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COLORADO PREMISES LIABILITY LITIGATION: DEFENSE PERSPECTIVE

Background of Colorado's Premises Liability Law

At common law in Colorado, whether a particular duty was owed by a defendant to a plaintiff was determined as a matter of law by the Court. *Cary v. United of Omaha Life Ins. Co*., 68 P.3d 462, 465 (Colo. 2003). Prior to 1971, Courts determined landowner duties based upon a recognized plaintiff classification: trespasser, licensee or invitee. The duties owed by landowners were different, depending on whether the plaintiff was a trespasser, licensee or invitee. The classifications of the plaintiffs were determined as a matter of law by the Courts. In 1971 the Colorado Supreme Court decided *Mile High Fence Co. v. Radovich*, 489 P.2d 308 (1971), rejecting the trespasser, licensee and invitee classification scheme in favor of a standard of reasonable care for landowners in view of the foreseeability of injury to others. *Id.* The Colorado legislature in 1986, during a period of tort reform, next enacted the Premises Liability Statute, §13-21-115(2), C.R.S. ("the Premises Liability Statute"), which reinstated the status classification scheme that existed prior to 1971.[1] The purpose of the Statute was to provide greater protection to landowners than was available to them at common law, and to "create a legal climate [to] promote private property rights and commercial enterprise and…foster the availability and affordability of insurance." C.R.S. §13-21-115(1.5)(d).

When a person is injured on the real property of another due to a condition on the property or circumstances or activities conducted on the property, the person's exclusive remedy against the landowner is pursuant to Colorado's Premises Liability Statute ("Statute"). Most commonly, the Statute is invoked with respect to allegedly dangerous conditions on real property, like spilled milk, staircases slippery from melting snow or faulty fixtures. *Lawson v. Safeway, Inc*., 878 P.2d 127 (Colo. App. 1994) (spilled milk); *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612 (Colo. App. 2003) (melting snow on steps); *Thornbury v. Allen*, 991 P.2d 335 (Colo. App. 1999) (glass shelf fell on housekeeper's foot). However, the Statute has broad application and it has been found to be the exclusive remedy even in cases involving dog bites and flying hockey pucks. *Wilson v. Marchiondo*, 124 P.3d 837 (Colo. App. 2005) (dog bite); *Teneyck v. Roller Hockey Colorado, Ltd.*, 10 P.3d 707 (Colo. App. 2000) (flying hockey puck). In 2010, the Colorado Court of Appeals found that a church was a landowner

[1] The Supreme Court held the Statute unconstitutional in 1989. *Gallegos v. Phipps*, 779 P.2d 856, 862-63 (Colo. 1989). The following year the legislature amended the Statute to address the Supreme Court's equal protection concerns, and the status classifications became applicable once more.

under the Statute because it sponsored an activity where participants were towed on an inner tube around a frozen lake by an ATV. *Wycoff v. Grace Community Church of the Assemblies of God*, 251 P.3d 1260, 1266 (Colo. 2010). Even though the church was not the titled owner of the real property where the accident happened, the church "undisputedly was responsible for the ATV activity" and, therefore, it was a landowner under the Statute. *Id.*

If a claim is brought under the Statute, no other remedies or claims for relief can be made. Motions to dismiss or motions for summary judgment are appropriate for claims such as negligence, negligence *per se*, negligent supervision/training, *res ipsa loquitur*, etc. when those claims are brought in the same Complaint as a Premises Liability Statute. The express language of the Statute itself precludes other claims and the Supreme Court also addressed the issue in *Vigil v. Franklin*, 103 P.3d 322, 328 (Colo. 2004):

> Where the interaction of common law and statutory law is at issue, we acknowledge and respect the General Assembly's authority to modify or abrogate common law. *Beach,* 74 P.3d at 4; *see also* § 2–4–211, C.R.S. (2004) ("The common law... shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority"). Here, the General Assembly abrogated the common law with respect to landowner duties when it passed Colorado's premises liability statute.

The Statute applies to "landowners," and here again, the Statute is broadly applied. Landowners include not only titled owners of real property, but anyone who exercises a sufficient degree of control over the circumstances existing or activities taking place on real property where an accident occurred. The Statute even contemplates that there may be more than one landowner in a given case. *See Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1219, 1220 (Colo. 2002) (a "landowner," for the purposes of the Premises Liability Statute is any person in possession of real property and that such possession need not necessarily be to the exclusion of all others). Tenants of leased premises can be landowners. *Id.* Janitors can be held responsible under the Statute as landowners in a slip and fall case. *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612, 615 (Colo. App. 2003). The scope of a person or entity's control or lack of control over the real property where an incident occurred is critical to the determination of whether that person is a landowner under the Statute.

