.2d 857, 865 (Wis. 2004).

Because an employer or owner is not an insurer of the safety of employees or frequenters of the premises, there is no liability for a condition without actual or constructive notice of it. *Strack v. Great Atlantic & Pac. Tea Co.*, 150 N.W.2d 361, 362 (Wis. 1967). The condition must have existed for a sufficient length of time that the employer or owner had an opportunity to both discover and remedy it. *Boutin v. Cardinal Theatre Co.*, 64 N.W.2d 848, 851 (Wis. 1954). However, notice is not required where the condition was created by the employer or owner. *Merriman v. Cash-Way Inc.*, 150 N.W.2d 472, 475 (Wis. 1967).

Evidence of notice or failure to inspect is not required if the employer or owner completely denies that a condition existed. *Petoskey v. Schmidt*, 124 N.W.2d 1, 5 (Wis. 1963). Evidence of notice is also not required as to structural defects. *Hannebaum v. Drenzo and Bomier*, 469 N.W.2d 900, 905 (Wis. Ct. App. 1991). A structural defect is "a hazardous condition inherent in the structure by reason of its design or construction." *Mair v. Trollhaugen Ski Resort*, 715 N.W.2d 598, 605 (Wis. 2006).

Slip & Fall On Snow/Ice

Pursuant to the *Safe-Place Statute* an owner or employer does not have a duty to be an insurer of absolute safety on his premises in regards to the maintenance and repair of the property. In order to incur liability for such defects, he must have either actual or constructive notice of such defects. *Merriman v. Cash-Way Inc.*, 150 N.W.2d 472, 474 (Wis. 1967) (Trial court did not abuse discretion in refusing to admit photographs of alleged ice patch on which store patron slipped and fell where photographs were taken two days after accident and no evidence was introduced showing that ice depicted in pictures was same as ice patch on day of accident.).

There is an exception however to the general rule of notice which allows for a finding of constructive notice even though a defect had existed for an insufficient length of time if it is "reasonably probable that an unsafe condition will occur because the nature of the property owner's business and the manner in which the owner conducts it." *Strack v. Great Atlantic & Pac. Tea Co.*, 150 N.W.2d 361, 364 (Wis. 1967)

In slip and falls involving snow or ice, it is well-settled that when ice or snow has naturally accumulated on a public sidewalk abutting private property, the property owner owes no duty to clear or remove any accumulations. *Holschbach v. Washington Park Manor*, 694 N.W.2d 492, 495 (Wis. Ct. App. 2005). A defendant may however incur liability for

any artificial accumulations. *Id.*

However, where land grading and structures on the property are built in a usual and ordinary manner and not for the purpose of accumulating and discharging runoff on a public sidewalk, any incidental drainage will be deemed a natural accumulation. *Id.* Conversely, where a property owner negligently omits to prevent such run off onto a part of the premises where one would not ordinarily expect to find more than a normal amount of accumulation (i.e., failing to repair or replace a broken drain pipe), then an artificial condition has been created. *Id.*

Accordingly, Wisconsin recognizes that «the presence of a design system is crucial to a slip and fall plaintiff's case: something made with human labor must be defective, and the runoff must result from that defect.» *Id.*

Where a drain spout collected water from the roof of the defendants' hospital building and discharged it onto the ground at the rear and southwest side of the premises but then flowed from the ground to the defendant's driveway onto the public sidewalk, the ice puddle that resulted on the public sidewalk was deemed a natural accumulation incidental to the natural flow of the sidewalk. *Plasa v. Logan*, 53 N.W.2d 720, 722 (Wis. 1952). Therefore, the court did not find that the natural topography of the property combined with the buildings drainage system created an "artificial 'design system'." *Id.* at 728.

Defendant was liable where the drainage pipe meant to discharge water into defendant's private alley way resulted in run off creating an ice patch on a public sidewalk, because a culvert meant to collect any excess run off was clogged. *Adlington v. City of Viroqua*, 144 N.W. 1130 (Wis. 1914).

Where a property owner violated a town ordinance that admittedly could have prevented the hazardous conditions, defendant was not held liable for the icy conditions of the sidewalk in front of the property because "failing to hook up to the [working] storm sewer does not magically turn the naturally formed ice puddle into an accumulation formed by artificial means." *Holschbach v. Washington Park Manor*, 694 N.W.2d 492, 497-98 (Wis. Ct. App. 2005).

