RECENT DEVELOPMENTS IN PREMISES LIABILITY

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use
for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
RECENT DEVELOPMENTS IN PREMISES LIABILITY

I. OVERVIEW OF PREMISES LIABILITY

A. Introduction

The most controversial question and the subject of most case law on premises liability is whether the premises owner owes the entrant a legal duty. Generally, the duty owed by a premises owner to entrants upon its land (other than trespassers) is that of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them. See 740 ILCS 130/2; see also Rhodes v. Illinois Central Gulf R.R., 172 Ill. 2d 213 (1996). Although the determination depends on the facts and circumstances of any given case, whether a duty exists is a question of law for the court.

Pursuant to the traditional and controlling duty analysis, the court considers the following factors when determining whether a duty exists in a given case:

1. The reasonable foreseeability of injury;
2. The reasonable likelihood of injury;
3. The magnitude of the burden that guarding against injury places on the defendant; and
4. The consequences of placing that burden on defendant.


B. When conditions on the land are involved, the foreseeability prong is decided pursuant to the General Rule found in Restatement (Second) of Torts §343:

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 danger.
1) The Exception – the Open and Obvious Doctrine:

A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement (Second) of Torts § 343A (1).

2) The Two Exceptions to the Open & Obvious Exception where the possessor should nonetheless anticipate harm are:

i. The Distraction/Forgetfulness Exception: when the possessor “has reason to expect that the invitee’s attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it;” and

ii. The Deliberate Encounter Doctrine: when the possessor “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.”

Restatement (Second) Torts § 343A, Comment f.

II. ILLINOIS PREMISES LIABILITY LEGISLATIVE UPDATE

A. Public Act 98-0522 – Amended The Recreational Use of Land and Water Areas Act:

On August 23, 2013, the Governor signed into law a senate bill that amended sections 2, 4, 6 and 7 of The Recreational Use of Land and Water Areas Act. In pertinent part, the Act has been amended to extend liability protections to landowners who permit the general public to freely access property for “any activity undertaken for conservation, resource management, educational, or outdoor recreational use.” 745 ILCS 65/2(c) (emphasis added). Prior to the amendments, the Act limited its liability protections to hunting and/or recreational shooting sports only.

The amendments to the Act also expressly exempts individuals invited onto property from the protections of the Act if the property is not freely accessible to the general public. See 745 ILCS 65/2(f) and 65/6(b). The amendments took effect on January 1, 2014 and are prospective only. In other words, the extended liability protections are not available to causes of action that accrued before or on January 1, 2014.

III. ILLINOIS PREMISES LIABILITY CASE LAW UPDATE

A. First District

1. Middle School’s Combined Cafeteria and Auditorium (i.e. “Cafetorium”) is Not “Recreational” Property Covered by the Immunity Found in Section 3-106 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/3-106):

Abrams v. Oak Lawn-Hometown Middle School, 2014 IL App (1st) 132987 – Plaintiff, a middle school student, fell and was injured at the school’s combined cafeteria and auditorium (known as the “Cafetorium”) during the evening while students and parents were entering the Cafetorium for a ceremony to induct students into the National Junior Honor Society. The Cafetorium is used daily as the school’s cafeteria and regularly for events such as student assemblies, school club meetings, induction ceremonies, parties for school sport teams, school chorus and band performances, and school plays. The school has a separate gymnasium.

Plaintiff filed an action against the school and the school district. The school district moved the trial court to dismiss the action arguing that 745 ILCS 10/3-106 immunized it from suit because it is a public entity and the Cafetorium was “public property intended or permitted to be used for recreational purposes.” Abrams, 2014 IL App (1st) 132987 at ¶1. Section 3-106 provides that:

Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury.

The trial court denied the school district’s motion but certified a question for interlocutory appeal: “Where an injury occurs on an area of public property which has both recreational and nonrecreational purposes, should section 3-106 immunity apply when said area is located within a public school where the primary character of the area and overall facility is educational and nonrecreational?” Id. at ¶4. The first district answered in the negative.

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1 This Article does not contain detailed summaries of unpublished appellate decisions filed under Illinois Supreme Court Rule 23; however, citation and a brief parenthetical have been provided for each case in section III(F)(1-10) for the sake of completeness and in case a particular fact pattern interests the reader.
In doing so, the court concluded that there was no indication that the school had ever intended, permitted or encouraged the Cafetorium to be used for recreational purposes. *Id.* at ¶13. To the contrary, the Cafetorium was instead used for educational uses or uses incidental to the same, pointing out that musical and dramatic practices and performances occur primarily to instruct the students and are thus part of the educational process; not recreational uses. "The term ‘permitted’ in the statute does not sweep in all public property where recreation might occur or where it is not expressly prohibited. If ‘permitted’ were given such an expansive interpretation, then section 3-106 immunity would swallow up any liability the public entity has for its property." *Id.* at ¶11 (citing *Bubb v. Springfield School Dist.* 186, 167 Ill. 2d 372 (1995).

2. **A Plaintiff Is Not a Business Invitee When Injured at a Orthodontic’s Premises the Plaintiff Mistakenly Believed to Be a Funeral Home**

*Garest v. Booth*, 2013 IL App (1st) 121845 – The plaintiff fell down a stairway to the basement door of a building owned by the defendant and suffered injuries. Plaintiff alleged that her fall was caused by deficient illumination in the area and brought an action against, *inter alia*, the defendant owner of the building. The defendant operated his orthodontics business out of the building but it was closed at the time of plaintiff’s fall. It was never the plaintiff’s intent to visit the defendant’s business. Instead, she was on her way to a wake and mistakenly thought the defendant’s building was the funeral home. Plaintiff was neither a patient of the defendant’s, nor had she ever visited the defendant’s building. The case went to trial and the jury returned a verdict in plaintiff’s favor.

Despite the defendant’s claim that plaintiff was a trespasser and that plaintiff’s only allegations against defendant at the time of trial were negligence to a foreseeable trespasser and willful and wanton conduct; the trial court submitted special interrogatories and instructions to the jury that allowed the jury to determine that the plaintiff was a business invitee via an implied invitation theory. The defendant appealed arguing that the special interrogatories and jury instructions were improper and warranted a new trial because plaintiff was a trespasser as a matter of law. The first district agreed, reversed the judgment and remanded the case for a new trial.

In doing so, the court set forth the following black letter law with regard to trespassers and business invitees:

[A] landowner owes a reasonable duty of care to all entrants upon his property regarding the state of the premises. However, as to trespassers, no reasonable duty of care is owed except to refrain from willfully and wantonly injuring the trespasser. If a landowner knows or reasonably anticipates a trespasser to encounter a place of danger when entering upon his land, the landowner is held to a duty of ordinary care to protect and/or warn the trespasser. Further, a person may be a business invitee of a landowner if: “(1) the person enters by express or implied invitation; (2) the entry is connected with the owner’s business or with an activity conducted by the owner of the land; and (3) the owner receives a benefit.”
Garest, 2013 IL App (1st) 121845 at ¶54. (citations omitted). In reversing the judgment, the court found that plaintiff did not receive an express invitation to enter defendant’s property. Accordingly, she had to have been an implied invitee for her to be considered a business invitee to which the reasonable duty of care attached. *Id.* at ¶55. However, the court rejected such a theory because plaintiff did not enter defendant’s premises for a reason that was connected with the defendant’s business and defendant did not receive a benefit from plaintiff. Therefore, as a matter of law, the plaintiff could not have been a business invitee and any findings to the contrary were both factually and legally wrong. *Id.* at ¶56.

3. **Railroad Did Not Owe Pedestrian a Duty to Warn of Oncoming Train Because Danger Was Open and Obvious Under Circumstances**

*McDonald v. Northeast Illinois Regional Commuter Railroad Corp.*, 2013 IL App (1st) 102766-B – The plaintiff’s decedent was a 79-year-old who did not wear a hearing aid and only wore glasses for reading. While crossing the North Glenview train station from the east parking lot to the west side platform, decedent realized he had forgotten his change in his car so he hurried back to obtain the same. Upon his return trip to the west side platform, decedent entered the crosswalk despite the fact that a train was approaching and hurried across in response to hearing the sound of the train’s horn. Decedent made it across the crosswalk prior to the train’s arrival but was blown back into the train on account of the wind it created and he was injured as a result. He subsequently died a short time thereafter for reasons unrelated to the accident.