Before a defendant owner of real property can owe any duty to a plaintiff injured on the property under the Statute,[2] plaintiff must first establish that the defendant exercised a sufficient

[2] It is important to note that in a case where a plaintiff is injured on the real property of another by a person or entity who is conducting some activity on real property, but who is determined not to be a "landowner" under the Statute, that person or entity may still be held liable under general negligence principles.

degree of control over the property to qualify the defendant as a "landowner" under the Statute. Leasing real property to a tenant, for example, may be considered a complete transfer of possession and control of the premises to the tenant. *Sundheim v. Board of County Commissioners*, 904 P.2d 1337, 1350 (Colo. App. 1995), aff'd, 926 P.2d 545 (Colo. 1996) ("[a]bsent some agreement to the contrary, a tenant is entitled to the possession of the leased premises to the exclusion of the landlord.") In such a case, the titled owner of the real property may be found to owe no duty at all to a plaintiff injured on the property. *See Ogden v. McChesney*, 584 P.2d 636 (Colo. App. 1978) (landlord transferred control of premises to tenant, and even though landlord actually undertook repairs of premises during tenancy, this was still insufficient "control" for landowner liability); *University of Denver v. Whitlock*, 744 P.2d 54, 61 (Colo. 1987) (lease obligating the landlord to "maintain the grounds and make necessary repairs to the building" insufficient for landowner liability); *Pierson*, 48 P.3d at 1217 (although the lease gave the landlord the right to enter premises and "remedy" any dangerous operations, this was insufficient for landowner liability); *Wilson v. Marchiondo*, 124 P.3d 837 (Colo. App. 2005), *cert. denied* (landlord's right to inspect, maintain and repair was not sufficient for imposition of landowner liability); *see Nordin v. Madden*, 148 P.3d 218 (Colo. App. 2006), *cert. denied* (where tenants were prohibited from making repairs without landlord's written permission, landlord had retained sufficient control over premises for the imposition of liability). Exceptions to the general rule that landlords will not be liable if control over premises is transferred to a lessee are: (1) if the dangerous condition was present before the transfer of control to the lessee; (2) if the landlord failed to exercise reasonable care in performing a repair contract or was negligent in making repairs to the property; and (3) if the landlord retained control over the portion of the premises where the injury-producing condition existed. *See Perez v. Grovert*, 962 P.2d 996 (Colo. App. 1998).

If a person or entity is a "landowner" under the Statute, the duties of that landowner are "non-delegable." That is, a landowner who maintains some degree of control over the property cannot transfer duties to another, such as a property management company. Landowners who do not transfer possession and control over premises, but simply hire property management or maintenance companies to supervise or manage the property, may be found liable to those injured on the property. *See Sofford v. Schindler Elevator Corp*., 954 F. Supp. 1459 (D. Colo. 1997); *Jules v. Embassy Properties, Inc*., 905 P.2d 13, 14 (Colo. App. 1995) and *Kidwell v. K-*

Pierson v. Black Canyon Aggregates, Inc., 32 P.3d 567 (Colo. App. 2000). See also *Wycoff v. Grace Community Church of the Assemblies of God*, 251 P.3d 1260, 1266 (Colo. 2010) ("if [defendant] were correct that it was not covered by the [Statute], it still would have owed plaintiff a duty of reasonable care."). The difference between these cases and one in which a titled property owner is found not to be a landowner and thus not liable, is that in the former, the defendant conducted an activity in which plaintiff was injured, and in the latter the titled property owner defendant had no other relationship to the accident than the ownership of the property where the accident occurred.

Mart Corp., 942 P.2d 1280 (Colo. App. 1996). However, keep in mind that Colorado is a pro-rata fault state. Pursuant to C.R.S. §13-21-111.5, generally a tortfeasor may be held liable only for the damages associated with its own share of fault.

"Invitee" plaintiffs need only show a landowner had constructive knowledge ("knew or should have known") of a danger on the landlord's premises to establish liability. However, plaintiff must offer some evidence to prove that a landlord had even this low threshold of awareness to survive a summary judgment motion on liability. *Sofford v. Schindler Elevator Corp*., 954 F. Supp. 1459, 1463 (D. Colo. 1997) (judgment granted in defendant's favor after plaintiff failed to meet burden of proof in demonstrating even that defendant "should have known" of dangerous condition); *Henderson*, 70 P.3d at 616 (no duty to "anticipate" that a dangerous condition might occur); *McIntire v. Trammell Crow, Inc.*, 172 P.3d 977 (Colo. App. 2007) (insufficient for the imposition of liability for plaintiff to show that defendant knew generally that conditions on the property were dangerous, plaintiff would have had to present evidence that a property manager should have known the specific mechanism of injury was a dangerous condition).

