

# MARGOLIS EDELSTEIN

## PREMISES LIABILITY

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## PREMISES LIABILITY - DEFENSE PERSPECTIVE

In evaluating a case from a defense perspective one must review several issues in determining whether the potential for liability exists.

### **I. STATUS OF CLAIMANT**

In reviewing a premises liability case, one must determine the status of the claimant. That is, under Pennsylvania law, the determination of the duty of possessor of land toward a third party entering the land depends on whether the entrant is a trespasser, licensee or invitee. *Updyke v. BP Oil Company*, 717 A.2d 546, 548 (Pa. Super. 1998).

#### **A. Trespassers**

The Restatement (Second) of Torts defines a trespasser as “a person who enters or remains upon land in the possession of another without the privilege to do so created by the possessor’s consent or otherwise.” Restatement (Second) of Torts § 329. See *Updyke v. BP Oil Company, supra*, 717 A.2d 549. Also, see *Cresswell v. END*, 2003 Pa. Super. 308, 2003 Pa. Super. LEXIS 2536, 831 A.2d 673 (2003).

In Pennsylvania, a trespasser may recover for injuries sustained on land only if the possessor of land was guilty of wanton or willful negligence or misconduct. *Rossino, et. al. v. R.C. Titler Construction, Inc., et. al.*, 553 Pa. 168, 718 A.2d 755 (1998) citing *Engle v. Parkway Company*, 439 Pa. 559, 266 A.2d 685 (1970).

The Pennsylvania Superior Court in *Ott v. Unclaimed Freight Company*, 577 A.2d 894, 894 (Pa. Super 1990) defined wilful or wanton misconduct as:

Willful misconduct means that the actor desired to bring about the resultant harm, or was at least aware that it was substantially certain to ensue; this means that willful conduct requires actual prior knowledge of the trespasser’s peril . . . .

Wanton misconduct by contrast, means that an actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences, and not a desire to bring them about; as such, actual prior knowledge of the particular injured person’s peril is not required. It is enough that the actor realizes, or at least has knowledge of sufficient facts that would cause a reasonable man to realize, that a period exists, for sufficient time beforehand, to give the

actor a reasonable opportunity to take means to avoid the injured person's accident; the actor is wanton for recklessly disregarding the danger presented . . . .

*Ott v. Unclaimed Freight Company, supra*, 577 A.2d at 897; *Graham v. Sky Haven Coal, Inc.*, 386 Pa. Super. 598, 563 A.2d 891, 895 (1989).

For a defendant, if at all possible, it is best to establish that a plaintiff is a trespasser as opposed to a licensee or invitee.

Comment c of The Restatement (Second) of Torts § 329 notes that:

In determining whether the person who enters or remains on land is a trespasser within the meaning of this action, the question whether entry had been intentional, negligent or purely accidental is not material except as it may bear upon the existence of a privilege to enter . . . so far as the liability of the possessor of land to the intruder is concerned, however, the possessor's duty, and liability, will be the same regardless of the manner of entry so long as the entry itself is not privileged.

## **B. Licensee**

A licensee is a person who is privileged to enter or remain on the land by virtue of a possessor's consent. Restatement (Second) of Torts § 330. See *Updyke v. BP Oil Company, supra*, 717 A.2d at 549. Also, see *Cresswell v. END, supra*, 831 A.2d 695.

A "gratuitous licensee" is one who is upon the land of another solely for licensee's own purpose, in which the possessor has no interest either business or social. See *Sharp v. Luksa*, 440 Pa. 125, 269 A.2d 659 (1970). The fact that a licensee may perform some minor or incidental service for his host or possessor of land during a stay does not confer the status to that of an invitee or business visitor. *Id.*

The Restatement (Second) of Torts § 342 sets forth the basis of liability for possessor of land regarding a licensee. § 342 provides:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if,

- (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

- (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
- (c) the licensees do not know or have reason to know of the condition and the risk involved.

See *Rossino, et. al., v. R.C. Titler Construction Inc., et. al., supra*, 718 A.2d at 757. Also, see *Cresswell v. END, supra*, 831 A.2d at 675.

### **C. Invitee**

An invitee is either a public invitee or a business visitor. A public invitee is a person who is invited to enter or remain on the land as a member of the public for a purpose for which the land is held open to the public. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of land. Restatement (Second) of Torts § 332. Also, see *Updyke v. BP Oil Company, supra*, 717 A.2d at 549 citing *Palange v. Philadelphia Law Department*, 433 Pa. Super. 373, 640 A.2d 1305, 1307 (1994). Also, see *Cresswell v. END, supra*, 831 A.2d at 675.

Said invitee is owed the highest duty that is owed to any entrant upon the land. *Swift v. Northeastern Hospital of Philadelphia*, 456 Pa. Super. 330, 690 A.2d 719, 722 (1997).

Restatement (Second) of Torts § 343 provides that a possessor of land is liable for physical harm caused to his invitee by a condition on land if, but only if, he or she:

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize it involves unreasonable risk of harm to such invitee, and
- (b) should expect that they will not discover or realize the danger, or fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

See *Kiehner v. School District of Philadelphia*, 712 A.2d 830, 833-34 (Pa. Commw. 1998).

In order to obtain the status of a public invitee, the individual must “enter the premises upon invitation and ‘for a purpose for which the land is open to the public’”. *Updyke v. BP Oil Company, supra*, 717 A.2d at 549 citing *Palange v. Philadelphia Law Department, supra*, 640 A.2d at 1308; Restatement (Second) of Torts § 332(2).