Defendant, a town house complex, was held liable for injuries sustained by plaintiff for the accumulation of ice and snow on defendant's parking lot where it was uncontested that the day before the incident the premises caretaker slipped on ice in the lot and as a result salted the area, but then noticed the hazardous conditions the next day and failed to take any reasonable efforts to cure the condition. *Wittka v. Hartnell*, 46 Wis.2d 374, 385, 175 N.W.2d 248, 254 (Wis. 1970).

Items Falling Off Shelves

Defendant was not liable where plaintiff suffered injuries resulting from items falling off a shelf and hitting her on the head and shoulders while shopping at a Wal-Mart. *Graetz*

v. Nat'l Union Fire Ins. Co. of Pittsburgh, No. 00-3007, 2001 WL 943165 (Wis. Ct. App. Aug. 15, 2001). Reasoning that the toppled carriers could be attributed to customers attempting to reach them, and thus the testimony from an employee "that she daily observed customers attempting to remove items from the shelving" although not at work the day of the incident, properly permitted the jury to infer that a customer disturbed the storage area. Therefore, a *res ipsa* instruction was not warranted because it requires that "the evidence offered is sufficient to remove the causation question from the realm of conjecture, but not so substantial that it provides a full and complete explanation of the event." *Id.*

Foreign Substance on Floor

There is an exception however to the general rule of notice which allows for a finding of constructive notice even though a defect had existed for an insufficient length of time if it is «reasonably probable that an unsafe condition will occur because the nature of the property owner's business and the manner in which the owner conducts it.» *O'Brien v. Badger Bowl, Inc.*, No. 95-1187, 1996 WL 368739 (Wis. Ct. App. July 3, 1996).

Where a plaintiff slipped and fell on a prune in defendant's supermarket aisle, the court held that when a store displays its merchandise in a manner such that customers may touch and move around the items and presumably knock or drop items on the floor, reasonable measures must be taken to discover and remove any hazards which may occur as a result. *Strack v. Great Atlantic & Pac. Tea Co.*, 150 N.W.2d 361, 363 (Wis. 1967).

Where plaintiff slipped and fell on shaving cream in the aisle of a store at a self-service counter, the court found that "the unsafe condition here was substantially caused by the method of operation used to display merchandise for sale." *Steinhorst v. H.C. Prange Co.*, 180 N.W.2d 525, 527 (Wis. 1970). Therefore, "the evidence was sufficient to put [defendant] on notice that its method of operation could reasonably create an unsafe condition to the public and [defendant] must be charged with constructive notice." *Steinhorst*, 180 N.W.2d at 528.

Defendant was not held liable where plaintiff slipped and fell on a banana while walking through a store's parking lot, the store had no actual notice of the banana and no evidence was offered how long the banana had been on the parking lot. Finding that the notice exception as described in *Strack* and *Steinhorst* involved slip and fall injuries on aisles inside stores, and thus did not extend to such circumstances. *Kaufman v. State St. Ltd. P'ship*, 522 N.W.2d 249, 254 (Wis. Ct. App. 1994). The court reasoned that, "the parking lot in this case was not within the exclusive control of the defendants, individually or collectively. Outside, exposed to the comings and goings of countless parkers and shoppers, the lot was subject to potentially dangerous conditions unrelated or only incidentally related to Walgreen's and Pick 'N Save's 'method of operation' and to State Street's

management of the lot."

Parking Lot Defects

It is well settled that an owner of a place of employment or a public building has a duty to construct, repair, or maintain the premises, and to provide such safety devices or safeguards as reasonably required to render the premises safe. *Strack v. Great Atlantic & Pac. Tea Co.*, 35 Wis.2d 51, 54, 150 N.W.2d 361 (1967).

A structural defect is "a hazardous condition inherent in the structure by reason of its design or construction." *Sorrel v. Livesey Co. LLC*, No. 2005AP1665, 2006 WL 1169638 (Wis. Ct. App. May 4, 2006).

Where plaintiff alleged that her slip and fall on an ice patch was a result of the defective design of the parking lots drainage system, question of fact existed as to whether the ice patch formed in the lot due to a structural defect in the system. *Sorrel*, 2006 WL 1169638, at *4.

Plaintiff failed to meet their burden of proof that the defendants had actual notice of the defect or that the hazard existed for such an appreciable time that the defendants should have discovered it where plaintiff "felt the pavement collapse and cause her fall" in the parking lot. The court found that since plaintiff testified that there were no potholes before she stepped on the spot, "The plaintiffs failed to meet their burden of proof that the defendants had actual notice of the defect or that the hazard existed for such an appreciable time that the defendants should have discovered it." *Heintz v. Godfrey Co.*, 81-436, 982 WL 172136 (Wis. Ct. App. Jan. 13, 1982).

