SPRING TRAINING: 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.

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I. PREMISES LIABILITY IN ILLINOIS

A. Premises Liability Act

Historically, a landowner's duties relied upon the status of the injured party as invitee, licensee, or trespasser. In 1984, the Premises Liability Act, 740 ILCS 130/1, abolished the common law distinction between duties owed to invitees and licensees, but retained the common law duty owed to trespassers. The Premises Liability Act provides that the possessor of the premises owes a duty "of reasonable care under the circumstances regarding the state of the premises or acts done or omitted on them," to all entrants on the premises other than trespassers. 740 ILCS 130/2. Although an owner or occupier of land does not ensure the safety of such a person, he or she may become liable to invitees and licensees because of a condition on his or her land.

In determining whether a premises owner or possessor owes a duty, the Illinois courts will look at the following factors: (1) whether an injury is reasonably likely; (2) Whether an injury is reasonably foreseeable; (3) the magnitude of the burden of guarding against it; and (4) the consequences of placing that burden on the defendant. *Washington v. City of Chicago,* 188 Ill. 2d 235 (1999).

B. Foreseeability and Notice

A large majority of cases turn on whether an injury resulting from a condition on the premises was foreseeable. Foreseeability is determined by whether it was "objectively reasonable" to expect an injury to occur and not whether an injury might conceivably occur. *Genaust v. Illinois Power Co.,* 62 Ill. 2d 456 (1976) (no duty to warn of danger of uninsulated power lines because it was not objectively reasonable to expect ordinarily intelligent and experienced adult to bring conductor of electricity close to electric lines).

Notice is often significant when the allegedly dangerous condition is a foreign substance on the floor. The absence of prior complaints or prior problems can be used to show lack of notice. However, as the Illinois Supreme Court explained in *Marshall v. Burger King Corp.,* 222 Ill. 2d 422 (2006), it is not absolute in the analysis. In *Marshall,* a restaurant patron was killed when a vehicle crashed through the wall of the restaurant and struck that patron, and the estate sued the restaurant owner alleging that the restaurant was located in a high-traffic area; that "various aspects of its design, including its 'brick half wall,' and its sidewalk, render[ed] it susceptible to penetration by out-of-control automobiles; that defendants took no precautions, such as installing 'vertical concrete pillars or poles,' to prevent automobiles from entering the restaurant; and that defendants had knowledge of all of the foregoing." *Marshall*, 222 Ill. 2d at 445-46. The Illinois Supreme Court found potential liability and rejected the argument that it should not impose a duty because there had not been similar accidents, or near misses, at the premises. The court explained that even if there was not some actual notice of a problem, the defendants

had reason to know that the negligent conduct of third persons was likely to endanger defendants' customers based on the "place and character of defendants' business." *Id.* at 445.

C. Open and Obvious Exception

Even if an injury was reasonably foreseeable, the open and obvious doctrine may apply. The open and obvious defense provides that even if there is a foreseeable risk of harm to a lawful entrant on the premises, no duty will apply to the premises owner if the allegedly dangerous condition was open and obvious. The existence of an open and obvious danger is not a *per se* bar to the finding of a legal duty on the part of a defendant; "[i]n assessing whether a duty is owed, the court must still apply traditional duty analysis to the particular facts of the case." *Jackson v. TLC Associates, Inc.,* 185 Ill. 2d 418, 425 (1998).

Application of the open-and-obvious rule affects the first two factors of the duty analysis: (1) the foreseeability of injury and (2) the likelihood of injury. Where the condition is open and obvious, the foreseeability of harm and the likelihood of injury will be slight, which weighs against the imposition of a duty. However, where an exception to the open-and-obvious rule applies, the outcome of the duty analysis with respect the first two factors is invalidated.

D. Distraction Exception and Deliberate Encounter Exception

There are two exceptions to the open and obvious defense—the deliberate encounter exception and the distraction exception. Thus, even if a court finds that the condition on the land causing injury was open and obvious, the court may still find that a duty of reasonable care exists if one of the two exceptions exists.