Also, comment b to § 332 discusses the distinction between invitation and permission which is central to a determination of whether an entrant is an invitee or a licensee. That is, comment b states:

#### Invitation and Permission

Although invitation does not in itself establish the status of an invitee, it is essential to it. An invitation differs from your permission in this:

An invitation is conduct which justifies others in believing that the possessor desires them to enter the land; permission is conduct which justifies others in believing that the possessor is willing that they shall enter if they so desire.

See *Updyke v. BP Oil*, 717 A.2d 546, 549; Restatement (Second) of Torts §332, comment b. Also, see *Cresswell v. END*, *supra*, 831 A.2d at 675.

However, as set forth in Restatement (Second) of Torts § 343(a)(1) and Pennsylvania case law,

the possessor of land is not liable to the invitee for injuries caused by '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 §343 (1965). *Carrender v. Fitterer*, 503 Pa. 178, 469 A.2d 120 (1983).

It should also be noted that in determining whether an individual is an invitee as opposed to a licensee does not depend upon the possessor's interests and having the entrant on the land. Rather the relevant question is whether the possessor desired the presence of the public. *Updyke v. BP Oil Company*, *supra*, 717 A.2d at 550. In the case of *Updyke v. BP Oil Company*, the possessor of land argued that the Restatement and case law indicate that in order to qualify as an invitee the landlord must receive a benefit from the entrant's presence. However, the Court in *Updyke* found that while this language may be helpful in distinguishing between a business visitor and a licensee, this land owner's interests requirement need not exist to find an individual a public invitee. The Court cited comment d to §332 of the Restatement which provides that "where land is open to the public it is immaterial that the visitor does not pay for his admission, or that the possessor's purpose in so opening a land is not a business purpose, and the visitor's presence is in no way related to business dealings with the possessor or to any possibility of benefit or advantage, present or prospective, pecuniary or otherwise to the possessor. *Id.* Restatement (Second) of Torts § 332, comment d.

In reviewing the exercise of the duty of care, it should be noted that a possessor of land is not

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an insurer of the safety of those on its premises. *Swift v. Northeastern Hospital of Pennsylvania*, 456 Pa. Super. 330, 690 A.2d 719 (1997). In *Swift v. Northeastern Hospital*, *supra*, 690 A.2d at 719, the Court noted that the mere existence of an alleged harmful condition of a public place of business or the mere happening of an accident due to such a condition is neither evidence of a breach of the proprietor's duty of care nor is it a presumption of negligence. It is upon the Plaintiff to demonstrate the existence of a dangerous condition and that the proprietor had a hand in creating the harmful condition or had actual notice or constructive notice of it. At times it may be difficult for a claimant to establish actual notice of a dangerous condition. However, the claimant may establish constructive notice. That is, the possessor will be found to have constructive notice if it can be shown that the condition existed for sufficient length of time so that he should have known of its existence by the exercise of reasonable diligence. In that situation, he is charged with constructive notice of the defect. Usually, this is a question of fact determined by the jury. *Winkler v. Seven Springs, Inc.*, 240 Pa. Super. 641, 359 A.2d 440 (1976).

## II. NOTICE

As discussed above, it is upon the plaintiff to demonstrate the existence of a dangerous condition and that the proprietor had a hand in creating the harmful condition or had actual or constructive notice of it.

Assuming the plaintiff is unable to establish that the landowner created the harmful condition, the plaintiff must prove that the landowner had actual notice or construction notice of the condition. See *Swift v. Northeastern Hospital*, 456 Pa. Super. 330, 690 A.2d 719, 722 (1997).

As stated above, if the conduct of the landowner created or had a hand in creating the alleged condition, then there is no need for the plaintiff to prove notice. Furthermore, if the alleged condition is one that the possessor of land knows frequently reoccurs, then actual notice can be imputed to the landowner, and the invitee need not to offer additional proof of constructive notice. *Moultrey v. Great A&P Tea Company*, 422 A.2d 593 (Pa. Super. 1980). However, if a third person is responsible for the alleged condition on the land or it cannot be determined how the alleged condition came to be on the premises, then the plaintiff must prove that the landowner had either actual or constructive notice of the condition. *Moultrey v. Great A&P Tea Company*, *supra* 422 A.2d 593.

If there is actual notice, then there is no issue. However, if Plaintiff has no evidence of actual notice, then the plaintiff must establish constructive notice.

In analyzing whether or not constructive notice can be established by plaintiff, the courts have looked at such factors as length of time an alleged condition existed on the premises, and how the alleged condition was created.

In *Swift v. Northeastern Hospital*, *supra*, 690 A.2d at 719, Pennsylvania Superior Court found that the plaintiff had failed to establish actual or constructive notice. The Court found that the

estate presented no evidence as to how the water arrived on the floor nor as to how long the condition existed. It was further noted that there was no evidence that the area was not monitored or maintained by the hospital. The *Swift* Court held that without such proof, the estate could not establish a breach of legal duty owed to the decedent by the hospital, which was a condition precedent to a finding of negligence. *Swift v. Northeastern Hospital, supra*, 690 A.2d at 722-723.