The train was not exceeding the FRA-set speed limit at the time. Pedestrian warning signals were installed at the cross walk; however, they were not yet in service. Decedent had been to the station approximately 30 times over the previous three years. The trial court entered judgment on the jury verdict in plaintiff’s favor and denied the railroad’s post trial motion for judgment notwithstanding the verdict and a new trial. The first district ultimately reversed the trial court’s decision finding that the defendant did not owe a duty to the decedent to warn him of the approach of an oncoming train.

The first district did so pursuant to the “open and obvious” doctrine, which provides that a “landowner is not liable for physical harm to individuals caused by any activity or condition on the land whose danger is known or obvious unless the landowner should anticipate the harm despite such knowledge or obviousness.” *McDonald*, 2013 IL App 102766-B at ¶22. The “open and obvious” doctrine is an exception to the general duty owned by a landowner to non-trespassers to use reasonable care regarding the state of its premises and acts conducted on the same.

The court found that:

[The oncoming train in this case was an open and obvious danger because the decedent could have seen it approaching the station had he looked both ways prior to stepping on the crosswalk, the decedent was made aware of its approach]
by its horn prior to stepping in its path, and the decedent had time to stop and step back away from the track before it arrived. We also determine that the tracks in front of a moving train constitute an area made dangerous by the train and that the decedent should have realized the risk of entering that area and attempting to hurry across the tracks in advance of the train’s arrival. As such, we conclude that the danger posed by the oncoming train in this case was open and obvious and that the decedent should have realized the risk of trying to hurry across the tracks before it arrived at the station.

*Id.* at ¶25.

The court further found that both the “distraction” and “deliberate encounter” exceptions to the open and obvious exception were inapplicable. *Id.* at ¶26. First, there was no evidence suggesting the decedent was distracted when he hurried through the cross walk or that the defendant would have any reason to expect that the decedent would be distracted. *Id.* Second, although people do attempt to cross railroad tracks in front of trains, people exercising reasonable care for their own safety do not. *Id.* at ¶27. Therefore, defendant had no reason to suspect the decedent would have confronted the dangerous condition.

### 4. Premise Owners Can Be Liable Not Only For Conditions of their Land, But Also For The Activities that Create Those “Conditions”

*Smart v. City of Chicago*, 2013 IL App (1st) 120901 – Plaintiff was injured at an intersection in Chicago while riding his bicycle when the front of his bicycle became lodged in a trench created by street resurfacing that was allegedly performed improperly. The plaintiff brought a single count negligence complaint against the city asserting that the city failed to maintain its property in a reasonably safe condition. The case went to trial and the jury returned a verdict in plaintiff’s favor.

The relevant issue on appeal asserted by the city was that the trial court erred in refusing to use IPI Civil No. 120.08, which is the premises liability issues and burden of proof instruction, and instead used instructions given in ordinary negligence actions (i.e. IPI Civil Nos. 20.01 and B10.03). IPI Civil No. 120.08:

requires a plaintiff pursuing a premises liability claim to prove that (1) there was a condition on the property that presented an unreasonable risk of harm, (2) defendant knew or in the exercise of ordinary care should have known of both the condition and the risk, (3) defendant could not reasonably expect that people on the property would not discover or realize the danger, (4) defendant was negligent in specific ways, (5) plaintiff was injured, and (6) defendant’s negligence was the proximate cause of plaintiff’s injury.

*Smart*, 2013 IL App (1st) 120901 at ¶21.
The basis for the city’s argument was that plaintiff was injured by a condition on the city’s property and was therefore a standard premises liability claim. Accordingly, the trial court’s refusal to use IPI Civil No. 120.08 prejudiced the city because plaintiff did not have to prove the cause of action’s more stringent elements. *Id.* at ¶46. However, the first district disagreed and affirmed the judgment.

The court found that it was the city’s resurfacing activities that rendered the street to be unsafe. *Id.* at ¶¶50 and 53. Therefore, as directed by the comments and notes of both IPI Civil No. 120.02 and 120.08, the relevant negligence instructions were required. *Id.* at ¶¶48-49. The court even went as far as to say that it would have been error for the trial court to submit IPI Civil No. 120.08 under the circumstances of the case because although the city created the hazard, plaintiff would have had the burden to nonetheless affirmatively prove that the city had notice of it. *Id.* at ¶55. Furthermore, the court cited to precedent that “where a landowner’s conduct in creating an unsafe condition precedes the plaintiff’s injury, a plaintiff may elect to pursue a negligence claim, a premises liability claim, or both.” *Id.* at ¶54.

**B. Second District**

1. **Geneva Dam Downstream Current an Open and Obvious Danger as Pled and Deliberate-Encounter Exception Inapplicable:**

   *Suchy v. The City of Geneva*, 2014 IL App (2d) 130367 – Mr. Suchy’s estate filed a personal injury/wrongful death action against The City of Geneva, the Geneva Park District and the County of Kane. Upon seeing a young boy drowning in the downstream side of the Geneva dam in the Fox River, Mr. Suchy jumped in and saved the boy’s life. However, Mr. Suchy suffered injuries as a result of the rescue that subsequently led to his death.

   The Geneva dam is a low head dam and water was flowing over it at the time of the incident. The river and dam are owned by the State of Illinois and are maintained by the Department of Natural Resources. The Park District possessed land adjacent to the river where the incident occurred. The city had an ordinance prohibiting swimming at the site and signage was posted in the area warning of hazardous currents and prohibiting swimming. Plaintiff conceded the presence of the signs but alleged that the signage was inadequate.

   The trial court granted the defendants’ motions to dismiss finding that the defendants had no control over the river or the dam and that the defendants had no duty to warn or otherwise protect Mr. Suchy against the open and obvious risks presented. *Id.* at ¶¶15-17, 21. The second district, even assuming that the defendants exercised sufficient control over the river and/or dam, agreed with the lack of a duty owed by the defendants and affirmed the trial court’s decision.

   In doing so, the second district acknowledged that bodies of water are recognized as open and obvious dangers because of the inherent risks of drowning and diving into water that is too shallow. *Id.* at ¶¶22-23. However, the Court also recognized that “the mere existence of an open
and obvious danger is not a *per se* bar to the finding of a duty owed and that a traditional duty analysis must still be performed. *Id.* at ¶ 24. Nonetheless, the court did not find the existence of a duty owed to Mr. Suchy.

In performing the traditional duty analysis, the court found that likelihood of injury factor was low because of the open and obvious nature of the condition and the lack of any allegations that the dangers were latent or concealed. *Id.* at ¶33. In other words, the likelihood of injury was low because it is assumed that persons encountering an open and obvious danger would avoid it. Similarly, the court also found that the foreseeability of injury factor was low as well because “defendants could not have reasonably expected decedent to jump into the water near the dam, which presented the risks of drowning and diving into shallow water, which are ‘inherent characteristic[s] of bodies of water and *** danger[s] that defendants did not create.’” *Id.* at ¶34. The court then addressed the deliberate-encounter exception to the open and obvious doctrine when considering the foreseeability factor as required.

The deliberate encounter exception provides that “harm may be reasonably anticipated when 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.’” *Id.* at ¶24. “The deliberate-encounter exception most often applies in cases involving economic compulsion or impetus.” *Id.* In finding the exception inapplicable, the court stated that “we disagree with plaintiff that it is highly (or even moderately) foreseeable that a reasonable person in decedent’s position would conclude that the advantages of jumping into the water, despite its open and obvious inherent dangers, to save another person’s life would outweigh the risk of drowning himself (or sustaining injuries that subsequently took his life), where there was no compulsion to do so.” *Id.* at ¶34. Noting the exception’s need for compulsion, the court acknowledged that it is foreseeable that a person may attempt to rescue someone who is in a dangerous position; however, the court made a point to state that there is no legal duty or legal compulsion to do so.