One particularly interesting case with respect to the invitee "should have known" standard was addressed by the Colorado Supreme Court in 2008. In *Lombard v. Colorado Outdoor Educ. Center, Inc*., 187 P.3d 565 (Colo. 2008), a teacher was at a seminar at the defendant's recreational center. She was staying in one of the on-site cabins which had a loft. She was climbing down from the loft using a ladder when she fell and was injured. It was discovered that the recreational center had not built the ladder in compliance with then applicable building codes. The plaintiff (an invitee) claimed that this was negligence *per se* and established as a matter of law that the defendant landowner had knowledge of a "dangerous condition." The Supreme Court held that the building code violation could be introduced as evidence with respect to the question of whether the defendant "should have known" of a dangerous condition. The case went to trial and the jury found that the defendant did not have actual or constructive knowledge of a dangerous condition. The plaintiff appealed again. In *Lombard v. Colorado Outdoor Education Center, Inc.*, --- P.3d ---, 2011 WL 3616755 (Colo. App. Aug. 18, 2011) the Court of Appeals held that it was appropriate for the trial Court to instruct the jury that a building code violation could be considered "as evidence that landowner failed to exercise reasonable care" but they could consider other evidence on this issue as well. *Id*. at *4-5. The Court also rejected plaintiff's tendered instructions that equated knowledge of the building code violation as *per se* knowledge of a dangerous condition. The Court stated, "not every violation of a building code results in a dangerous condition, or notice of a dangerous condition, within the meaning of the premises liability act." *Id*. at *5. Another proposed instruction would have allowed the jurors to impute the building department's knowledge of building code violations to the landowner, but the Court found no authority for

this proposition and rejected it. *Id*.

A plaintiff bringing a premises liability claim which involves both a landowner and a hired subcontractor (i.e., a property manager) must prove the knowledge requirement established by the Statute against the landowner, and not just against the hired subcontractor. Although the duties of a landowner are not delegable, the law does not impute the knowledge of a subcontractor like a property manager to a landowner. The seminal Colorado case on point for this specific knowledge requirement fact pattern is the Sofford case, previously referenced herein. In *Sofford*, the plaintiff was injured in an elevator. The plaintiff sued the owner of the real property upon which the elevator was located, as well as the elevator company responsible for maintenance. A footnote to the *Sofford* decision states:

> Even if there were evidence that Millar [the subcontractor] knew or should have known about the condition of the elevator, no authority exists for imputing this knowledge to United [the absentee landowner]. In *Kidwell*, the Colorado Court of Appeals held that negligence of an independent contractor must be imputed to the landowner "if that negligence created a danger to invitees and if [the landowner] knew or should have known of the danger." (emphasis added). Thus plaintiff must still present evidence that United knew or had reason to know of the elevator condition in order to avoid summary judgment. *Sofford*, supra at FN 4, emphasis added.

Recent Important Premises Liability Cases and Developments

Jordan v. Panorama Orthopedics & Spine Center, PC, 346 P.3d 1035 (Colo. 2015):

Panorama Orthopedics & Spine Center, PC ("Panorama"), a medical services provider, leased office space in an office building owned by another entity, as did three other tenants. Ms. Barbara Jordan went to Panorama for medical treatment. Following her treatment visit, she left the building and began walking to her car, which was parked in the building's parking lot. While walking on a sidewalk leading to the parking lot, she allegedly tripped over a one-half inch raised lip between concrete sections of the sidewalk. She fell and was injured. Ms. Jordan filed suit against the property owner, the property manager and Panorama, asserting claims for negligence and premises liability. Before trial, she settled her claims against the property owner and the property manager. Panorama then designated them as nonparties at fault. The district court granted Panorama's motion for summary judgment on the negligence claim, but denied Panorama's motion for summary judgment on the premises liability claim. The latter claim was tried to a jury. When Ms. Jordan finished presenting her case, Panorama moved for a directed verdict, asserting that the evidence had failed to demonstrate that it was a landowner under the

Act. The parties agreed that the court, rather than the jury, should determine if Panorama was a landowner under the Act. The court made findings on the record and concluded that Panorama was a landowner. The jury apportioned 30% of fault for the incident to Panorama, 60% to the property owner, and 10% to the property manager.

Panorama filed an appeal with the Colorado Court of Appeals. See *Jordan v. Panorama Orthopedics & Spine Center, PC*,--- P.3d ----, 2013 WL 2448744 (Colo. App. Jun 06, 2013). In its appeal briefing, Panorama argued that the district court erred by determining it was a landowner under the Premises Liability Act. The Colorado Court of Appeals reversed the district court's finding of landowner status for Panorama, specifically determining: (1) as a matter of first impression, that a tenant being a "landowner" within meaning of the Premises Liability Act was a mixed question of law and fact; (2) that the tenant did not have possessory interest in the sidewalk outside of the building and thus, was not a "landowner," within meaning of Premises Liability Act; (3) that the tenant was not conducting activity on sidewalk outside leased premises, and thus, was not landowner, within meaning of Act; and (4) tenant did not exercise control over sidewalks, and thus, did not have possessory interest in sidewalk, so as to come within definition of "landowner" subject to liability under the Colorado Premises Liability Act.