The deliberate encounter exception applies when a possessor of land has reason to anticipate or expect that the invitee will proceed to encounter an open and obvious danger because to a reasonable person in their position the advantages of doing so would outweigh the apparent risk. See Restatement (Second) Torts § 343A, cmt. f (1965); see also *LaFever v. Kemlite Co.*, 185 Ill. 2d 380 (1998).

Economic compulsion, such as loss of employment, lies at the root of the invitee's decision to deliberately encounter the obvious danger. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380 (1998). For example, in *Kotecki v. Walsh Construction Co.*, 333 Ill. App. 3d 583 (1st Dist. 2002), the plaintiff was a painter and was injured when he lost his footing when descending a ladder with his paint supplies and equipment. The plaintiff assumed he was injured because of an uneven surface created by a dock leveler on the job site. The court determined that there existed no exception to the open and obvious rule applied and refused to find that the landowner owed him a duty. The plaintiff failed to offer any evidence that he made a reasonable decision to deliberately encounter an obvious danger. In fact, the evidence showed that the plaintiff had the right to paint at a different time of day if he so desired.

By contrast, the distraction exception applies when the possessor of land has reason to expect that the invitee's attention may be distracted, so that he or she will not discover what is obvious, will forget what he or she has discovered, or will fail to protect himself or herself against it. See Restatement (Second) Torts § 343A, cmt. f (1965).

Until recently, the landmark decision involving the distraction exception was *Ward v. K-Mart Corp*., 136 Ill. 2d 132 (1990), where a shopper at a retail store was carrying a large mirror he had purchased and walked into a concrete pole. The court found that while the concrete pole was open and obvious, the distraction exception applied because the retail store defendant could reasonably foresee that one of its customers could become distracted while carrying their purchase out of the store. *Ward*, 136 Ill. 2d at 153-54. With such a broad interpretation of the distraction exception, trial courts were increasingly reluctant to grant summary judgment under the open and obvious rule until the *Bruns* decision in 2014.

In *Bruns v. City of Centralia*, 2014 IL 116998, the plaintiff tripped on a raised and cracked part of the sidewalk that came into being as a result of a tree root. The plaintiff acknowledged seeing the crack not only on this occasion, but on at least nine prior occasions. When she tripped, plaintiff was looking at the entrance of the building toward which she was walking, and argued that doing so was both a distraction and a reasonable one which, she argued, created liability on the part of the city in spite of the open and obvious nature of the hazard. The Illinois Supreme Court disagreed, finding plaintiff failed to identify any circumstance which required her to divert her attention from the open and obvious defect or otherwise prevented her from avoiding the defect. The court also noted that holding the city liable for protecting pedestrians from open and obvious sidewalk defects would create an unreasonable financial burden on the city.

II. SNOW AND ICE

A. Natural Accumulation Rule

Because of the location and climate of Illinois, the law applicable to claims for injuries resulting from slip and falls on ice and snow is well-developed. Generally, in order for an owner or occupier of land to be held liable for a slip and fall on snow or ice, the owner must be shown to have, in some way, caused an unnatural accumulation of ice or snow, or to have aggravated a natural condition. *Kellerman v. Car City Chevrolet-Nissan, Inc*., 306 Ill. App. 3d 285 (5th Dist. 1999). Notice of an unnatural accumulation of snow or ice is required to impose liability upon the landowner or occupier.

As a general rule, the owner or occupant is under no duty to remove ice or snow that has resulted from natural accumulations. This general rule has been applied without regard to any ongoing precipitation or the length of time the natural accumulation has existed. *Krywin v. Chicago Transit Authority,* 238 Ill. 2d 215 (2010).