Defendant was not liable to plaintiff for injuries sustained when he tripped over a ridge apparently created by a height disparity between the edge of a restaurant-tavern parking lot and an abutting gravel strip. *Topp v. Cont'l Ins. Co.*, 266 N.W.2d 397 (Wis. 1978). The court found, the "the jury was free to have concluded that customers of the restaurant-tavern would ordinarily enter the building directly from the parking lot, rather than directly from Badger Road...there was also credible evidence from which the jury could have concluded that the gravel shoulder was lowered the morning of the accident by a snowplow. The safe place statute does not give rise to a duty to repair until the owner or employer has at least constructive notice of the defect." *Id.* at 788-89.

Failure to provide sufficient lighting may constitute a failure to properly maintain the area, and can result in passive negligence where the defective lighting condition "exists for an unreasonable time because of the failure to discover it by the owner when he should have or a failure to correct the condition after actual notice." *Low v. Siewert*, 195 N.W.2d 451, 453 (Wis. 1972).

Defendant was not held liable for injuries suffered by plaintiff because owners of building could not be charged with constructive notice that bulb in light for adjacent parking lot

in which building tenant's employee fell and was injured was burned out. Reasoning "there is no evidence of how long the light remained out; it may have failed during the day or shortly before 10:00 p.m. This court is not prepared to hold that an owner of property must make an hourly inspection to discover burned out light bulbs on a parking lot. This is not a case in which the owner had reason to expect the bulb to burn out or to be turned out by third parties." *Id.* at 354-55.

Where plaintiff was injured parking lot after over a portion of the lot raised about two inches higher than another portion of the lot, the premises were found to be a place of employment and that respondent was negligent under the Safe-Place statute in failing to maintain a lot in a condition as safe as the nature of the place permitted. *Gordon v. Schultz Savo Stores, Inc.*, 196 N.W.2d 633, 634 (Wis. 1972).

Assault

An invitor, while not an insurer of absolute safety, does owe a duty of ordinary care to an invitee not only as to the physical condition of the premises but also as to the known hazardous conduct of other persons upon the premises. *Stam-berger v. Matthaidess*, 155 N.W.2d 88, 91 (Wis. 1967). This includes a duty to discover that such acts are being done or are likely to be done, or to provide adequate warning to enable invitees of the hard, or to otherwise protect invitees from such harm. *Id.*

"When one assembles a crowd or a large number of people upon his property for purposes of financial gain to himself he assumes the responsibility of 'using all reasonable care to protect the individuals from injury from causes reasonably to be anticipated.'" *Id.* Proper precautions may include a certain number of security guards or employees as well as other necessary measures to control the actions of the crowd. *Id.*

"The conduct of hotel innkeepers in providing security must conform to the standard of ordinary care. In the context of the hotel-guest relationship, it is foreseeable that an innkeeper's failure to maintain adequate security measures not only permits but may even encourage intruders to rob or assault hotel patrons. Therefore...a hotel has a duty to exercise ordinary care to provide adequate protection for its guests and their property from assaultive and other types of criminal activity." *Peters v. Holiday Inns, Inc.*, 278 N.W.2d 208, 212 (Wis. 1979). Relevant factors to consider include: the crime rate of surrounding area, the extent of crime or assault to other similar businesses in the area, presence of suspicious individuals, and any unusual security problems attributed to the hotel's design. *Id.* at 213. Furthermore, certain circumstances may require one or more of the following security devices: security guards, TV surveillance, deadbolt locks and/or chain locks on room doors, or security doors at locations other than the lobby. *Id.*

A tavern or restaurant owner owes a duty to protect patrons because «the proprietor of a place of business who holds it

out to the public for entry for his business purposes, (including a restaurant) is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons, or by giving a warning adequate to enable them to avoid harm.» *Weiher v. Piccione*, 78 N.W.2d 757, 761 (Wis. 1956).

The degree of care owed depends upon the facts and circumstances of each particular case. *Id.* Therefore, if the character of the place or business is such that the owner should reasonably expect the criminal conduct or carelessness of third parties, the owner has a duty to employ reasonable safeguards to protect against such conduct (i.e., sufficient amount of security guards or employees). *Id.* The duty however does not extend beyond the premises the tavern legally owns. *Delvaux v. Vanden Langenberg*, 387 N.W.2d 751, 756-57 (Wis. 1986) (estate's case dismissed). See also *Symes v. Milwaukee Mutual Insurance Co.*, 505 N.W.2d 143 (Wis. Ct. App. 1993). In *Delvaux*, plaintiff and another patron got into an argument while playing pool, and after a bartender separated them the men later got into a fight several blocks away where plaintiff was fatally beaten. *Delvaux*, 130 Wis.3d 387 N.W.2d at 757-58.