Ms. Jordan filed a Petition for Writ of *Certiorari* with the Colorado Supreme Court. The Colorado Trial Lawyers Association (the plaintiff attorneys' bar association) filed an *amicus* brief on August 23, 2013 in support of Jordan's petition. On February 24, 2014, the Supreme Court granted Jordan's Petition for Writ of *Certiorari*, agreeing to decide the issue of whether the Court of Appeals erred in reversing Jordan's verdict on the grounds that Panorama was not a landowner within the contemplation of the Colorado Premises Liability Act. See *Jordan v. Panorama Orthopedics & Spine Center, PC*, --- P.3d ----, 2014 WL689560 (Colo. February 24, 2014). On April 13, 2015, the Colorado Supreme Court published its opinion. The Court determined: (1) tenant clinic was not "in possession of" medical campus' common areas; and (2) tenant clinic was not legally responsible for condition of common area sidewalk, as required to be a landowner under the Act.

Traynom v. Cinemark USA, Inc.

In *Traynom v. Cinemark USA, Inc.*, 940 F.Supp.2d 1339, 1343 (D. Colo. 2013), the plaintiffs, who consisted of movie theater patrons and parents of deceased patrons, brought an action against the movie theater alleging premises liability, negligence, and wrongful death claims under Colorado law arising from a mass shooting at theater. Cinemark filed motions to dismiss these claims. The District Court accepted in part the recommendation of Michael E. Hegarty, United States Magistrate Judge, and held that: (1) under Colorado law, plaintiffs

sufficiently stated a premises liability claim; (2) patrons' undisputed status as invitees did not preclude the court from determining whether plaintiffs stated a premises liability claim; (3) common-law negligence claims would be dismissed with the possibility of reinstatement pending decision in *Larrieu* case involving question of effect of Act on such claims; and (4) parents of deceased patrons could pursue wrongful death claims that were derivative of claims under Act. The Court, in making these rulings, discussed the premises liability focal issues as defining the duty of the movie theater, and correctly determining the "danger" involved:

> In the present cases it is undisputed that Cinemark is a "landowner," and that the plaintiffs were "invitees." The statute provides, as relevant here, that "an invitee may recover for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known." *Id.* § 3(c)(1). Thus, the Court does not define Cinemark's duty to the plaintiffs. Rather, the statute provides that Cinemark owes its theater patrons a duty to exercise reasonable care to protect them against dangers of which Cinemark knew or should have known. *See Lombard v. Colorado Outdoor Education Center, Inc.,* 187 P.3d 565, 568 (Colo.2008).
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> The difficulty in these cases is to determine what the relevant "danger" is. Plaintiffs allege that the dangerous conditions on the premises include but are not limited to (1) failure to have security guards present, (2) failure to provide reasonable protection against surreptitious entry into a darkened theater, (3) failure to provide reasonable door entry security devices (locking systems, alarms), (4) failure to provide other reasonable security devices (one-way security doors, exit doors interlocked with warning signals, alarms), (5) failure to develop adequate emergency response plans and procedures, (6) failure to provide proper employee training for emergency responses, and (7) failure to provide proper training on reasonable surveillance procedures. *E.g.,* First Amended Complaint in case 12cv2514 [# 14] ¶ 46. However, in my view this is not a list of dangers. Rather, it is plaintiffs' view of the actions that a reasonable theater owner would take to protect patrons against an unspecified danger. *Cf. McIntire v. Trammell Crow, Inc.,* 172 P.3d 977, 980 (Colo.App.2007) (although the danger must arise from the condition of the property or activities conducted or circumstances existing on the property, "it is not knowledge of the condition, activities or circumstances that gives rise to liability; it is the danger of which the owner actually knew or should have known").

Larrieu v. Best Buy Stores, L.P.

In *Larrieu v. Best Buy Stores, L.P.*, 303 P.3d 558 (Colo. 2013), a customer who was injured in a Best Buy store parking lot when trying to load a freezer he had purchased onto his trailer with the help of a store employee brought a personal injury action against the store in state court under the Colorado Premises Liability Act. The customer tripped over a curb while walking backward carrying a heavy gate from her vehicle. She had removed the gate so that the freezer could be loaded into the back of her vehicle. The action was removed to federal court. The United States District Court for the District of Colorado granted summary judgment in favor of the store, finding that the phrase "activities conducted or circumstances existing on such property" refers only to those activities and circumstances that are inherently related to the land, and so ruled that the plaintiff could not recover from the defendant store under the Colorado Premises Liability Statute. The United States Court of Appeals, Tenth Circuit accepted the case for review and certified to the Colorado Supreme Court the question of whether the scope of the Premises Liability Statute is confined to activities and circumstances "inherently related to the land." The Colorado Supreme Court held that the scope of the Premises Liability Statute is not confined to activities and circumstances "inherently related to the land." Pursuant to the Colorado Supreme Court's interpretation of the Premises Liability Statute on this issue, the United States Court of Appeals, Tenth Circuit entered an Order on July 10, 2013, reversing the decision and remanding the case back to the District Court.