The premises owner that removes snow and ice assumes a duty to do it nonnegligently, and the entrant then has a case if he or she can show that the patch of snow or ice he or she fell on was an "unnatural accumulation." A simple pile of plowed or shoveled snow can cause an unnatural accumulation. A plaintiff may often sustain a case simply by testifying that he or she believes that the ice on which he or she fell came from a snow pile caused by the landowner, which then melted and then refroze where the plaintiff encountered it. *Russell v. Village of Lake Villa,* 335 Ill. App. 3d 990 (2d Dist. 2002). To establish liability for a fall on snow or ice, the claimant must be able to establish an identifiable cause of the water formation and must show that the accumulation was due to unnatural causes or a natural cause that was aggravated by the proprietor and that the proprietor had actual or constructive notice of the condition. *Gilberg v. Toys "R" Us, Inc.,* 126 Ill. App. 3d 554 (1st Dist. 1984).

To prevail in a snow/ice slip-and-fall case against the premises owner, the plaintiff must establish: (1) That was an unnatural accumulation of [ice] [snow] on the [property] [land] [building] [other] which presented an unreasonable risk of harm to people on the property; (2) The defendant knew or in the exercise of ordinary care should have known of both the condition and the risk; (3) The defendant could reasonably expect that people on the property [would not discover or realize the danger] [or] [would fail to protect against such danger]; (4) The defendant was negligent in one or more of the ways; (5) The plaintiff was injured; (6) The defendant's negligence was a proximate cause of the plaintiff's injury. I.P.I. - Civil No. 125.02. *See Williams v. Sebert Landscape Co.,* 407 Ill. App. 3d 753 (1st Dist. 2011).

B. Snow and Ice Removal Act

In 1979, the General Assembly passed the Snow and Ice Removal Act, which provides immunity to residential property owners from liability in connection with their snow or ice removal efforts. 745 ILCS 75/1, 2. However, the owners still owe a duty of reasonable care to prevent unnatural accumulation of ice and snow on their property where the owner has actual or constructive knowledge of the dangerous condition. *Graham v. City of Chicago*, 346 Ill. 638 (1931).

The two main theories for liability resulting from the accumulation of ice and snow include: (1) defective conditions or negligent maintenance of the property, and (2) a voluntary undertaking theory. The Illinois Supreme Court recently provided clarification on how the immunity provided by the Snow and Ice Removal Act applies to these two theories of liability in *Murphy-Hylton v. Lieberman Management Services, Inc*., 2016 IL 120394 (discussed below).

III. CASE LAW IN ILLINOIS

A. Slip/Trip and Falls

1. *Schade v. Clausius*

Schade v. Clausius, 2016 IL App (1st) 143162 – The plaintiff Lana Schade was a guest onboard a boat that was scheduled to sail Lake Michigan on the Fourth of July. Schade, an inexperienced

boater, slipped and fell on the swim platform in back of the boat and broke her fall with her right hand. After watching the fireworks, the boaters returned to shore. A few days after the fall, Schade said she went to a doctor and learned that she had torn her rotator cuff. She had surgery to repair it, but suffered complications and had chronic pain.

Plaintiff filed a negligence complaint against the boat owners, Mark and Paulette Clausius. The trial court granted the defendants' motion for summary judgment. Schade appealed, arguing that there existed genuine issues of material fact as to whether the defendants were negligent for creating a dangerous condition that proximately caused her injury. Furthermore the defendants failed to warn her that the crowded swim platform could become dangerously slippery with water. The Appellate Court, First District, held: (1) the wet nature of the swim platform on the boat was open and obvious, (2) the boat owners did not have a duty to warn guests about the dangers of standing on a crowded swim platform that could become wet, and (3) the distraction exception to the open and obvious rule did not apply. The court noted that there was a likelihood that the platform would be wet because people were going in and out of the water. Schade's failure to exercise due care, notice an open and obvious condition, and wear proper footwear caused or contributed to her injury.