Also, the Court in *Craig v. Franklin*, 555 F. Supp.2d 547 (E.D. Pa. 2008) found that the plaintiff had failed to establish actual or constructive notice. In said case, plaintiff sought recovery against the mall for injuries sustained when she slipped on a puddle of soda while walking through the mall. Defendant Mall filed a motion for summary judgment, asserting that there was no evidence that it caused the spill, had actual notice of the spill or had constructive notice of the spill. The Court noted that there was no evidence that the Mall caused the soda spill or had actual notice of it. Therefore, the issue was whether the Mall had constructive notice. The Court reviewed the factors to determine constructive notice, including the number of persons using the premises, the frequency of such use, the nature of the defect, its location on the premises, its probable cause and the opportunity which defendant, as a reasonably prudent person, had to remedy it. *Craig v. Franklin*, 555 F. Supp.2d at 549-550. The Court noted that one of the most important factors to consider is the time elapsing between the origin of the defect and the accident. *Craig v. Franklin*, 555 F. Supp.2d at 550, citing *Neve v. Insalaco's*, 771 A.2d 786, 791 (Pa. Super. 2001). The Court noted the importance of the duration of the hazard. Since the hazard only existed for a very short period of time before causing any injury, then the possessor of land, even “by exercise of reasonable care”, would not discover the hazard, and therefore, would owe no duty to protect any invitee from such hazard. *Craig v. Franklin*, 555 F. Supp.2d. at 550 citing Restatement (Second) of Torts § 343. Further, the Court cited *Lanni v. Pa. R.R. Co.*, 88 A.2d. 887, 889 (Pa. 1952) stating that the evaluation of these factors is within the providence of a jury. However, where the evidence introduced requires the jury to resort to conjecture, guess or suspicion, the determination must be made by the court. Accordingly, the Court in *Craig* granted the Mall’s motion for summary judgment finding that the plaintiff produced no circumstantial evidence of the duration of the spill sufficient to put the Mall on notice that a hazard had existed. The only evidence was that a liquid substance was spilled in the Mall and existed for some indeterminate length of time before plaintiff slipped on it.

### **III. DEFENSES**

#### **A. Comparative Negligence**

From a defense perspective most, if not all cases, will allow for argument for comparative negligence.

The Comparative Negligence Act, Section 1 provides:

The fact that a plaintiff may have been guilty of contributory negligence shall not bar a recovery by plaintiff where such negligence



was not greater than the causal negligence of defendant, or defendants against whom recovery is sought, but any damages sustained by plaintiff shall be diminished in proportion to the amount of negligence attributed to plaintiff.

From a defense perspective, defendants will argue that the plaintiff failed to exercise a degree of care for one's own safety which persons of ordinary prudence would exercise under similar circumstance. In evaluating the case, from a defense perspective, one must determine where the plaintiff was looking at the time of fall. Under Pennsylvania law, it is the duty of a person to look where he is walking to see that which is obvious. *Lewis v. Duquesne Incline Plane Company*, 346 Pa. 43, 44, 28 A.2d 925, 926 (1942). Also, see *Villano v. Security Savings Associates*, 268 Pa. Super. 67, 407 A.2d 440 (1979); and *Graham v. Moran Foods, Inc.*, 2012 WL 1808952 (E.D. Pa.) citing *Villano* in which the Superior Court held "It is hornbook law in Pennsylvania that a person must look where he is going." *Id.* at \*4.

If a condition is open and obvious and the plaintiff could have easily observed the condition had the plaintiff been more attentive, then a defendant can assert that the plaintiff should have realized the condition and taken the appropriate action to protect himself against it. In *Carrender v. Fitterer*, 503 Pa. 178, 469 A.2d 120 (1983) the Pennsylvania Supreme Court explained open and obvious. The Court claimed that a danger is obvious when "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence and judgment." *Carrender v. Fitterer, supra*, 469 A.2d at 123-24 (quoting Restatement (Second) of Torts § 343A comment b). And a danger is known when it is "known to exist" and "recognized that it is dangerous and the probability and the gravity of the threatened harm [is] appreciated." *Id.* at 124 (quoting Restatement of Torts § 343A comment b). "Although the question of whether a danger was known or obvious is usually a question of fact for the jury, the question may be decided by the court where reasonable minds could not differ as to the conclusion." *Id.* (citing Restatement ( Second) of Torts § 328B comments c, d). Also see *Graham v. Moran Foods, Inc., supra*, 2012 WL 1808952 at \*3; and *Havir v. Fountain Hill Development Associates*, 2012 WL 2115537 (Court of Common Pleas of Pennsylvania, Lehigh County, May 2, 2012.) In cases involving open and obvious, some trial courts have been willing to grant a motion for summary judgment as they have found under the "reasonable man" standard that the plaintiff should have observed such an "open and obvious condition" and avoided the condition. This is not the same as the argument for assumption of risk, which will be discussed below. See, *Graham vs. Moran Foods, Inc., supra*, 2012 WL1808952 (E.D. Pa. 2012), and *Havir vs. Fountain Hill Development Associates*, 2012 WL2115537 (Court of Common Pleas, Lehigh County, May 2, 2012).

## **B. Assumption of Risk**

As the Pennsylvania Superior Court in *Bullman v. Giuntoli, et. al.*, 2000 Pa. Super. 284, 761 A.2d 566 (2000) pointed out, the doctrine of assumption of risk has been very problematic and has fallen from the favor of some of the judiciary and legal commentaries. *Id.* at 569. However, although there may be question as to the viability of the assumption of risk, a defendant, wherever



applicable should attempt to assert this defense.