Collard v. Vista Paving Corp.

In *Collard v. Vista Paving Corp*., 292 P.3d 1232 (Colo. App. 2012), the Colorado Court of Appeals held that a landowner must be exercising control over the property at the time of plaintiff's accident for the premises liability statute to apply. The case involved a motorist who was injured in a collision with a newly-constructed median in the center of a road in Grand Junction, Colorado. After the median was completed, but before the yellow street striping was altered to reflect the existence of the new median, the median contractor left the site taking his caution cones away. The yellow street dividing line, at the time the cones were removed, led directly into the median. The Court of Appeals found that a premises liability claim against the contractor who constructed the median (and removed the caution cones) was inappropriate, because at the time of the accident the contractor was not exercising control over the property. The Court relies for this holding on the cases of *Land-Wells v. Rain Way Sprinkler and Landscape, LLC*, 187 P.3d 1152, 1154 (Colo. App. 2008), and *Nordin v. Madden*, 148 P.3d 218 (Colo. App. 2006). *Land-Wells* does hold that the Premises Liability Statute only applies if defendant has control over the property at the time of the accident, citing *Nordin* for the proposition that "a party was not 'legally responsible' for the condition of the property because 'at the time of the accident [it] was not conducting any activity related to, or creating the

condition of, the malfunctioning hot water heater.'" *Land Wells*, 187 P.3d at 1154. In fact, the Court in *Nordin* was considering whether, in a case where tenants had had exclusive possession of real property for nine years and where the landlord had not inspected the property for "several years" prior to an accident, the landlord was still a "landowner" under the Statute. *Nordin* 148 P.3d at 221. The *Nordin* Court found that even under those extreme circumstances, where the defendant had not exerted any actual control over the property for several years prior to the accident and who clearly was not exerting control over the property at the time of the accident, there was a fact question with respect to whether the landlord was a landowner under the Statute. *Id*. No Petition for Writ of *Certiorari* was filed.

St. Vrain School District RE-1J v. A.R.L. by and through Loveland

On May 19, 2014, the Colorado Supreme Court decided *St. Vrain School District RE-1J v. A.R.L. by and through Loveland*, 325 P.3d 1014 (Colo. 2014). In this case, a nine-year-old student and her parents brought a lawsuit against the school district and a district employee for negligent supervision and premises liability in connection with injuries sustained by the student when she fell from a "zip line" apparatus on the school playground. The Weld County District Court judge dismissed the claims as being barred by the Colorado Governmental Immunity Act ("CGIA"). The student and her parents appealed the dismissal. The Court of Appeals affirmed the dismissal of the negligent supervision claim but reversed the dismissal of the premises liability claim and remanded for further proceedings on that claim. The Colorado Supreme Court granted *certiorari* to district and employee. Addressing issues of first impression, the Supreme Court held that:

> (1) a playground located on the premises of a public elementary school is "public" within meaning of recreation area waiver of immunity under CGIA;
>
> (2) individual "zip line" apparatus on public playground does not qualify as "public facility" for purposes of the recreation area waiver, but entire playground can qualify as "public facility" and a condition on a zip line apparatus may qualify as "dangerous condition" of that facility;
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> (3) a single water slide in a water park would not itself qualify as a "swimming facility" within the waiver of immunity under CGIA for injuries resulting from operation of a swimming facility by a public entity, abrogating *Anderson v. Hyland Hills Park & Recreation District*, 119 P.3d 533 (Colo. App. 2004);

(4) the term "facility" under recreation area waiver of immunity can be interpreted to include both a prototypical bricks-and-mortar structure and a collection of items that serve a greater purpose, such a playground;

(5) for a facility to be "public" under the recreation area waiver of immunity, it must be accessible to the public and maintained by a public entity to serve a beneficial public purpose;

(6) playground in question qualified as "public" facility; and

(7) playground was "located in" a "recreation area" within meaning of recreation area waiver of immunity.

There were two other "public facility"/premises liability decisions by the Colorado Supreme Court in 2014. In *Young v. Brighton School District 273*, 325 P.3d 571 (Colo. 2014), a student slipped and fell in a puddle of water that had accumulated on a concrete walkway at his elementary school. The Supreme Court held that the walkway was not, in and of itself, a "public facility," for purposes of CGIA's recreation area waiver, and the walkway was not a component of the larger public facility that was the playground. In *Daniel v. City of Colorado Springs*, 327 P.3d 891 (Colo. 2014), a pedestrian brought a negligence action against the city for injuries sustained after she stepped in a hole in the parking lot for a public golf course owned and maintained by the city. The city moved to dismiss the action on the basis of governmental immunity, and the district court denied the motion. The city filed an interlocutory appeal. The Colorado Court of Appeals reversed the denial. Addressing issues of first impression, the Colorado Supreme Court held that:

(1) a parking lot that serves a public golf course is a "public facility" under the recreation area waiver of the Colorado Governmental Immunity Act (CGIA);

(2) governmental immunity can be waived if an injury results from a dangerous condition of a public parking lot, so long as that parking lot is "located in" a "recreation area," overruling *Jones v. City & County of Denver*, 833 P.2d 870 (Colo. App. 1992);

(3) three-step analysis applies in determining whether a particular piece of property is "located in" a "recreation area" pursuant to the recreation area waiver of immunity under CGIA; and

> (4) parking lot at issue was "located in" a "recreation area" for purposes of immunity waiver.