The court found that the third and fourth duty analysis factors – the magnitude of guarding against the injury and the consequences of placing that burden on the defendant factors – weighed “somewhat against imposing a duty” noting that warning signs were already in place and “the installation of fences and other measures . . . constitutes a considerably more significant burden.” *Id.* at ¶35.

2. *De minimus* Defect Rule Defeats Semi-Tractor Driver’s Action Based on Injuries From a Slip and Fall Caused by a 1½” Depression in the Asphalt of Defendants’ Loading Bay

*Morris v. Ingersoll Cutting Tool Co.*, 2013 IL App (2d) 120760 – Mr. Morris, a truck driver for Con-Way Freight, tripped and fell after he backed his semi-tractor/trailer rig into a loading bay and disembarked his semi-tractor. He tripped when his foot caught on a 1½” deep depression that was approximately 2 feet long and 1 foot wide. The facility was owned by defendant D.I. Properties, Inc. and leased by defendant Ingersoll Cutting Tool Co.
Mr. Morris had been to the facility on three or four previous occasions, was aware of the depression prior to his fall and had even informed the defendants of it. \textit{Id.} at ¶3. The manager of the facility was deposed in the case and he testified that he performed weekly inspections for hazards on the premises and had previously taken a class covering trip-and-fall prevention where he learned that a one-inch difference in elevation was a rough guideline for a trip hazard. \textit{Id.} at ¶4. However, he also testified that whether the depression was located where a driver would disembark his truck depended on the length of the trailer and how far a driver had backed up into the loading bay. \textit{Id.} The trial court granted defendants’ motions for summary judgment finding that the alleged defect was \textit{de minimus} and thus was not actionable. \textit{Id.} at ¶6. The second district agreed and affirmed the trial court’s decision.

The court found that the defendants did owe a duty to Mr. Morris to keep the premises in a reasonably safe condition. \textit{Id.} at ¶11. However, the court acknowledged that the duty owed does not require defendants to maintain their premises in perfect condition. \textit{Id.} at ¶14. The duty owed requires defendants to maintain their premises to avoid creating unreasonable risks of harm. Furthermore, the court recognized that a \textit{de minimus} rule applies to outdoor surface defects located on sidewalks, parkways or analogous locations. \textit{Id.} at ¶¶11-13.

Per the \textit{de minimus} rule “[i]f a defect is such that a reasonably prudent person would not anticipate some danger to persons walking upon it, it is considered \textit{de minimus} and is not actionable” because it is outside the scope of the duty owed. \textit{Id.} at ¶12. The basis of the rule is that requiring premises owners of such property to keep them defect free would be unduly burdensome, impractical and intolerably expensive.

Given that there is no bright line rule or mathematical formula to determine what constitutes a \textit{de minimus} defect, a court must look at the particular facts of the case in light of the four factors underlying the traditional duty analysis: (1) the foreseeability of injury; (2) the likelihood of injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant. \textit{Id.} at ¶13. If a defect is found to be \textit{de minimus}, there is no cause of action unless certain aggravating factors exist that render the \textit{de minimus} rule inapplicable.

In determining whether the defect at issue was \textit{de minimus}, the Morris court compared the loading bay to a parkway and cases discussing the same, as opposed to a sidewalk. \textit{Id.} at ¶¶14-17. Accordingly, the court found the likelihood and foreseeability of injury as being low because the area was for industrial truck traffic and loading - not an area used by pedestrians as a means of ingress and egress. As noted by the court, sidewalk conditions cannot be expected in a loading bay used for large semi-tractors and trailers. Furthermore, the court found that requiring defendants to repair every 1½” defect in the loading bay, especially in light of it being trafficked by large trucks with heavy loads, was economically burdensome. Therefore, the court found the defect at issue to be \textit{de minimus}. \textit{Id.}
Despite the plaintiff’s arguments, the court did not find that the length and width of the depression was a sufficient aggravating factor to avoid the application of the *de minimus* rule given its relatively small proportionate size compared to the total size of the loading bay itself. *Id.* at ¶¶18-22. Similarly, the court disagreed with the plaintiff’s argument that a sufficient aggravating factor existed because the depression was located in an area of ingress and egress from Mr. Morris’ truck and he would be distracted at the time he encountered it. *Id.* at ¶¶23-28. The court found that various factors governed whether a driver would in fact encounter the depression when exiting a truck in the loading bay and the facts suggested it would not and did not regularly occur. The court further added that the defect can be seen when both entering and exiting trucks in the loading bay and it was not obscured by dim lighting or an optical illusion. Lastly, the court also rejected plaintiff’s aggravating factor argument that the facility manager’s training that 1 inch constitutes a trip hazard renders the *de minimus* rule inapplicable. *Id.* at ¶¶29-30. No policy of repairing defects over 1 inch was ever implemented and the manager’s training and resulting knowledge cannot be imputed as explicit company policy.

3. **Salon Owner’s Duty Owed to Invitee Did Not Extend to Injuries Caused by Out-of-Control Car Suffered on Sidewalk Outside of Sole Entrance/Exit**

*Hougan v. Ulta Salon, Cosmetics and Fragrance, Inc.*, 2013 IL App (2d) 130270 – Plaintiff was struck by an out-of-control car operated by Joseph Briddle on the sidewalk outside Ulta’s salon shortly after she had exited the salon. Mr. Briddle was pulling into a parking spot facing the front of the entrance/exit to the salon and accidentally hit the accelerator as opposed to the brake, striking Ms. Hougan and another pedestrian. The only way for customers to walk to and from the salon to the parking lot was the sidewalk at issue. *Id.* at ¶5. There were no protective concrete pillars or similar devices between the storefront and the parking lot.

The Ulta salon was located in a shopping center owned by codefendant Fridh Corporation (“Fridh”). Ulta leased the store from Fridh, but pursuant to the terms of the lease, Fridh owned, maintained and controlled the sidewalk at issue, as well as the parking lot, as common areas. *Id.* at ¶¶8-10. Ulta was able to request that changes be made to the exterior of its leased space pursuant to the lease; however, approval of the requested changes was at Fridh’s sole discretion. *Id.* at ¶8. The trial court granted Ulta summary judgment finding that Ulta’s duty to Ms. Hougan as a business invitee ended once she left the physical boundaries of the salon onto the common area that was controlled by Fridh. *Id.* at ¶16. The second district agreed and affirmed the trial court’s decision.

In the affirming the trial court, the second district acknowledged that a business inviter’s duty to its invitees, which includes the duty to protect the invitees from reasonably foreseeable negligent acts of third parties, does not automatically stop at the premises’ threshold. *Id.* at ¶31. However, the court found that Ulta’s duty did in this case. The facts pertinent to the court’s determination, and in distinguishing a number of cases that extended business owners’ duties to areas outside their property, where:
(1) Fridh exclusively owned and maintained the sidewalk area at issue and had sole discretion over changes to the area;

(2) Ulta did not otherwise take any affirmative action to appropriate the area, for example, to control entry to the salon;

(3) the area was not for Ulta's exclusive use given that tenants of neighboring stores in the shopping center parked in front of the salon and used the sidewalk area to walk to and from the other stores; and

(4) Ulta did not directly and immediately contribute to the injury by, for example, allowing Plaintiff to exit knowing injury was likely to occur such as in bar fighting cases where bar owners require plaintiffs to leave after an altercation with a perpetrator knowing of the perpetrators propensity for violence.

Id. at ¶¶23-44.

4. The Second District Rules that The Snow and Ice Removal Act Grants Immunity for Injuries Caused By Unnatural Accumulations of Snow or Ice Resulting From Defective Conditions of the Premises

Ryan v. Glen Ellyn Raintree Condominium Assoc., 2014 IL App (2d) 130682 – Plaintiff slipped and fell on a patch of ice that formed at the entrance of the condominium complex where she resided and suffered injuries as a result. Plaintiff brought an action against the defendant property owner. She alleged that the ice formed because of water dripping from an overhead awning that froze thereafter. The defendant contracted with codefendant CDH Properties, Inc. to maintain the premises and with another entity to remove snow and ice from the property. CDH inspected the property weekly and after each time the snow and ice removal company performed its work. The trial court granted defendant summary judgment finding that it was immune from suit pursuant to the Snow and Ice Removal Act (745 ILCS 75/1 et seq.). The second district agreed and affirmed.