Under the Restatement of Torts there are four types of the assumption of risk. The Pennsylvania Supreme Court in *Howell v. Clyde*, 533 Pa.151, 620 A.2d 1107 (1993) (plurality opinion) set forth the four types of the assumption of risk as follows:

1. The plaintiff expressly consents to relieve the defendant of any obligation to exercise care and agrees to take the chance of injury from a known or possible risk.
2. The plaintiff voluntarily enters a relation with the defendant that he knows to involve risk and the plaintiff is regarded as tacitly agreeing to relieve the defendant of responsibility.
3. The plaintiff is aware of the risk created by the defendant and proceeds voluntarily to encounter it.
4. The plaintiff's voluntarily encountering a known risk that is unreasonable and amounts to contributory negligence, and the plaintiff is barred from imposing on the defendant a loss for which his own negligence is partly responsible.

*Wallis v. SEPTA*, 723 A.2d 267 (Pa. Commw. 1999) (citing *Howell v. Clyde, supra*, 620 A.2d at 1107). Also, see Restatement (Second) of Torts § 496A comment c.

The Pennsylvania Supreme Court in *Howell v. Clyde, supra*, 620 A.2d at 1107 abolished assumption of risk as an affirmative defense to be decided by the jury and, instead, found that to the extent an assumption of risk analysis applies in a given case, the court must apply it as part of its duty analysis. That is, the doctrine must be applied to only cases involving an express assumption of the risk, in cases brought under a strict liability theory and in cases which the doctrine is preserved by statute. *Wallis v. SEPTA, supra*, 723 A.2d at 270 (citing *Howell v. Clyde, supra*, 620 A.2d at 1107). Also, see *Hughes v. 7 Springs Farm, Inc.*, 563 Pa. 501, 762 A.2d 339 (2000). In *Hughes*, the Court referred to the statute concerning downhill skiing and discussed at length the doctrine of the assumption of risk.

When a trial judge applies assumption of risk as part of the duty analysis, the “court may determine that no duty exists only if reasonable minds could not disagree that the plaintiff deliberately and with the awareness of a specific risk inherent in the activity nonetheless engaged in the activity that produces his injury. *Id.* at 270 (citing *Howell v. Clyde, supra*, 620 at 1113).

Assumption of the risk involves the claimant's knowledge or awareness of the risk or hazard and voluntarily encounters said risk. The analysis of assumption of the risk involves a determination as to whether or not the claimant was subjectively aware of the risk inherent in an activity and

willingly accepted it. Claimant has voluntarily assumed the risk where he fully understands it and voluntarily chooses to encounter it. A plaintiff's knowledge and understanding of the risk may be shown by circumstantial evidence. *Frey v. Harley Davidson Motor Company*, 1999 Pa. Super. 130, 734 A.2d 1 (1999). The operative fact in evaluating assumption of risk is the plaintiff's voluntary choice to encounter the risk. The theoretical underpinning of assumption of risk is that as a matter of public policy one who chooses to take risk will not be heard later to complain he was injured by the risk he chose to take and will not be permitted to seek money damages from those who might otherwise have been liable. *Zachardy v. Geneva College*, 561 Pa. 700, 733 A.2d 648 (citing *Howell v. Clyde, supra*, 620 A.2d at 1112).

Accordingly, the essence of assumption of risk defense is not an evaluation of fault and negligence in encountering the danger but an acknowledgment that the plaintiff changed his position. That is, before suffering the injury, "he intelligently acquiesced in a known danger and abandoned his right to complain, but afterwards, seeks to assert the claim he had waived." *Bullman v. Giuntoli, supra*, 761 A.2d at 570.

It is clear from the above cited cases as well as continuing decisions of trial courts that "a plaintiff will not be precluded from recovery except where it is beyond question that he voluntarily and knowingly proceeded in the face of an obvious and dangerous condition . . ." *Bullman v. Giuntoli*, 761 A.2d at 570 (citing *Struble v. Valley Forge Military Academy*, 445 Pa. Super. 224, 665 A.2d 4 (1995)).

### **C. Choice of Ways**

From a defense perspective, in evaluating possible defenses in a case, one must determine if argument can be made that the plaintiff had a choice of routes, one of which was safe but the plaintiff voluntarily chose the route which was subject to risk and danger.

*Updyke v. BP Oil Company, supra*, 717 A.2d at 551, set forth the "choice of ways" doctrine as follows:

Where a person, having a choice of ways, one of which is perfectly safe, and the other of which is subject to risks and dangers, voluntarily chooses the latter and is injured, is guilty of contributory negligence . . . . Id.

In order for this rule to apply, three elements must exist. That is, there must be evidence of:

1. A safe course;
2. A dangerous course; and
3. Facts which would put a reasonable person on notice of the danger or actual knowledge of the danger. Id. at 552.

However, the rule will not apply and a jury should not be charged with the doctrine where the person is confronted with a choice of equally safe or equally hazard paths, despite what in hindsight would be a mistake in judgment. See *Hopton v. Donora Borough*, 450 Pa. 173, 202 A.2d 814 (1964); and *Konarkowski v. Borough of North Braddock*, 157 Pa. Super. 325, 43 A.2d 381 (1945). Furthermore, the rule will not apply where the person is not able to discover dangerous conditions or extrinsic conditions. See *Petruski v. City of Duquesne*, 152 Pa. Super. 393, 33 A.2d 436 (1943). Under most circumstances, the question of “choice of path” is ordinarily a jury question. *Commonwealth of Pennsylvania v. Harris*, 104 Pa. Commw. 580, 522 A.2d 184 (1987).

#### **IV. MOTION FOR SUMMARY JUDGMENT**

In premises liability cases, a defendant should consider whether or not a motion for summary judgment would be appropriate.