These Supreme Court's holdings regarding "public facilities" may mean we will see a new trend in premises liability lawsuits arising out of incidents occurring at public places such as parks, school playgrounds, and golf courses.

Tort Claims Related and/or Relevant to Premises Liability: Recent Case Law

Groh v. Westin Operator, LLC, 347 P.3d 606 (Colo. 2015):

This lawsuit involved drunken patrons of a downtown Denver Westin hotel causing a serious car accident (involving a fatality and a serious brain injury), after being evicted from the hotel for causing a noise disturbance. After a late night out in downtown Denver, Jillian Groh brought a group of friends back to a room she had rented at the Westin Hotel. Security guards confronted the group about the noise level in the room and ultimately evicted them, even though Groh and her companions advised the guards that they were drunk and could not drive. On the way out, one of Groh's friends asked a guard if the group could wait in the lobby for a taxicab because it was freezing outside. The guard responded by blocking the door and saying, "no, get out of here." Seven people got into Groh's car, with a drunk driver behind the wheel. Fifteen miles away, the driver of Groh's car rear-ended another vehicle, resulting in a crash that killed one man and left Groh in a vegetative state with traumatic brain injuries. Groh (through her parents) sued the Westin for damages under several negligence and breach of contract claims. The trial court granted summary judgment for the Westin, concluding in relevant part:

> Based on Groh's alleged claims for negligence, in order for the Westin to be liable for negligence there must be a duty for a hotel, when evicting guests, to ensure that they do not drive away drunk.
>
> This Court holds that hotels do not have a legal duty to prevent injuries subsequent to eviction by preventing drunk driving. To hold otherwise would put hotels in the impossible position of exercising control over others when they have no right to do so.

The trial court also found that the Westin had the right to evict Groh and the group based on her breach of the contract, and that the Westin had not waived its right to object to the number of persons in the room.

Groh appealed the district court's summary judgment order. The Court of Appeals

initially affirmed the district court's summary judgment order, but then Groh filed a petition for rehearing. The Court of Appeals granted the petition for rehearing. The Court of Appeals withdrew its first opinion, and reversed the summary judgment order with respect to the negligence-related claims. It held that "a hotel must evict a guest in a reasonable manner, which precludes ejecting a guest into foreseeably dangerous circumstances resulting from either the guest's condition or the environment." It then deemed summary judgment inappropriate because a reasonable jury could find a breach of this duty based on the record in this case. Westin filed a petition for *certiorari* with the Colorado Supreme Court, which was granted. Both the Colorado Trial Lawyers Association and the Colorado Defense Lawyers Association filed *amicus* briefs.

On April 13, 2015, the Supreme Court rendered decisions in the case as follows: (1) as a matter of first impression, the hotel had a duty to exercise reasonable care while evicting guest, which required the hotel to refrain from evicting Groh into a foreseeably dangerous environment; (2) hotel's duty to exercise reasonable care while evicting guest did not end at hotel's property line; (3) genuine issue of material fact as to whether hotel breached its duty to exercise reasonable care under the circumstances by evicting intoxicated guest into a foreseeably dangerous environment precluded summary judgment on negligence claim; and (4) Dram Shop Act did not provide hotel immunity.

Build It and They Will Drink, Inc. v. Strauch

In 2011, the Colorado Supreme Court issued a decision in *Build It and They Will Drink, Inc. v. Strauch*, 253 P.3d 302, 308 (Colo. 2011) in which the Court found that there is no foreseeability element in tavern owner liability. In this case, an assault victim who was stabbed approximately a block-and-a-half from a nightclub brought an action against the nightclub and its owner for serving alcohol to the (allegedly) visibly intoxicated patron who stabbed him. The district court granted the nightclub's summary judgment motion, and the assault victim appealed. The Court of Appeals affirmed the district courts' findings in part and reversed in part. The nightclub and its owner filed a petition for writ of certiorari for the case to be heard by the Colorado Supreme Court. The Supreme Court granted certiorari to determine whether an injury must be foreseeable to a liquor licensee for liability under the dram-shop statute. The Supreme Court concluded that because the plain language of C.R.S. 12-47-801 does not include foreseeability, the court should not read an additional element into the statute. It therefore held that to establish liability of liquor licensee under dram shop liability statute, there is no requirement that plaintiff's injury be a foreseeable consequence of the sale or service of alcohol. The Court in its decision acknowledged explicitly that it was "not presented with an issue of general premises liability in the present case" such that the foreseeability element necessary for the imposition of premises liability was "irrelevant to our discussion of dram-shop liability." *Id.*

SW ex rel. Wacker v. Towers Boat Club, Inc.