Where a patron sustained injuries in a fight outside of a bar in a parking lot, although the defendant did not own the lot, the fact that the Department of Transportation allowed the bar to utilize the property as its parking lot, and that defendant maintained the property (i.e., plowed snow during the winter), it was found that there was "no legitimate difference between the area of the parking lot owned by the tavern and the area adjacent to it with respect to the tavern's ability to know or have reason to know whether Flynn was at risk of injury. Therefore, we conclude Flynn's injuries occurred on the tavern's premises." *Flynn v. Audra's Corp.*, 796 N.W.2d 230, 233 (Wis. Ct. App. 2011).

Recreational Activities

The *Recreational Immunity Statute*, Wis. Stat. § 895.52, provides owners, lessors, and occupiers of property with immunity from liability to persons who are injured while engaging in a recreational activity or are attacked by a wild animal on the property. The statute specifically provides that no duty or liability is created either under the *Safe-Place Statute* or the common law attractive nuisance doctrine toward any person using another's property for a recreational activity. Wis. Stat. § 895.52(7). Some highlights of this comprehensive statute are as follows.

The statute lists numerous activities that are considered recreational activities under the statute, including hunting, fishing, picnicking, bicycling, horseback riding, motorcycling, hiking, and snowmobiling. Immunity afforded by the

statute does not apply if the property owner collects more than \$2,000 per year in payments for use of the property for recreational activities. "Payment" excludes such things as a gift of fish or game meat resulting from the recreational activity, or a donation of money, goods, or services for the management and conservation of resources on the property. Wis. Stat. § 895.52(6).

No immunity is afforded for injuries to a social guest who has been specifically invited by the owner for the specific occasion during which the injury occurs if, for example, it occurs on residential property, or if the injured party is an employee of the owner acting within the scope of his or her duties. Wis. Stat. § 895.52(6)(d) and (e).

Duty to Trespassers

Recent tort reforms enacted by the Wisconsin Legislature included the 2011 Wisconsin Act, defining the duty of care owed to trespassers, including children, by an owner, lessee, tenant, or other lawful occupant of real property.

The statute, which applies to actions filed on or after December 21, 2011, provides: § 895.529 Civil liability limitation; duty of care owed to trespassers.

(1) In this section:

- (a) "Possessor of real property" means an owner, lessee, tenant, or other lawful occupant of real property.
- (b) "Trespasser" means a natural person who enters or remains upon property in possession of another without express or implied consent.

(2) Except as provided in sub. § (3), a possessor of real property owes no duty of care to a trespasser.

(3) A possessor of real property may be liable for injury or death to a trespasser under the following circumstances:

- (a) The possessor of real property willfully, wantonly, or recklessly caused the injury or death. This paragraph

does not apply if the possessor used reasonable and necessary force for the purpose of self-defense or the defense of others under § 939.48 or used reasonable and necessary force for the protection of property under § 939.49.

(b) The person injured or killed was a child and all of the following apply:

1. The possessor of real property maintained, or allowed to exist, an artificial condition on the property that was inherently dangerous to children.
2. The possessor of real property knew or should have known that children trespassed on the property.
3. The possessor of real property knew or should have known that the artificial condition he or she maintained or allowed to exist was inherently dangerous to children and involved an unreasonable risk of serious bodily harm or death to children.
4. The injured or killed child, because of his or her youth or tender age, did not discover the condition or realize the risk involved in entering onto the property, or in playing in close proximity to the inherently dangerous artificial condition.
5. The possessor of real property could have reasonably provided safeguards that would have obviated the inherent danger without interfering with the purpose for which the artificial condition was maintained or allowed to exist.

(4) This section does not create or increase any liability on the part of a possessor of real property for circumstances not specified under this section and does not affect any immunity from or defenses to liability available to a possessor of real property under common law or another statute.

We appreciate your comments and suggestions regarding the Your House Counsel® Insurance and Corporate Liability Defense Reporter, and look forward to sending you future issues. Please email all correspondence to hshafer@yourhousecounsel.com.

A handwritten signature in blue ink, appearing to read 'H. Shafer', with a stylized flourish at the end.

Howard S. Shafer, President

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