2. *Offord v. Fitness International, LLC*

Offord v. Fitness International, LLC, 2015 IL App (1st) 150879 – Health club patron Herbert Offord alleged negligence and willful and wanton conduct against L.A. Fitness after he slipped on an accumulation of water from a leaking roof while he was playing basketball on the gymnasium floor. The trial court granted L.A. Fitness's 2-619 motion to dismiss on the basis that plaintiff signed a waiver of liability. On appeal, Offord argued that the trial court erred in granting the motion because the injury he suffered was not contemplated by the guest wavier form.

The first district agreed and reversed. The court concluded that it was not reasonably foreseeable that a patron could have been injured from slipping on water caused by a leaky roof and therefore the plaintiff should be held to have waived liability. Although a party may enter into a contract to avoid liability for negligence, such exculpatory clauses "must contain clear, explicit, and unequivocal language referencing the type of activity, circumstances, or situation that it encompasses and for which the plaintiff agrees to relieve the defendant from a duty of care. Citing *Platt v. Gateway International Motorsports Corp*., 351 Ill. App. 3d 326, 330 (5th Dist. 2004).

3. *Negron v. City of Chicago*

Negron v. City of Chicago, 2016 IL App (1st) 143432 – Melanie Negron was walking down a crowded street when she heard someone behind her shouting obscenities and yelling to get on the ground. Startled and concerned for her safety, she looked over her shoulder and kept walking. While her attention was diverted, she tripped over a two-inch high uneven piece of sidewalk fracturing both elbows. She sued the City of Chicago for failing to properly maintain the sidewalk. The trial court entered summary judgment on behalf of the City and held that

there was no duty to protect Negron from an open and obvious sidewalk defect. It also held the distraction exception did not apply because it could not be foreseen that the obscenity-shouting individual would distract Negron and cause her to trip.

The first district affirmed, concluding that a possessor of land is not liable for injuries caused by a danger that is known or obvious. It was uncontested that Negron was distracted; however it was not foreseeable that the distraction would be caused by a crowd shouting or making loud noises.

B. Snow and Ice Removal Act

1. *Murphy-Hylton v. Lieberman Management Services, Inc.*

Murphy-Hylton v. Lieberman Management Services, Inc., 2016 IL 120394 – *Murphy-Hylton* is the landmark case from 2016. The plaintiff, Pamela Murphy-Hylton, slipped and fell while walking on the sidewalk outside of her condominium. She brought a negligence claim against the property management company and the condominium, alleging they were negligent for allowing water to run onto the sidewalk from nearby downspouts which then froze and formed an unnatural accumulation of ice, causing her to fall. The defendants filed a motion for summary judgment arguing, in part, that Murphy-Hylton's slip and fall was barred by the immunity provided to residential owners and operators under the Snow and Ice Removal Act, 745 ILCS 75/0.01, which awards immunity to residential property owners in cases where a pedestrian claims injury from negligent snow and-or ice removal efforts. Though there was a split in the authority regarding immunity under the act, the trial court granted the summary judgment motion.

The Appellate Court, First District, reversed, finding that Murphy-Hylton's complaint did not allege negligence due to snow or ice removal, but instead alleged that the defendants negligently maintained or constructed their premises. Therefore, the Act did not apply.

The Illinois Supreme Court affirmed, noting the purpose of the Act is to encourage residential property owners to remove "natural accumulations" of snow and ice from their walkways – an action they have no duty to perform – to promote safety. Immunity provided for in the Act did not apply in this case because Murphy-Hylton was not alleging that the defendants were negligent in removing the snow or ice, but rather, she was alleging the negligent maintenance and design of the premises. For the immunity to apply under the Act, the plaintiff must allege the snow or ice that caused her injury was the result of the acts or omissions in defendants' actual snow removal actions, not the result of a defect on the premises.