In *SW ex rel. Wacker v. Towers Boat Club, Inc.*, 315 P.3d 1257 (Colo. 2013), a child was injured while playing on an inflatable structure rented by a landowner for a social gathering. A claim premised upon the attractive nuisance doctrine by the plaintiff child and his parents was successfully challenged by the defendant landowner via summary judgment motion in the state district court. The plaintiffs appealed. The Colorado Court of Appeals determined, as a matter of first impression, the attractive nuisance doctrine did not apply to child licensees. The Court of Appeals concluded the common law doctrine of attractive nuisance applies only to trespassing children. The plaintiff argued this was an unfair result, as it appeared to conflict with the Statute in providing more legal protection to trespassing children than to "licensee" children. The Court of Appeals disagreed, finding that the attractive nuisance child trespasser was considered multi-jurisdictionally as an "implied invitee" in the context of the attractive nuisance doctrine. A Petition for Writ of *Certiorari* was granted by the Colorado Supreme Court. As a matter of first impression, the Colorado Supreme Court held that all children, regardless of their classification as trespasser, licensee, or invitee, could bring an attractive nuisance claim.

Trends and Briefing Tips

The duties owed by a landowner are determined according to the status of the injured party plaintiff under the Statute. "Invitees" are generally people on the property to conduct business with the landowner. *C.R.S. § 13-21-115(5)(a).* Landowners have a duty to use reasonable care to protect invitees from dangerous conditions about which the landowner knew or should have known. *C.R.S. § 13-21-115(3)(c)(I).* "Licensees" are those who enter property for their own convenience with the landowner's permission. *C.R.S. § 13-21-115(3)(c)(II).* It is important to note that social guests fall into the "licensee" category. *Id.* Landowners have a duty to use reasonable care to warn licensees of dangerous conditions (which the landowner either created, or which are not normally present on the particular type of property) about which they have actual knowledge. *C.R.S. §13-21-115(3)(b)(I) and (II).* "Trespassers" are those who did not have permission to enter the landowner's property, and landowners owe only a duty to refrain from willfully or deliberately injuring plaintiffs in this category. *C.R.S. § 13-21-115(5)(c) and (3)(a).*

A plaintiff's status under the Statute is determined as a matter of law but is often decided via parties' stipulation, without the need for briefing to the court. Sometimes this issue bears close scrutiny, however, and in most cases it is proper for the parties to engage in some discovery before the issue of a claimant's status can be confirmed. There could be a question of

a plaintiff's status based upon many factors, and a plaintiff's choices while on the landowner's property could change his/her expected status under the Statute dramatically.

For instance, "Joe Plaintiff" is injured in a retail store, and files a lawsuit alleging that the store violated the Statute by failing to clean up a liquid hazard in one of its aisles. On its face, it would appear that Joe Plaintiff could be nothing other than an "invitee," as a customer alleging injury occurring in a retail store aisle. However, it could not be until discovery is undertaken that it is learned that the aisle had been taped across by store personnel prior to Joe Plaintiff's fall with a "do not enter" sign. Joe Plaintiff, although he would be considered an invitee during his movements in other parts of the retail store, has arguably suddenly become either a "licensee" or a "trespasser" for purposes of his claim.

The 1958 Colorado Supreme Court case, *Mathias v. Denver Union Terminal Ry. Co.*, 323 P.2d 624 (Colo. 1958) stands for the proposition, "(w)hen an invitee goes upon a part of the premises not intended for his use, and where he would not reasonably be expected to go, and his purpose in being there is his own, he becomes a licensee." In the *Mathias* case, photographer Frank Mathias left the area used by passengers at a railway depot to climb onto a window sill and down onto an overhanging glass canopy. The glass gave way, and Mr. Mathias was injured. The 1949 Colorado Supreme Court wrongful death case, *Roessler v. O'Brien*, 201 P.2d 901 (Colo. 1949) involved a man who upon his own whim decided to climb a fire escape and died in the process. Here is a pertinent excerpt from the decision:

> Here there was no city ordinance requiring the construction of a fire escape on defendant's apartment house, and it is obvious that its purpose was for use as a means of escape from the apartment house in event of fire therein. There is no evidence whatever that it was used, or intended to be used, for any other purpose. What decedent's object was in going upon the stairway to the second story of the apartment house, opening the door to the fire escape, and going thereon is inexplicable, especially in view of the warning of Johnson. Decedent was not expressly or impliedly invited, either by Johnson or the owner, to go to the second floor or to use the fire escape, and when he ostensibly started home and instead went up onto the fire escape, he was using it for a purpose for which it was not intended or constructed. It is not necessary for us here to determine whether by departing from the way usually and customarily traveled in leaving Johnson's apartment to go to the street decedent became a licensee or trespasser, but certainly it cannot be contended successfully that in going on the second floor and the fire escape he still retained the status of an invitee. By departing from the usual course traveled in entering or leaving

> the apartment, decedent became either a licensee or trespasser, and then the only duty which defendant owed him was not to willfully and intentionally inflict any injury.