Section 1 of the Act provides:

It is declared to be the public policy of this State that owners and others residing in residential units be encouraged to clean the sidewalks abutting their residences of snow and ice. The General Assembly, therefore, determines that 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 which amount to clear wrongdoing, as described in Section 2 of this Act.
Section 2, the operative provision of the Act, provides:

Any owner, lessor, occupant or other person in charge of any residential property, or any agent of or other person engaged by any such party, who removes or attempts to remove snow or ice from sidewalks abutting the property shall not be liable for any personal injuries allegedly caused by the snowy or icy condition of the sidewalk resulting from his or her acts or omissions unless the alleged misconduct was willful or wanton.

The plaintiff, citing the fourth district’s recent Greene decision summarized below, argued that the immunity afforded by the Snow and Ice Removal Act does not apply to unnatural accumulations of ice caused by defective conditions of the premises as opposed to negligent snow and ice removal efforts. Ryan, 2014 IL App (2d) 130682 at ¶14. The second district disagreed with the plaintiff’s and fourth district’s interpretation of the Act and found that although the ultimate cause for plaintiff’s injury was allegedly the defect in the awning, the more immediate cause alleged was the lapse in defendant’s undertaking to remove the snow and ice. Therefore, the Act had prima facie application to plaintiff’s claim and barred her cause of action. Id. at ¶21.

C. Third District

1. Laborer Assumed Risk of Llama Attack and Thus Was Barred from Recovery

Edwards v. Lombardi, 2013 IL App (3d) 120518 – Plaintiff was attacked by a llama owned by the defendants while tending to the defendants’ animals while they were out of town and suffered injuries as a result of the attack. Plaintiff had previously worked at the defendants’ pet store when he was in high school and helped tend to the animals on their farm while they were out of town. He had previously been attacked and injured by the llama at issue, knew of the llama’s aggressive nature towards him personally and further knew that the llama would be free to roam in the barn at the time the plaintiff was tasked to clean it in the present instance. Notwithstanding, plaintiff chose to enter the barn in the llama’s presence and was attacked in a manner similar to the past instances. The trial court granted summary judgment to the defendants’ finding that the plaintiff had assumed the risk of the attack. The third district agreed and affirmed the trial court’s decision.

“In a common-law negligence action, a plaintiff injured by an animal cannot recover unless the animal had a dangerous disposition and the owner knows of the dangerous disposition.” Id. at ¶12. However:

Primary implied assumption of risk is an affirmative defense that arises where the plaintiff’s conduct indicates that he “has implicitly consented to encounter an inherent and known risk, thereby excusing another from a legal duty which would otherwise exist.” . . . The defense is “based on the theory that a plaintiff ‘will not be
heard to complain of a risk which he has encountered voluntarily, or brought upon himself with full knowledge and appreciation of the danger.” . . . If the doctrine applies, primary assumption of the risk operates as a complete defense to a negligence action because the defendant is said not to owe any duty to the plaintiff.

Id. at ¶18 (internal citations omitted).

Accordingly, the third district found that the plaintiff assumed the risk at issue as a matter of law in light of his past experiences and knowledge, and his decision to enter the barn and confront the llama despite that experience and knowledge. Id. at ¶¶ 20-21.

The court did not consider the plaintiff’s argument that the “deliberate encounter exception” excused his assumption of the risk because the plaintiff had failed to raise the argument in the lower court. Id. at ¶¶ 22-25. However, although the court noted that the “deliberate encounter exception” is typically applicable to cases involving open and obvious dangers on land, the court acknowledged that the first district indicated in Morrissey v. Arlington Park Racecourse, LLC, 404 Ill. App. 3d 711, 732 (1st Dist. 2010), that the deliberate encounter exception may still allow a plaintiff to recover when the doctrine of primary assumption of risk applies.

2. School District’s Conduct Did Not Amount to Willful and Wanton Conduct; Therefore, the School District was Immune From Plaintiff’s Action Arising from Slip and Fall in Gymnasium Pursuant to Section 3-106 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/3-106):

Bielema v. River Bend Community School District No. 2, 2013 IL App (3d) 120808 – Plaintiff was injured when she slipped on Gatorade spilled on the floor of the defendant school district’s gymnasium. The principal of the high school had noticed the spill prior to the accident and asked her husband to stand guard over the spill until she returned with someone to clean it up. At the time of the accident, the principal’s husband was not focused on the spill but was instead speaking with others nearby. The plaintiff ran up behind the principal’s husband (the plaintiff’s former coach) to greet him when she slipped and fell on the spill.

Plaintiff brought an action against the defendant alleging that the defendant committed willful and wanton conduct in an effort to circumvent the immunity provided by the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/3-106). Section 3-106 provides that:

Neither a local public entity nor a public employee is liable for an injury where the liability is based on the existence of a condition of any public property intended or permitted to be used for recreational purposes, including but not limited to parks, playgrounds, open areas, buildings or other enclosed
recreational facilities, unless such local entity or public employee is guilty of willful and wanton conduct proximately causing such injury.

The trial court granted the defendant summary judgment finding that there was insufficient evidence showing that the defendant’s conduct was willful and wanton. The third district agreed and affirmed the trial court.

In doing so, the third district rejected plaintiff’s attempt to use the less stringent common law definition of willful and wanton conduct ruling that the Tort Immunity Act’s definition applied. Bielema, 2013 IL App (3d) 120808 at ¶¶13-17. The latter provides that:

“Willful and wanton conduct” as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. This definition shall apply in any case where a “willful and wanton” exception is incorporated into any immunity under this Act.

Id. at ¶13; see also 745 ILCS 10/1–210 (West 2012). The court also noted that when making the determination, courts in the past have looked at whether the public entity undertook any action to remedy the danger and acknowledged that such was the case at hand. Id. at ¶¶18-19.

In conclusion, the court found as a matter of law that the defendant’s conduct did not constitute willful and wanton conduct because the facts did not suggest that the principal or her husband acted with the intent to harm the plaintiff; nor did it evidence a course of conduct showing an utter indifference to or conscious disregard for the safety of others. Id. at ¶19.

D. Fourth District

1. The Fourth District Rules that The Snow and Ice Removal Act Does NOT Grant Immunity for Injuries Caused By Unnatural Accumulations of Snow or Ice Resulting From Defective Conditions of the Premises

Greene v. Wood River Trust, 2013 IL App (4th) 130036 – Plaintiff slipped and fell on an icy walkway at the entrance of her apartment building and suffered injuries. She brought an action against the defendant (the landlord) as a result. The icy condition was not caused by snow and ice removal efforts, but was instead caused by a deficient condition of the premises. The trial court dismissed plaintiff’s cause of action finding that, inter alia, the Snow and Ice Removal Act (745 ILCS 75/1 et seq.) barred plaintiff’s claims. The fourth district disagreed holding that the Snow and Ice Removal Act does not grant immunity for injuries caused by defective construction or improper or insufficient maintenance of the premises. Greene, 2013 IL App (4th) 130036 at ¶23.
Pursuant to the common law, “a landowner has no duty to remove natural accumulations of snow or ice.” *Id.* at ¶14. However, exceptions were created for situations where an act or omission amounting to negligence contributed to the condition. For example, where:

1. “the defendant voluntarily undertook the task of removing natural accumulations of ice or snow and did so negligently;”

2. “the defendant was responsible for an unnatural accumulation of ice or snow;” or

3. “the accumulation of ice or snow becomes unnatural due to the design and construction of the premises.”

*Id.* at ¶¶14-15.

In an effort to encourage premises owners to remove snow and icy conditions from residential walkways adjacent to their property, the legislature passed the Snow and Ice Removal Act. The Act modified the common law liability by, according to the fourth district, granting immunity to premises owners for injuries caused by negligent snow and ice removal efforts. *Id.* at ¶¶16-17; *see also* 745 ILCS 75/2 (willful and wanton conduct is an exception).