In Pennsylvania, the standard for summary judgment is set forth in the Pennsylvania Rules of Civil Procedure, Rule 1035.2. Pa. R.C.P. 1035.2(2) states:

After the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for summary judgment in whole or in part as a matter of law . . .

- (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

In Federal Court, summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Federal Rules of Civil Procedure Rule 56(a). A motion for summary judgment will not be defeated by “the mere existence” of some disputed facts, but will be denied when there is a genuine issue of material fact. *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 581 (3d Cir. 2009) (quoting *Anderson v. Liberty Lobby Inc.*, 477 US 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

A defendant must evaluate the evidence that has been produced through discovery and determine if a motion for summary judgment is appropriate.

Also, recently in federal court, defendants have been successful in securing summary judgment.

In the matter of *Hymes, III v. Great Lakes Warehouse, et al*, 2014 U.S. Dist. LEXIS 34064 (March 17, 2014), the District Court granted summary judgment for Defendant, Transportation

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Investment Group, LP. In this matter, Defendant Transportation Investment Group LP, as a landlord, entered into a lease agreement with Team Hardinger Transportation, as tenant, to lease a portion of the building owned by the landlord in Erie, Pennsylvania. The lease agreement permitted the landlord a right to inspect the leased premises. However, Transportation Investment Group, landlord, never exercised its right to inspect the leased property during the term of the lease through the date of the incident. Per a verbal agreement, the tenants were solely responsible for keeping the parking areas, walkways and steps leading to the building free from snow and ice. On January 19, 2009, the plaintiff claimed that he was caused to slip and fall due to the presence of ice and snow outside a warehouse facility owned by Defendant Transportation Investment Group. There was no dispute that snow had stopped falling in Erie, Pennsylvania approximately 15 minutes before Plaintiff arrived at the building. Prior to Plaintiff entering the building, the steps to the building had been swept off. The Plaintiff did not notify anyone inside the building that the steps were icy or slippery. As the Plaintiff exited the building, he slipped and fell. Plaintiff filed suit against Transportation Investment Group as well as others. Transportation Investment Group filed the Summary Judgment Motion in which it argued that it was not responsible for the maintenance of the steps where the Plaintiff fell and that the incident did not otherwise fall into any legal exceptions that would establish liability and, even if said Defendant had control over the steps and was responsible for maintaining them, it was still not liable for the Plaintiff's injuries because snow had just fallen and the steps were recently clear.

The court granted said Defendant's Motion for Summary Judgment. The court noted that in Pennsylvania, a landlord is generally not liable to its tenants or to others, including guest, for any physical harm caused by either natural or artificial conditions on the leased premises that existed when the leased property was transferred or that arise after the transfer of possession of the leased property to its tenant.

However, the court noted that the Pennsylvania courts do hold out-of-possession landlords liable under any of the following circumstances:

1. If the landlord has reserved control over the defective portion of the leased property;
2. If the leased property is so dangerously constructed that it is a nuisance per se;
3. If the landlord has knowledge of the dangerous condition existing on the leased premises at the time of transferring possession and fails to disclose the condition to the tenant;
4. If the landlord rents the leased property for a purpose involving the admission of the public and the landlord neglects to inspect for or repair dangerous conditions existing on the property before possession was transferred to the lessee;
5. If the landlord undertakes to repair the leased property and negligently makes the repair; or

6. If the landlord fails to make repairs after having been given notice of and a reasonable opportunity to remedy a dangerous condition existing on the leased premises. *Hymes, supra* 2014 U.S. Dist. Lexis 34064.

Plaintiff argued that his incident fell into categories 1, 5 and 6 as an exception to the general rule. The court, in its opinion, addressed each exception. As to the first exception, the court found that Plaintiff did not provide sufficient evidence to support his argument that the landlord reserved control over the defective portions of the leased property. The court noted that just because the lease agreement contained a provision for reserving the rights of the landlord to inspect the leased property did not create a situation of reserved control over the leased properties. Additionally, the court noted that the provision in the lease agreement requiring landlord approval for improvements to the leased property was of no legal consequence, as the parties agreed that such approval would not have been necessary to correct snow and ice accumulation before the Plaintiff's fall. *Id.*

Next, the Plaintiff argued that said Defendant had undertaken repairs on the steps and could have repaired the steps in such a negligent fashion that it increased its hazardous nature. However, the court found that the Plaintiff's argument was not supported with any evidence suggesting negligent repair took place or citations to Pennsylvania law. *Id.*

Lastly, Plaintiff asserted that Defendant landlord failed to make repairs to the steps after it was given notice of and reasonable opportunity to remedy that dangerous condition existing on the leased premises. However, the court found that Plaintiff failed to show that said Defendant maintained significant control over the area of the building in which the incident occurred. Moreover, the court noted that snowfall had only stopped 15 minutes before he arrived at the building, that he had used the same steps while entering the building and did not notify anyone that they had been icy or slippery and had no difficulty navigating the steps on his way into the building. As the steps had been swept off at the time Plaintiff entered the building, the court found that the landlord acted reasonably under the circumstances. The court further disregarded Plaintiff's argument concerning the "hills and ridges" doctrine. *Id.*

Accordingly, the court granted Motion for Summary for Defendant Transportation Investment Group.