2. *Reed v. Country Place Apartments-Moweaqua I, L.P.*

Reed v. Country Place Apartments-Moweaqua I, L.P., 2016 IL App (5th) 150170 – The plaintiffs, Terry and Carolyn Reed, alleged that Terry Reed was injured when he slipped and fell on an icy ramp which led to the parking lot of an apartment building owned and/or managed by the defendants. The Reeds alleged that the defendant negligently maintained the gutter that hung

over the passageway to the ramp. The gutter was packed with snow and dripping onto the ramp, causing an unnatural accumulation of ice and snow. The Reeds also filed suit against the contractor who was responsible for removing snow and ice.

The trial court granted summary judgment on behalf of the defendants. Citing to the Snow and Ice Removal Act, the court reasoned that the plaintiff fell as a consequence of an accumulation of snow and/or ice after removal efforts had been made. The fifth district reversed, noting that the allegations of the complaint related to premises defects which support a common law claim wholly independent from the Act. Noting the appellate court decision in *Murphy-Hylton,* the court held that there was no basis to conclude that the General Assembly intended to abrogate the common law duty to prevent unnatural accumulations caused by design deficiencies or negligent maintenance of property.

Emily J. Perkins

- Associate

Emily concentrates her practice in the area of employment/labor law, governmental law, and Section 1983 civil rights litigation. She is involved in various employment matters, including hostile work environment issues, discrimination, and retaliation claims against employers. She also defends clinical therapists and law enforcement officers in Section 1983 deliberate indifference and failure to protect claims. In addition to federal practice, Emily defends premise liability and personal injury claims in state court and represents townships, villages, road districts, and other governmental entities in a variety of litigation areas. She drafts and negotiates a wide variety of contracts ranging from severance agreements to large business contracts, including purchase, consulting, license, and software agreements.

Emily joined the firm's Peoria office as an associate in 2014, after serving as a summer law clerk in 2012 and 2013. As a member of the Trial Advocacy Society at Northern Illinois University College of Law, she had the opportunity to compete in the Student Trial Advocacy Competition for the American Association for Justice in Chicago, Illinois. While in law school, Emily also served as the President of the Student Bar Association. Her article "*Regulating Appearance in the Workplace: An Employer's Guide to Avoid Employment Discrimination Lawsuits*" was chosen as a winner in the National Law Review writing competition and published in February of 2014.

Significant Cases

- *Adams v.* ___ (C.D. Ill 2017) - Successfully defended grievance examiner of a state facility in two religious claims: the Religious Land Use and Institutionalized Persons Act claim and a First Amendment claim for the freedom of religion. The Central District granted the defendant's summary judgment motion and agreed the policies at the facility did not have any effect on the plaintiffs' religious beliefs. Furthermore, the facility's failure to initiate a specific non-denominational Christian church service for these plaintiffs was not a violation of the plaintiffs' First Amendment right because there are currently several Christian church services for the plaintiffs to attend.
- *Hughes v.* ___ (C.D. Ill 2017) - Defended grievance examiner in a claim relating to the quality of food at a state facility. The court agreed that the grievance examiner had no control over the food service. Additionally, the grievance examiner properly addressed the plaintiff's concerns outlined in his grievances and attempts to resolve. The court granted the defendant's summary judgment motion.
- *Poole v.* ___ (2015) - Successfully argued summary judgment motion in state court as it related to plaintiff's cause of action for deliberate indifference for failing to protect him from another inmate as well as deliberate indifference to his medical needs against jail personnel. The court agreed that there was no evidence that the plaintiff's attacker was a specific risk of harm to the plaintiff and that the defendants were not personally involved in administering plaintiff's medication or medical treatment.
- *Strickland v.* ___ (C.D. Ill 2016) - Defended jail personnel in a claim for deliberate indifference to plaintiff's serious medical needs due to a back brace that was allegedly confiscated during his incarceration. The Central District granted defendants' summary judgment motion based on the fact that the defendants lacked personal involvement as it related to any alleged confiscation of a back brace as well as any personal involvement in his medical care or treatment.