However, the fourth district interpreted the Act as only extending immunity to negligent snow and ice removal efforts; not for unnatural accumulations of snow or ice caused by “defective construction or improper or insufficient maintenance of the premises.” *See id.* at ¶¶18-19. Accordingly, the court reversed the trial court’s dismissal of plaintiff’s complaint because the unnatural accumulation of ice at issue was not caused by snow or ice removal efforts, but was instead allegedly the result of the defective condition of the building located adjacent to the walkway.

**2. Rural, Residential Landlord Did Not Owe Tenant a Duty For Injury Resulting From Disrepair of Driveway Under the Circumstances**

*Nida v. Spurgeon*, 2013 IL App (4th) 130136 – Plaintiff rented a rural residential property from the defendant. The property had an asphalt driveway that was in disrepair and consisted of asphalt crumbles throughout the driveway bordered by loose gravel. The defendant used the driveway to deliver water to the property and to access a garage on the property the defendant used for storage. Notwithstanding, the lease released possession of the driveway to the plaintiff and the defendant did not otherwise retain control over it.

During the initial walk-through of the rental, defendant represented that he would repair the driveway; however, despite several requests, the defendant did not perform any repairs prior to the plaintiff’s accident, which occurred approximately 15 months after the plaintiff took possession of the property. On the date of the accident, Plaintiff walked down to the mailbox at the end of the driveway walking in a “zig zag” pattern to avoid broken pieces of asphalt.
However, on the return trip to the house, a football size piece of asphalt cracked when she stepped on it and she was injured as a result. Plaintiff brought an action against the defendant; however, the trial court granted the defendant’s motion for summary judgment finding that the defendant did not owe the plaintiff a duty because the condition was open and obvious and the *de minimus* rule applied. The fourth district affirmed the trial court’s decision.

The traditional duty analysis governed the fourth district’s decision: whether a duty of care exists depends on the consideration of “(1) the reasonable foreseeability of injury; (2) the likelihood of injury; (3) the magnitude of the burden of guarding against injury; and (4) the consequences of placing that burden on the defendant.” *Nida*, 2013 IL App (4th) 130136 at ¶26.

The court recited the general rules that relate to the duty a landlord owes to a tenant:

1. As a general rule “[a] landlord is not liable to a tenant for injuries caused by a defective or dangerous condition, existing when the lessee took possession, on premises leased to a tenant, and under the tenant’s control.”

Exceptions to the general rule exist where:

1) A latent defect existed at the time of the leasing which lessor should have known about; 
2) There is a fraudulent concealment by a landlord of a dangerous condition; 
3) The defect causing the harm amounts to a nuisance; 
4) *The landlord makes a promise to repair a condition at the time of leasing*; 
5) The landlord violates a statutory requirement of which tenant is in the class designed to be protected and the resulting harm is reasonably foreseeable; or 
6) The landlord voluntarily undertakes to render a service.

2. Furthermore, the general rule does not apply “[i]f the landlord retains control of the leased premises.” If he or she does, the landlord “has the duty, as the party in control, to use ordinary care in maintaining that part of the premises in a reasonably safe condition.” *Id.* at ¶29.

The court did find that a promise to repair the driveway was made, arguably sufficient to satisfy exception 4 above. *Id.* at ¶¶44-47. Nonetheless, in light of the open and obvious nature of the condition of the driveway and the risk involved with walking across the same, the court found that “Defendant could not have foreseen plaintiff would injure herself and was entitled to presume plaintiff would exercise caution when encountering an open an obvious condition.” *Id.* at ¶54. Furthermore, the court acknowledged the rural setting of the premises and the inability
to provide an injury-proof driveway under the conditions. Accordingly, the court ruled that the defendant did not owe the plaintiff a duty.

In doing so, the court further recognized that there was no evidence indicating the defendant retained control over the driveway supporting the application of exception 2. *Id.* at ¶43. For the same reason, the court refused to extend a landlord’s duty to provide a reasonably safe means of ingress and egress from the property. *Id.* at ¶33.

**E. Fifth District**

1. **Distraction Exception Creates Duty for Open and Obvious Crack in Sidewalk**

*Bruns v. City of Centralia*, 2013 IL App (5th) 130094 – Plaintiff, an 80-year-old patient of an eye clinic, tripped over a three inch high crack in the city defendant’s sidewalk preceding the entrance to the clinic created by the growth of a nearby tree. At the time of her fall, plaintiff’s attention was directed at the entrance as opposed to the ground. The plaintiff had prior knowledge of the crack due to her previous visits to the eye clinic and had even commented previously that it was an “accident waiting to happen.”

However, the city defendant was also aware of the dangerous condition. The clinic had previously reported the crack and that someone else had tripped over the crack a year prior. The clinic also offered to remedy the defective condition at its own expense. Notwithstanding, the city’s tree committee refused the removal of the tree because it considered the tree to have historical significance. The trial court granted the defendant’s motion for summary judgment finding the condition to be open and obvious and the distraction exception inapplicable under the circumstances. The fifth district disagreed.

Although the court agreed the crack was an open and obvious condition, the court found the distraction exception applicable and reversed the trial court’s ruling setting forth the following black letter law.

In general, a party that owns, controls, or maintains property has a duty to maintain the premises in a reasonably safe condition. Any dangerous condition, therefore, must be removed or corrected, or a warning to invitees who might encounter the danger must be provided.

However, a property owner is generally under no obligation to guard against injury from open and obvious dangers. Open and obvious conditions are conditions and risks which are apparent to and would be recognized by reasonable people exercising ordinary perception, intelligence, and judgment in visiting the area. Property owners are not expected to foresee an injury from an open and obvious danger, because property owners are entitled to the
expectation that those who enter upon their property will exercise reasonable
care for their own safety.

Our courts have also recognized a “distraction” exception to the open and
obvious danger rule grounded in foreseeability. The exception applies when there
is reason to expect that a plaintiff’s attention may be distracted from the open
and obvious condition because circumstances required him or her to focus on
some other condition to the extent that he or she will forget the hazard that has
already been discovered. Under such circumstances, property owners owe a duty
to exercise reasonable care to protect invitees from harm in spite of the open and
obvious nature of the danger.

_Bruns_, 2013 IL App (5th) 130094 at ¶¶9-10.

A defendant need not create, contribute to or otherwise be responsible for the distraction.
“[T]he key question is the foreseeability of the likelihood that an individual’s attention may be
distracted from the open and obvious condition, not the creation of the distraction.” _Id._ at ¶11.
Furthermore, “it is not necessary for a defendant to foresee the precise nature of the distraction.
... [A]ll that is required is the defendant’s awareness that those in proximity to the open and
obvious hazard are likely to become distracted in some way and forget about the presence of
the hazard.” _Id._ at ¶13.

In the present case, the court noted that:

It is certainly reasonable to foresee that an elderly patron of an eye clinic might
have his or her attention focused on the pathway forward to the door and steps
of the clinic as opposed to the path immediately underfoot. It is also reasonable
to foresee that a patron of an eye clinic may have had certain procedures
performed on his or her eyes and, upon exiting the clinic, may not be looking
downward at the sidewalk all of the time, even though the patron may have
previously noticed the defect and have knowledge of it. Likewise, it is also
reasonable to foresee that such a patron may look up while walking toward the
clinic’s entrance to see how much farther he or she needs to go before reaching
the steps to the clinic. The focus is on the foreseeability of the injury, and it is of
no consequence whether or not a jury will consider plaintiff contributorily
negligent for looking toward the entrance to the clinic. The factual circumstances
of plaintiff’s conduct are matters within the purview of the jury, not the court.

_Id._ at ¶12.