In the matter of *Fiore v. Holt*, 435 Fed. Appx. 63, 2011 WL 2632163 (C.A.3 Pa.), the Third Circuit of the Federal Court per curiam opinion, upheld the District Court's Order granting defendant's motion for summary judgment. The Third Circuit noted that under Pennsylvania law, specifically referencing *Carrender v. Fitterer*, 503 Pa. 178, 469 A.2d 120, 123 (1983), a plaintiff must show that a possessor of land: (1) knew of the icy walkway condition or would have discovered it by exercising reasonable care and should have realized that it posed an unreasonable risk of harm; (2) should have expected that plaintiff would not discover the danger or would have failed to protect himself against it; and (3) failed to exercise reasonable care to protect plaintiff from the danger. *Fiore v. Holt*, 435 Fed. Appx. 63, 2011 WL 2632163 at \*3 (citing *Carrender v. Fitterer, supra*, 469 A.2d at 123). In *Fiore*, the District Court concluded that summary judgment was appropriate as to

this claim because plaintiff offered no more than his bare assertions that ice on the walkway was in view of the security camera and that the staff aware of the condition. The Third Circuit, in reviewing the matter, agreed with the District Court and found that there was insufficient evidence. *Id.*

In the case of *Gorman vs. Kohl's Department Stores, Inc.*, 2011 WL45 74514 (W.D. Pa., 2011, September 30, 2011), the plaintiff had slipped and fell while inside the store belonging to defendant. The plaintiff claimed that she tripped over a clothing rack which had been unsafely positioned in the aisle. Defendant filed a motion for summary judgment. The District Court found that plaintiff had not provided any evidence that defendant was either responsible for the placement of the clothing rack in the aisle, had actual notice of the placement of the rack, or had constructive notice of the rack's placement. As such, the District Court found that defendant was entitled to summary judgment. *Gorman v. Kohl's Department Stores, Inc., supra*, 2011 WL 4574514 at \*1. The District Court discussed Pennsylvania law as to the duty owed to a business invitee as well as the requirement that plaintiff had to establish that the defendant "had a hand in creating the harmful condition, or . . . had actual or constructive notice of such condition." *Id.* at \*2. In this case, plaintiff did not have any evidence that defendant had created the condition nor that the defendant had actual notice. Therefore, plaintiff was required to establish constructive notice. The Court noted that there are several factors that are relevant in determining whether a defendant had constructive notice of the placement of a clothing rack, including "(1) the time elapsing between the creation of the defect and the accident; (2) size and physical condition of the premises; (3) the nature of the business conducted there; (4) the probable cause of the condition; and (5) the opportunity a reasonably prudent person would have remedied." *Id.* at \*2 citing (*Baynes v. Home Depot USA*, Civ. No. 9-3686, 2011 WL 3313658 at 6 (E.D. Pa. June 6, 2011)). Here, the District Court found that plaintiff had offered no evidence of any constructive notice and, therefore granted summary judgment.

In *Graham v. Moran Foods, Inc.*, 2012 WL 1808952 (E.D. Pa. 2012), the District Court granted summary judgment in which plaintiff tripped over a pallet and fell while grocery shopping with her family at the defendant's store. In this case, the Court found that "plaintiff is not relieved from her burden of exercising ordinary care because she failed to observe and avoid an obvious condition by not looking behind her before taking steps backwards. Whether she was distracted by displays on her way to the freezer is immaterial to plaintiff's failure to look behind her before taking steps backwards." *Id.* at \*5. The Court further noted that "as a matter of law, the pallet was an obvious condition that plaintiff failed to avoid by exercising ordinary care. Therefore, defendant did not owe plaintiff a duty under the facts of this case. *Graham v. Moran Foods, Inc.*, 2012 WL 1808952, *supra* at \*5 referencing *Carrender, supra*, 469 A2d at 124. Therefore, the District Court granted defendant's motion for summary judgment.

Also, the state courts have granted summary judgment for defendants in premises liability cases.

In *Thompson v. The Convent of the Sisters of Chestnut Hill*, 2011 WL 3027832, Court of Common Pleas of Pennsylvania, Philadelphia County (June 30, 2011), the Honorable Allan L.

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Tereshko granted summary judgment for defendant. The plaintiff was visiting defendant, Chestnut Hill College. Chestnut Hill College leased its premises from the Convent of the Sisters of St. Joseph of Chestnut Hill. Plaintiff, upon entering the public restroom on the premises of Chestnut Hill College, immediately noticed an accumulation of water approximately 2 ft. by 4 ft. on the restroom floor outside the stall directly in front of her. The water on the floor was allegedly caused by a malfunctioning bathroom fixture. Plaintiff also described the bathroom as being well lit. *Id.* Plaintiff did not advise anyone of the water on the ground before using the restroom. Plaintiff assumed that there were other available restrooms in the same building for her to use. Despite this fact, plaintiff proceeded around the water to use the stall on the opposite end of the restroom. Although plaintiff testified that she paid close attention to the accumulation of water as she was leaving the restroom, she nonetheless stepped into the water and slipped and fell. Defendant filed a motion for summary judgment. *Id.* The Court granted summary judgment. The Honorable Allan L. Tereshko, in his opinion, found that the facts in *Thompson* were similar to those in *Carrender v. Fitterer, supra*, 469 A.2d 120 (1993) in that plaintiff, *Thompson* was clearly aware of the dangerous condition and the risk that it posed to her. Accordingly, the Court in *Thompson* found that plaintiff had failed to establish the element of duty required for a prima facie case of negligence because the dangerous condition was open and obvious to her and, she thus assumed the risk by walking through the water. *Thompson vs. The Convening of the Sisters of Chestnut Hill*, 2011 WL 302 7832