Publications

- "The Motor Carrier Overtime Exemptions: The Importance of Proper Employee Classification," Heyl Royster Trucking Practice Newsletter (2016)
- "How Can Employers Respond to Race Discrimination? Promote Diversity," *Employer's Edge* - Heyl Royster Employment Newsletter (2016)
- "High Heels in the Workplace: Can Employers Still Require Women to Wear Them?"

Employer's Edge - Heyl Royster Employment Newsletter (2016)
- "Do Not Hire: Illinois Supreme Court's Decision Regarding Mandatory Grievance Arbitration," *A Lesson Learned Newsletter/Employer's Edge* - Heyl Royster Education & Employment Newsletters (2016)
- "Seventh Circuit Addresses Public Employee Speech," *Illinois Defense Counsel Quarterly* (2016)
- "Severance Agreement Upheld by Seventh Circuit Proves Big Win for Employers," *Employer's Edge* - Heyl Royster Employment Newsletter (2016)
- "An Overview of New Laws Affecting Illinois Employers in 2016," *Employer's Edge* - Heyl Royster Employment Newsletter (2016)
- "Survey of Illinois Law: Employment Law," *Southern Illinois University Law Journal* (2015)
- "It's What You Say AND How You Say It: How to Properly Conduct Business Succession Planning," *Employer's Edge* - Heyl Royster Employment Newsletter (2015)
- "Whose Right of Way is it Anyway?," *Heyl Royster Governmental Newsletter* (2015)
- "Supreme Court Limits the Scope of Personal Jurisdiction," DRI, *The Voice* - Weekly Feature (2015)
- "Regulating Appearance in the Workplace," *Employer's Edge - Heyl Royster Employment Newsletter* (2015)
- "Supreme Court Places Burden on Employers to Address Religious Accommodations," *Employer's Edge - Heyl Royster Employment Newsletter* (2015)

Public Speaking
- *"Mitigating Volunteer Liability"* IASB/IASA/IASBO's Joint Annual Conference (2016)
- *"Sexual Harassment Awareness and Prevention"* Heyl Royster Employers' Day Seminar (2016)
- *"Social Media - Must Know Legal and Insurance Risks"* Kuhl & Company Insurance Quarterly Seminar (2016)
- *"The Lindbergh Kidnapping/Murder Trial and Transactions with Clients"* PCBA and MCBA Professional Ethics Seminars - Tried and True: Part III (2016)
- *"Harassment-Free & Diversity Workplace Awareness Training"* Peoria Area Convention and Visitors Bureau (2016)
- *"2016 Legislative Update for Public Employers"* Heyl Royster Lunch & Learn Governmental Seminar (2016)
- *"New Laws Affecting Illinois Employers"* Heyl Royster Annual Employment Seminar/Webinar (2015)

Professional Recognition
- Quoted in the *Madison Record* in article entitled, "Seventh Circuit finds severance agreement enforceable and valid in case against CVS."
- Quoted in the *Hanford, California Sentinel* regarding employment discrimination laws and appearance in the workplace.
- Northern Illinois University College of Law recipient of the "Outstanding Contribution to the College of Law Community" Award (2014)
- Winner of the Winter National Law Review 2014 Writing Competition

Professional Associations
- Federal Bar Association
- Illinois Association of Defense Trial Counsel (Local Governmental Law Committee 2016-present; Employment Law Committee 2016-present)
- Abraham Lincoln Court
- Peoria County Bar Association (Young Lawyers Committee, Vice Chair, 2016-Present; Community Outreach Chair, 2014-2015; Fitness, Health & Wellness Committee, 2015-Present; Project Santa co-chair, 2015; Winter Series Civil Practice CLE co-chair, 2016)
- Illinois State Bar Association
- American Bar Association
- Women's Bar Association of Illinois
- 10th Judicial Circuit Pro Bono Subcommittee

Court Admissions
- State Courts of Illinois
- United States District Court, Central District of Illinois

Education
- Juris Doctor, Northern Illinois University College of Law, 2014
- Bradley University, Master of Business Administration, 2011
- Illinois State University, Bachelor of Science-Business Administration, 2008