The court further found that it is not a significant burden on a city to require them to address a
known dangerous condition within a reasonable time period. _Id._ at ¶13. In doing so, the court
recognized that:
While it is true that a municipality is not required to maintain hundreds of miles of sidewalks in good repair at all times, here, the City had knowledge of the dangerous situation that had developed on the pathway to the Clinic. The City had even been alerted that at least one other person had already tripped because of the dangerous unevenness of the sidewalk. Additionally, a committee authorized by the City to evaluate tree removal actually reviewed the issue but declined the Clinic’s offer to remove the tree at its own expense because of the historic significance of the tree. Clearly, other options existed, such as replacing the cracked sidewalk or reconfiguring the walkway to accommodate the tree. . . . The fact that this condition occurred over several years and that the City had knowledge of the danger does not allow the City to bury its head in the sand and ignore the real danger posed by the uneven sidewalk.

Id. Accordingly, the court found that the defendant owed the plaintiff a duty under the circumstances, leaving the question of whether the city breached the duty and plaintiff’s contributory negligence to a jury.

F. Illinois Unpublished Decisions Filed Under Illinois Supreme Court Rule 23

1. Lee v. Six Flags Theme Parks, Inc., 2014 IL App (1st) 130771-U – Defendant Six Flags not liable for decedent’s death caused from fall through hole in steel structure under section 343 of the Restatement (Second) of Torts because Six Flags did not have actual notice or constructive notice of the dangerous condition.

2. Lynne v. Duke Realty Limited Partnership, 2014 IL App (1st) 123659-U – Contractor defendants not liable for plaintiff’s injuries caused by car accident at intersection near construction site under section 343 of the Restatement (Second) of Torts because they did not own, control or otherwise possess the premises at issue. Furthermore, even assuming they did, they were still not liable because they did not have actual notice or constructive notice of the dangerous condition.

3. Torres v. Gutmann Leather LLC, 2014 IL App (1st) 122460-U – Summary judgment was proper for defendant premises owner on premises liability count where death was not caused by a “condition on the land,” but was instead caused by demolition activities of the independent contractor that was also responsible for implementing safety measures and in actual possession of the property at issue.

4. Aughenbaugh v. Decatur Memorial Hospital, 2013 IL App (4th) 130337-U – Defendant hospital not liable for injuries to plaintiff arising out of his electrical work performed by an electrical contractor at the hospital under section 343 of the Restatement (Second) of Torts because hospital had no reason to expect that plaintiff would not discovery the danger.
5. *Contini v. Green Dolphin, Inc.*, 2013 IL App (1st) 123036-U – Bar owner did not owe duty to decedent fatally shot off the premises after an altercation in the bar under section 344 of the Restatement (Second) of Torts and the traditional duty analysis.

6. *Flynn v. Cernugal*, 2013 IL App (3d) 121052-U – Homeowner not liable for son-in-law’s slip and fall at bottom of basement stairs under section 343 of the Restatement (Second) of Torts because homeowner did not have actual notice or constructive notice of the dangerous condition.

7. *Grzelak v. Classic Midwest, Inc.*, 2013 IL App (1st) 122701-U – Asset manager defendant was not liable to plaintiff for her trip and fall over a tent stake in a mall parking lot under section 343 of the Restatement (Second) of Torts because the asset manager defendant was not a “possessor of the land.”

8. *Henderson v. Byrkit*, 2013 IL App (4th) 130110-U – Homeowner not liable for electrician’s fall on sidewalk under section 343 of the Restatement (Second) of Torts because homeowner did not have actual notice or constructive notice of the dangerous condition.

9. *Magana v. Garcia*, 2013 IL App (1st) 1121810-U – Homeowner not liable to guest who dove head first into an above-ground pool at night because the danger was an open and obvious condition and “forgetfulness/distraction” exception inapplicable.

10. *Swift v. Litchfield Hotel Ventures, LLC*, 2013 IL App (5th) 120589-U – Trial court erred in dismissing plaintiff’s pleading where complaint alleged sufficient facts suggesting slip and fall in hotel’s parking lot was caused by unnatural accumulation of ice and snow.

### IV. FEDERAL CASE UPDATE

#### A. Southern District of Illinois

1. **Premise Owner Owed a Duty to Employee of Lessee to Keep the Common Areas of the Premises in Good Repair**

*Shifrin v. Associated Banc Corp.*, No. 3:12-CV-00839-JPG-DGW, 2013 WL 1826429 (S.D.Ill. Apr. 30, 2013) – Plaintiff alleged injury in the form of asthma, pneumonia, and other health-related injuries due to mold, fungi, bacteria and other harmful substances plaintiff observed in the building owned by defendants. Defendants leased part of the building to plaintiff’s employer, and defendant agreed in the contract to keep, among other things, the plumbing, heating, air conditioning, windows and window glass, and all common areas in good repair.

Plaintiff worked within the property on a daily basis and saw the alleged conditions on window sills in Suite 220 where the employer was located, in the basement of the building where ceiling tiles were broken or missing, and on the faucet located in the second floor men’s bathroom.
within Suite 220. *Shifrin*, 2013 WL 1826429 at *1. Defendant moved for summary judgment on the basis that it owed no duty of care to plaintiff because defendant did not control the portions of the premises where the alleged conditions were observed. *Id.* at *2.

In denying summary judgment, the Southern District of Illinois found that a duty existed as between plaintiff and defendant. The court held that defendant assumed a duty of reasonable care to maintain the portions of the premises by retaining control through its routine and periodic entry into Suite 220 for repairs, and repairs to the building generally on a daily basis, and by contracting to keep in good repair those areas where the alleged condition was observed. *Id.* at *5. Because defendant leased only a portion of property to the employer, the court held, defendant necessarily retained control of all common areas in the building. The court went on to find that plumbing and ductwork likely qualified as common areas, giving rise to the duty.

2. **Premise Defendants Denied Summary Judgment when Stage-Crashing Concertgoer Found to Be a Possible Exception to “No Duty to Trespassers” Rule Under Implied Consent and Frequent Trespasser Theories**

*Ford v. Psychopathic Records, Inc.*, No. 12-CV-0603-MJR-PMF, 2013 WL 5254583 (S.D.Ill. Sept. 17, 2013) – Plaintiff sued Insane Clown Posse (ICP) and the promoters and premise owners of the venue for a concert plaintiff attended. Plaintiff was injured during a portion of the show called “Faygo Armageddon” in which Faygo brand soda is sprayed and thrown into the crowd. *Id.* at *1. ICP allowed a number of concertgoers onstage during this portion of the concert, including plaintiff who was injured when he slipped and fell on spilled soda while on stage, striking an overturned trampoline. *Id.* at *2.

Defendants moved for summary judgment on a theory that they owed no duty to plaintiff because he was a trespasser on-stage. Defendants argued that plaintiff was outside the scope of his invitation to the concert when he entered the stage area after security attempted to restrain the crowd from entering the area. *Id.* at *3-4.

While trespasser status is a question of law, summary judgment will not be granted if disputed facts, or contrary inferences from undisputed facts, could lead to a finding that the injured party was not a trespasser. *Id.* at *4. In denying summary judgment, the court ruled that the trier of fact should determine whether or not a reasonable person in plaintiff’s position could have taken defendants’ actions to impliedly or expressly consented to plaintiff’s presence on-stage, and that defendants knew or should have known that concertgoers would be on-stage so that a duty could be found. *Id.* at *5.

The court reasoned that defendants had reason to anticipate the presence of concertgoers onstage, and that plaintiff could have taken defendants’ actions for consent, for several reasons. Defendants admitted that there was a history of concertgoers on-stage during the Faygo Armageddon portion of the show in the past. Defendants had started inviting fans to wait for a
chance to come onstage, and did not require any special pass or ticket to do so. Plaintiff was not restrained or asked to leave after he was discovered onstage by defendants, and plaintiff had been to past ICP shows in which concertgoers had been invited on stage. From these facts, the court found that a fact-finder could determine ICP knew or should have known of the possibility for frequent trespassers on stage, and therefore could have owed plaintiff a duty under the “frequent trespasser exception” to the “no duty to trespassers” rule. Id. at *6. With these facts in dispute, summary judgment on the “no duty to trespassers” rule was denied.