In *Harbison vs. JPS Getty, Inc., et. al.*, 2011 WL 7416100 (CCP Lancaster County, December 22, 2011), the trial court granted defendant's Motion for Summary Judgment. Plaintiff had been a prior customer of defendant store. On the day in question, as the plaintiff was about to enter the store, she noticed a woman with a walker exiting, and attempted to hold the door open for the woman. Without looking down, plaintiff stepped backward when opening the door. Plaintiff assumed there were two steps down off the apron before the pavement. However, the second step at the side of the store did not continue around to the front of the store. Plaintiff fell. *Id.*

The trial court found that the danger caused by the uneven steps at the store should have been known or obvious to plaintiff. Thus, the court concluded that the defendants were not responsible for plaintiff's injuries. The court also noted that plaintiff admitted, at her deposition, that she was not looking down when she stepped backward. The court further noted that plaintiff had a duty to look where she was walking and see that which was obvious. *Id.* citing *Lewis vs. Duquesne Inclined Plane Co.*, 346 Pa. 43, 28A2d. 925, 926 (1942). Lastly, the trial court held that the danger should have been known or obvious. Therefore, the court granted summary judgment. *Id.*

In the matter of *Swift v. Northeastern Hospital*, 690 A.2d at 722, the Pennsylvania Superior Court upheld the trial court's granting of defendants' motion for summary judgment. The *Swift* case is discussed above. Furthermore, the Pennsylvania Superior Court in *Neve v. Insalaco*, 771 A.2d 786, 789 upheld summary judgment.

However, the Court, at times, have found that summary judgment is not appropriate. Most recently, the PA Superior Court in *Reinoso vs. Heritage Warminster SPE, LLC*, 2015, Pa. Super 8 (Jan. 14 2015), overturned the trial court's granting of summary judgment. In this matter, the



plaintiff was walking hand in hand with her five year old granddaughter on the sidewalk in the shopping center owned by defendant, Heritage Warminster SPE, LLC. when they both tripped and fell on a raised section of the sidewalk. The granddaughter, who was next to the plaintiff, tripped first and then plaintiff tripped when the toe of her right shoe caught the elevated part of the sidewalk to cause both of them to fall. According to the plaintiff, the sidewalk had a height difference of 5/8 of an inch between sections of the sidewalk in the location where the plaintiff and her granddaughter fell. Plaintiff brought suit claiming injuries as a result of the fall. *Id.*

Defendant filed a Motion for Summary Judgment asserting that any defect in the sidewalk was, at most, trivial or de minimis, absolving defendant from any liability as a matter of law. The trial court agreed with the defendant and, therefore, entered summary judgment in favor of defendant and against plaintiff. The trial court noted:

As a general rule, an owner or occupier of a premises must exercise reasonable care not to endanger the safety of others lawfully using abutting sidewalks. However, such owner is not an insurer of the safety of those using sidewalks in a business invitee commercial context. An owner is not liable for injuries just because someone using the sidewalk, trips, falls and sustains an injury. As with any negligence claim against the landowner, there must be a failure of duty to maintain its premises in a reasonably safe condition and liability will arise only where the owner created or permitted to persist, a condition that raises an unreasonably safe condition. Where the defect that is so obviously trivial, its gravity should be a fact to determine in light of the circumstances of a particular case. *Id.*

The Superior Court noted that the trial court, in its opinion, concluded that:

There is no issue of material fact that the alleged defect in the sidewalk at its highest point 1 1/8 inches on the far right side of the sidewalk and 5/8 of an inch in the middle of the sidewalk, where Reinoso was walking. The land owner is not required to maintain the sidewalk to perfection, but only to the extent that unreasonably unsafe conditions are removed. The facts of this case are not in dispute and the material facts lead inexorably to the conclusion that Heritage was not negligent in permitting the subject condition to exist. There being no negligence, it would be a waste of judicial resources to allow this case to go to trial.

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The Superior Court, in its opinion, discussed the duty owed by defendant to plaintiff as a business invitee that, if breached, could support a finding of negligence. The Superior Court first discussed the standard of care that a property owner owes to one who enters upon the property. The court discussed that such standard of care depends upon whether the person entering the premises is a trespasser, licensee or business invitee. As to the business invitee, the Superior Court noted that said invitee is entitled to expect that the property owner took reasonable care to ascertain the actual condition of the property and, having discovered the defect in the property, either to make it reasonably safe by repair or to give warning of the actual condition or the risk involved therein. The Superior Court further noted that although property owners have a duty to maintain their sidewalks in a safe condition, property owners are not responsible for trivial or de minimis defects that exist in the sidewalk. The court noted that there is no definite or mathematical rule that has been laid down as to the depth or size of the sidewalk depression to determine whether the defect is trivial as a matter of law. The Superior Court noted rather, if the defect is not obviously trivial or de minimis, then the question of negligence must be submitted to the jury. Id.

The Superior Court noted that the plaintiff was a business invitee. After such a determination has been made, the Superior Court stated that it needed to determine whether to be trial court erred by granting summary judgment based upon the conclusion that the sidewalk defect on the defendant's property was trivial or de minimis as a matter of law. Id.