B. Northern District of Illinois


*Stanley v. Ameren Illinois Co.*, No. 12 C 06073, 2013 WL 5745339 (N.D.Ill. Oct. 22, 2013) – Plaintiff, a boiler engineer who worked at numerous power plant construction sites throughout his career, brought this action against Ameren Illinois and MidAmerican Energy, owners of two power plants, Sargent & Lundy, designer of two power plants, and EECI Services, general contractor during construction of one of MidAmerican Energy’s plants. The court granted summary judgment to all of these defendants after the following rulings.

(a) Asbestos dust at a power plant construction site was a “condition on land”

In ruling on plaintiff’s premises liability claim against Ameren, the court considered Ameren’s argument that any asbestos-containing dust at the site of construction for its plant was not a “condition on land” which would subject it liability under a general duty to exercise reasonable care to maintain the premises in a reasonably safe condition for use by the plaintiff and other invitees. *Stanley*, 2013 WL 5745339 at *7. Finding no Illinois authority directly on point, the court reasoned that the instant case involved asbestos dust which was a physical feature of the construction site. Id. at *8. The court distinguished this matter from another Illinois asbestos case in which these fibers were not a “condition on land” once they were carried home on the clothes of another, but took the negative implication that such dust had been a condition on the landowner’s premises before it left. Ultimately, based partially on its finding that asbestos containing insulation to be an improvement to the real property in question (discussed below), the court found that such asbestos dust was a condition on the land which gave rise to a duty to make the premises reasonably safe for invitees like plaintiff.

(b) General contractor directing power plant construction did not retain control over insulation installer subcontractor

Under Illinois law, a general contractor such as EECI Services will not be liable for the torts of an independent subcontractor unless the “retention of control” exception applies. The court in this case found that plaintiff had failed to show that EECI retained control over the manner and method of its insulation subcontractor’s work. Id. at *10. With little evidence bearing on the
actual contract and control exercised as between EECI and the insulation subcontractor, the court found that the evidence it did have of another subcontractor’s, Babcock & Wilcox, supervision and control of plaintiff’s work was sufficient to show the level of manner and method control EECI retained over its other contractors. Id. at *11. The court also found that safety meetings held by EECI were not sufficient to show retained control. Based on these two findings, the court found plaintiff’s claim against EECI Services failed as a matter of law.

(c) Asbestos-containing thermal insulation was an improvement to real property in the context of a power plant construction site

Despite its ruling that asbestos dust was a “condition on land” the court found that Ameren Illinois and Sargent & Lundy were entitled to summary judgment under 735 ILCS 5/13-214(b), the Illinois Construction Statute of Repose. At issue was whether the “item at issue” under the statute, in this case asbestos-containing thermal insulation, was an “improvement to real property” such that the statute would apply to bar plaintiff’s claims against these defendants.

Finding no precedent specifically on point as to asbestos-containing thermal insulation, the court evaluated whether the insulation was meant to be permanent or temporary, whether it was an integral part of the overall system, whether the value of the property was increased, and whether the use of the property was enhanced under the four-part test established by the Illinois Supreme Court in St. Louis v. Rockwell Graphic Systems, Inc., 153 Ill. 2d 1 (1992), Stanley, 2013 WL 5745339 at *12. The court found that power plants are designed to use thermal insulation at all times and would not operate without insulation, that the insulation made it possible to operate the plant and increases the efficiency of the plant, and that the insulation therefore becomes an integral part of the overall system and increases the value of the property by making it possible for the system to operate. Id. at *13. The court distinguished plaintiff’s case from State Farm Mutual Auto Ins. Co. v. W.R. Grace & Co., 24 F.3d 955 (7th Cir. 1994) in which the court of appeals ruled that spray-on insulation was not an improvement to real property, based on the above factors and noted that Illinois courts had since rejected that ruling as failing to apply the St. Louis factors. Stanley, 2013 WL 5745339 at *12. The court further noted that an argument that asbestos-containing insulation can wear out over time and require replacement does not bear on the issue of permanence, reasoning that such an argument conflates the words “improvement” and “fixture” which are not synonymous under the law. Id. Finding that thermal insulation is incorporated into and becomes part of the plant, allowing it to function properly, efficiently, and safely, the court ruled that thermal insulation is inseparable from the improvement to real property. Id. at *14. In so holding, the court granted Ameren Illinois and Sargent & Lundy’s motion for summary judgment.
2. **Defendant Retailer Granted Summary Judgment in Slip and Fall Case Because Plaintiff Failed to Show Actual or Constructive Notice of Grapes on the Floor**

*Berg v. Target Corporation*, No. 10 CV 6386, 2013 WL 6114790 (N.D.Ill. Nov. 18, 2013) – Plaintiff was injured when she stepped, slipped, and fell on one or two grapes on the floor of a Target store. *Berg*, 2013 WL 6114790 at *1. The undisputed facts included that a Target employee could not have been the person who dropped the grapes on the floor, and that Plaintiff had an unobstructed and well-lit view of the floor in front of her before her fall. *Id.* No employee or customer reported the grapes on the floor, and none of Target’s employees specifically recalled the last time the area had been traveled for an inspection or walkthrough.

Defendant Target maintained that its employees are instructed to walk through the store periodically, in this case on a 5, 10, or 15 minute interval, and clean up anything they see on the floor. *Id.* at *2. Plaintiff introduced an expert’s report based on a viewing of Target’s 2008 safety training videos, which the expert asserted were insufficient in instructing employees to diligently monitor the floor for hazards. Notably, the court found that the whether there was one grape or two did not make a difference for purposes of establishing constructive notice of the grapes. *Id.* at *3. Plaintiff’s testimony, interpreted in a way most favorable to plaintiff, established that a person who may have been a Target employee was in the area of the fall 10 to 15 minutes before the fall. *Id.* The court found that this sighting was insufficient to establish constructive notice on its own.

The court found the expert’s report inadmissible as unsupported by the expert’s preceding testimony. The expert admitted that Target employee depositions demonstrated that it was employees’ responsibility to look for and clean up slip and fall hazards. As a result, the court found the expert’s report on the inadequacy of Target’s training in conflict with his own admission. The court then went on to find that the maximum of 10 to 15 minutes between when a person who may have been a Target employee could have seen the grapes, and when plaintiff fell, was an insufficient amount of time to establish constructive notice, so that Target was entitled to summary judgment.

3. **Judgment Entered in Favor of Post Office Defendant After Plaintiff Failed to Prove an Unreasonable Risk of Harm from Floor Mat at Post Office Doorway**

*Gray v. United States*, No. 11-CV-4261, 2013 WL 4506778 (N.D.Ill. Aug. 22, 2013) – Plaintiff fell and was injured on the premises of a United States Post Office location, and filed this action for negligence against the United States. Plaintiff suffered from post-polio syndrome and walked with a limp and with the assistance of a cane and braces on both his legs. *Gray*, 2013 WL 4506778 at *1. One of several floor mats used at the Post Office was located near the glass double doors inside the building, and plaintiff crossed this mat without incident when he arrived. *Id.* at *2. However, plaintiff fell and struck the frame of the door as he exited, and alleged that a bubble in the mat had caused his fall. *Id.*
In a bench trial, the district court ruled that plaintiff had failed to meet his burden of proof that an unreasonable risk of harm existed at the time of his injury, and failed to introduce evidence that the Post Office employees had any knowledge of that risk. In so finding, the court considered testimony that the mat was perfectly flat in appearance to the manager of the Post Office, and that there had never before or since been any incident with the floor mats or any bubbles. *Id.* at *4*. The court found that the only evidence a bubble in the mat existed was plaintiff’s own unsubstantiated assertion to that effect. The court went on to find that, on the evidence before it, plaintiff’s fall was more likely than not to have been caused by his own medical disorder rather than any condition. *Id.* The court entered judgment in favor of the United States.

4. **Defendant Medical Center Granted Summary Judgment on Constructive Notice Issue in Premises Liability Arising From Injury During Construction of Particle Accelerator at Medical Center**

*Anderson v. Chicago Land Trust Co.*, No. 10 C 5415, 2013 WL 5423848 (N.D.Ill. Sept. 27, 2013) – Plaintiff was injured during the rigging and lifting of a bundle of scaffolding which was sized incorrectly for a job. *Anderson*, 2013 WL 5423848 at *1. Because the scaffold lift was in close quarters inside a trench dug for the installation of a linear particle accelerator for use in various imaging equipment at the defendant Medical Center, the plaintiff was in close proximity to, and needed to stand on, the bundle of scaffold while rigging it to be lifted out. Plaintiff sustained injuries to his right hand when, while holding the lifting strap, he stood on the scaffold bundle and the scaffold material shifted. *Id.* Plaintiff asserted that the scaffold was “bowed” and thus defective, and that this defective condition caused his injury. *Id.* at *2.*

The Defendant Medical Center argued that it had neither actual nor constructive notice of the “bowed” condition of the scaffold and therefore owed no duty to correct this condition. *Id.* at *10*. There was no evidence that defendant had actual notice of the condition of the scaffold. However, plaintiff argued, defendant had constructive notice because the scaffold was present in that condition “for a while” and “for some time before the occurrence,” based on the testimony of another person present at the site, who thought the scaffold was on-site for a total of “maybe a month.” The court, however, found this testimony unpersuasive on the issue of constructive notice, as the testimony did not establish how long the scaffold was present prior to plaintiff’s accident. *Id.* As a result, the court found that plaintiff had no evidence establishing constructive notice, and granted the Medical Center summary judgment on plaintiff’s premise liability claim. *Id.* at *11.*
5. Defendants Machinery Owner and Warehouse Denied Motion to
Dismiss Because Plaintiff Truck Driver's Injury Was Foreseeable and
Because Plaintiff Was a Third-Party Beneficiary of Defendants’
Storage and Shipping Agreement

*Smith v. MHI Injection Molding Machinery, Inc.*, No. 10-C-8276, 2013 WL 5310174, (N.D.Ill. Sept. 23, 2013) – Plaintiff, a truck driver, was injured when he slipped and fell while tarping a large piece of defendant Mitsubishi’s equipment he was loading for transport at defendant Casini’s warehouse. Casini employees refused to assist plaintiff with a crane used for that purpose on other trucks, and were aware of a slippery, oily condition which existed on the tarp and associated surfaces. *Smith*, 2013 WL 5310174 at *2. The agreement between Mitsubishi and Casini called for loading and unloading by Casini, and for tarping of the equipment before shipping. Plaintiff was not allowed to operate the warehouse crane. Plaintiff enlisted the help of another truck driver to tarp the equipment by hand, and was injured during the attempt when he slipped and fell to the concrete floor. On these facts, the court found that plaintiff’s injury was foreseeable and that a duty existed sufficient to survive a motion to dismiss. *Id.* at *3.

The court found that because the agreement between Casini and Mitsubishi provided for “loading and unloading of machinery,” including an express provision which required tarping which emanated from Mitsubishi itself, the mere loading of the equipment without tarping would have been at odds with the duty owed to plaintiff to provide “loading” of the equipment. *Id.* at *3. Instead, the court found, the loading of the machinery was by definition for purposes of transportation, encompassed both by the express agreement between Mitsubishi and Casini and the plain meaning of “loading,” and that as a result, plaintiff was a clearly intended third-party beneficiary of the agreement between Mitsubishi and Casini. *Id.* at *4. The court noted that plaintiff’s allegations that “custom and practice” in the industry and at Casini of assisting with tarping loads supported his showing that the cause should not be dismissed. *Id.* at *5 at FN5.

The court found that the plaintiff’s claims were sufficient to plead notice as to both foreseeability and duty and denied defendants’ Rule 12(b)(6) motion to dismiss based on failure to state a claim for which relief can be granted. *Id.* at *4-5. The court found that defendants’ motions failed to contemplate that plaintiff’s allegations were sufficient in the Federal scheme of notice-pleading. *Id.* at *4. The court further noted that though Illinois does not recognize an independent “willful and wanton” cause of action, willful and wanton conduct is a fact determination for the jury and not an issue to be disposed under Rule 12(b)(6) motions to dismiss. *Id.* at *5.

C. Federal Memorandum Opinions and Orders Not Reported in the Official Reporters

1. *Hickey v. Target Corp.*, No. 12-CV-4180, 2014 WL 1308350 (N.D.Ill. Apr. 1, 2014) – The court denied Target summary judgment because a genuine issue of material fact existed given that reasonable minds could differ as to whether Target’s employee’s actions were
a sufficient effort to warn of and prevent the slip and fall caused by detergent and suffered by the plaintiff.

2. *Parker v. Four Seasons Hotels, Ltd.*, No. 12-CV-3207, 2014 WL 1292858 (N.D.Ill. March 31, 2014) – The court denied defendant’s summary judgment motion given that a genuine issue of material fact existed as to whether the defendant had prior notice of exploding sliding glass doors. In doing so, the court considered hearsay finding it admissible pursuant to the residual exception to the hearsay rule, FRE 807.

3. *Fowler v. United States*, 08-CV-2785, 2014 WL 683751, (N.D.Ill Feb. 21, 2014) – Judgment entered in favor of defendant when plaintiff truck driver employed by US Postal Service contractor, injured while delivering mail to a distribution center when he tripped over a two-inch lip on a loading dock plate, failed to show that the condition posed an unreasonable risk of harm and failed to show that the government breached any duty owed to plaintiff.

4. *Geleta v. Meijer, Inc.*, No. 11-CV-6567, 2013 WL 6797111, (N.D.Ill Dec. 23, 2013) – Summary judgment denied under the “distraction exception” to the open and obvious doctrine, despite plaintiff’s admission that she could have seen the spill she slipped on had she been looking at the floor, and because a reasonable jury could find that a duty of ordinary care arose based on the presence of a Meijer employee near a spill which caused plaintiff to slip and fall, coupled with the length of time the spill sat near that employee’s work area.
Prior to law school, Gary enlisted in the Army in 2000 and served as a Cavalry Scout until 2004, which included being selected as the Distinguished Honor Graduate from the Army’s Primary Leadership Development Course and service in combat operations during Operation Iraqi Freedom.

A native of Spring Valley, Illinois, Gary began his legal career working as a law clerk for the DeKalb County State’s Attorney’s Office and a DeKalb County, Illinois law firm. During law school, Gary was the Managing Editor of the *NIU Law Review*, and his comment, “Criminal Discovery and the Costs of Reproduction: A Burden Taxpayers Should Not Have to Bear,” was published in the *NIU Law Review*. He was a finalist in the 2006 NIU College of Law Intramural Moot Court Competition, and a regional finalist in the 2007 National Trial Competition. He served as a board member of the Student Bar Association during the 2005-2006 school year.

Gary joined the firm in 2007 and practices in a variety of areas of civil tort litigation including the defense of matters involving product liability, premises liability, trucking and transportation claims and professional liability. Gary’s expertise in the defense of asbestos-related product and premises claims has made him a valuable member of many of the firm’s client defense teams. Gary serves as the primary point of contact for several asbestos clients and takes the lead in the coordination of responses and presenting objections to motions impacting all of the firm’s asbestos clients, such as those related to setting trial dates and expediting depositions. Gary has been one of the designated attorneys prepared to argue critical motions related to the asbestos litigation in Madison County, such as those relating to forum issues. In addition, he played a key role in the firm’s efforts to implement legislative change in the laws related to Worker’s Compensation claims in Missouri and the impact on employers facing direct asbestos claims.

Gary is involved in all aspects of the defense of cases in his various practice areas, including the preparation and presentation of all necessary motions, defending the firm’s clients at depositions, taking depositions of opposing parties and working with experts in order to prepare for trials in Illinois and Missouri.

**Publications**

**Public Speaking**
- “Class Speaker” 2007 NIU College of Law Commencement Ceremony (2007)

**Professional Associations**
- Illinois State Bar Association (Insurance Law Committee Member)
- Madison County Bar Association

**Court Admissions**
- State Courts of Illinois and Missouri
- United States District Court, Southern District of Illinois

**Education**
- Juris Doctor *(magna cum laude)*, Northern Illinois University, 2007
- Bachelor of Arts-Administration of Justice, Southern Illinois University, 1999

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