The Superior Court found that the trial court failed to consider all the material facts at issue when concluding that the defendant was not negligent in permitting the alleged sidewalk defect to exist. The Superior Court noted that the trial court only considered the height of the alleged defect in the sidewalk. Although the Superior Court agreed that the determination of the trial court that there was no material issue of fact as to the height difference between the sections of the sidewalk where the plaintiff fell, the Superior Court noted that plaintiff presented an additional set of facts which the trial court failed to have acknowledge in its opinion including the opinion of plaintiff's expert that the defect in the sidewalk was "seriously in excess of the 1/4 inch standard for the tripping danger and constituted a walkway safety hazard," "the subject condition violated applicable codes and standards" and an acknowledgment from one of the tenants in the shopping center that he advised the management company of a potential tripping hazard well before the incident occurred. The Superior Court found that the trial court ignored these additional facts and, therefore, held that the issue of liability was properly for a jury to determine. Id.

## **V. INVESTIGATION AND DISCOVERY:**

In performing an investigation and/or discovery, defense counsel should contact the client and determine if several things exist concerning the alleged incident. The following is a list of inquiries to be made of a client:

1. Photographs, video surveillance, drawings, specifications and/or diagrams of the area where the plaintiff claims the incident occurred.

If a client is immediately made aware of the incident, the client may have in fact taken photographs of the area.

Also, there may exist video surveillance. If so, time is of the essence and surveillance should be preserved. Many surveillance systems tape over or lose surveillance of a given area after short periods of time, some as little as a couple of days or a week. Therefore, it is important that if a client is made aware of the incident immediately following the incident, then surveillance should be reviewed, secured and preserved. However, if the client is not made immediately aware of the incident, then an inquiry should be made if any photographs, drawings, specifications or diagrams were made any time prior to the incident. Said photographs, drawings, specifications or diagrams, if taken close in time to the incident, will be of assistance in determining what the condition of the area was near the time of the plaintiff's incident. Also, photographs, drawings, specifications or diagrams may exist that were done after the incident even though there was no knowledge of the incident. If the defense attorney can secure photographs, drawings, specifications or diagrams within the time period of the incident, this may be of assistance in disputing the plaintiff's claims. Also, the claimant and/or his attorney may have taken photographs immediately after the incident. As soon as possible you should secure duplicate or a color copy of said photographs.

2. Incident/Accident Reports.

If any such report exist, then it should be secured as soon as possible.

3. Inspection reports.

If this is a business, then a determination should be made if any inspection reports are made as to any type of routine inspections made by the defendant of the area in question. Some businesses keep daily logs, regarding cleaning, maintenance and/or inspection of the premises.

4. Repair records.

You need to determine if the area in question had been repaired before the incident. If so, you need to locate the records and determine if the repairs were done "in house" by employees or outside contractors. If any outside contractor performed the work, then one must consider if said contractor should be joined to the lawsuit.

5. Witnesses.

First, you need to determine if any witnesses are known and if they actually saw the incident. Also, a determination should be made if any witnesses, including employees, may have been in the area just prior to or subsequent to the incident such as to provide a description of the area before and/or

after the incident. Also, neighbors or other businesses in the area should be contacted to determine if they are aware of the incident and/or the condition of the area before, during or after the incident. An adjacent business or business in close proximity may have surveillance of the outside of their premises which may include the area of your client's premises or may capture the plaintiff leaving the premises and/or depict the condition of the plaintiff. Time is of the essence as most surveillance video is only retained for short specific periods of time.

6. Surveys.

If any prior surveys exist of the property, this may be helpful, especially if there is any issue as to ownership, possession and/or control. Also, a survey may be needed and should be requested if there are issues of ownership, possession and/or control between various parties, especially if a property line issue is involved in the case.

7. Climatological Report.

If there is an issue of ice, snow or other weather conditions, then climatological reports may be of assistance. Also, a climatological expert may be needed to determine the exact conditions in the area in question.

8. Newspaper/Television/Internet/Social Media

Depending on the type of incident, there could be some type of news coverage, such as a newspaper article or TV coverage. If such is the case, then one should secure such documentation. Also, the internet and social media sites may provide valuable information about the plaintiff and/or opposing parties.

9. Contracts.

If any contract or lease agreements exist, then they should be secured to determine the responsibilities of the respective parties.

10. Experts.

Depending on the type of case an expert may be warranted. An engineer may be needed to determine if a defendant has complied with an applicable code, etc. Other experts to consider include, but are not limited to: architects, biomechanical experts, climatologists and surveyors.

11. Preserve Evidence.

Wherever possible, preserve all evidence.

12. Status of Claimant

Determine the status of the Claimant. See above discussion as to trespasser versus licensee versus invitee.

13. Ownership of Property, Control Of/Over Property and Possession of Property

Determine the status of ownership, control, possession, maintenance and operation. Does there exist a lease agreement, contract and/or property management agreement. Is your client an owner, tenant, property manager, contractor or some other person or entity associated with the property. What are the relationships between the owner, tenant, property manager, contractor, etc. See above, the case of *Hymes vs. Great Lakes Warehouse, et. al.* concerning discussion of landlord out of possession.



Carol Ann Murphy represents contractors, business owners, product manufacturers, restaurant and bar establishments, municipalities and other governmental authorities and their officials. Also included within Ms. Murphy's client base are insurers, homeowners, industrial plants, apartment complexes, animal owners and rescuers, and vehicle operators. She has experience in all trial, appellate and mediation forums including arbitration hearings (UM/UIM, state court and binding high/low), jury and bench trials and appellate courts. Ms. Murphy serves as an arbitrator for the Court of Common Pleas of Philadelphia County and as a Judge Pro Tem for the Court of Common Pleas of Philadelphia County.