See Also, *Chapman v. Willey*, 134 P.3d 568 (Colo. App.2006)(man's status of "licensee" under the Statute changed to "trespasser" when he entered a motel for the purpose of fighting).

A change from expected "invitee" status to "licensee" status can be a real game changer in a case. Furthermore, a change from expected "invitee" status to "trespasser" status can take a plaintiff out of the game entirely. A plaintiff counsel would not be expected to stipulate to a less favorable "licensee" or "trespasser" status, so in these situations defense counsel should be prepared to file a summary judgment motion or a motion for the determination of a question of law as to the plaintiff's status under the Statute.

Status classifications under the Statute also sometimes lead to surprising and/or unwelcome results for a plaintiff. A perfect example of this is a claim brought pursuant to the attractive nuisance doctrine. In April, 2012, the Colorado Court of Appeals decided the case, *SW ex rel. Wacker v. Towers Boat Club, Inc.*, ---P.3d ----, 2012 WL 1436152 (Colo. App. April 26, 2012). The plaintiff child in this case, undisputedly a licensee, was injured while playing on an inflatable structure rented by a landowner for a social gathering. A claim premised upon the attractive nuisance doctrine was successfully challenged by the defendant landowner via summary judgment motion. The plaintiff appealed. The Colorado Court of Appeals determined, as a matter of first impression, the attractive nuisance doctrine did not apply to child licensees. The Court concluded the common law doctrine of attractive nuisance applies only to trespassing children. The plaintiff argued this was an unfair result, as it appeared to conflict with the Statute in providing more legal protection to trespassing children than to "licensee" children. The Court disagreed, finding that the attractive nuisance child trespasser was considered multi-jurisdictionally as an "implied invitee" in the context of the attractive nuisance doctrine.

The elements of proof for an attractive nuisance claim support the Court's position:

1. The plaintiff had injuries, damages, or losses;
2. The plaintiff's injuries, damages, or losses were caused by an unusual activity being carried on the premises or by an unusual condition, other than a natural condition, existing on the premises;
3. The plaintiff was attracted onto the premises by the activity or condition or was on the premises with the express or implied consent of the defendant;

4. The activity or condition was unusually attractive to children;
5. The condition or activity created an unreasonable risk of injury to children which the defendant knew, or, as a reasonably careful person, should have known;
6. The plaintiff was too young to appreciate or realize the risk of injury to himself from the activity or condition; and
7. The defendant failed to exercise reasonable care to protect persons like the plaintiff from injury.

C.J.I. 12:4. So in this instance at least, a "trespasser" status would have served the plaintiff best, as unlikely as that sounds given what we know of the Statute.

The jury instructions for premises liability cases appear in Chapter 12 of the Colorado Jury Instructions, 4th Edition, but the instructions are generally limited to elements of liability for specific claimants (invitee, licensee, trespasser, children re: attractive nuisance doctrine, etc.) There are no form verdict forms or carrying instructions for premises liability included. In practice, the verdict forms and carrying instructions for negligence claims (Chapter 9 of the Colorado Jury Instructions, 4th Edition) are modified to become premises liability forms. Substituting "claim of premises liability" for "claim of negligence," and "was the defendant at fault" for "was the defendant negligent" is an easy and appropriate way to revise most of the form premises liability instructions. Special care needs to be given to the carrying instructions and verdict forms to make sure the jury is asked to answer all of the questions that are raised by a premises liability claim. Generally, those questions are:

1. Was there a dangerous condition?
2. a. (For Invitees): Did the landowner know of, or should the landowner have known of, the dangerous condition?
   b. (For Licensees): Did the landowner have actual knowledge of the dangerous condition?
3. a. (For Invitees): Did the landowner use reasonable care to protect against the dangerous condition?
   b. (For Licensees): Did the landowner use reasonable care to warn against the dangerous condition?
   c. (For Trespassers): Did the landowner willfully or deliberately damage the trespasser?

These questions are general, and may be impacted by the specific questions in a given case, such as whether the accident occurred on agricultural property and/or whether the "dangerous condition" was one created by the landowner, or was of a type not ordinarily present on the type

of property where the accident occurred. There is an excellent discussion of jury instructions in *Lombard v. Colorado Outdoor Education Center, Inc.*, --- P.3d ---, 2011 WL 3616755 (Colo. App. Aug. 18, 2011).

The primary reason for a plaintiff or a defendant to pursue or defend a case under a premises liability theory is that the Statute has been heavily litigated. Many questions regarding liability and/or status under the Statute can be determined as a matter of law. Conceivably, this can give the parties greater certainty as to how their claims will proceed and what evidence may be admissible in a given case. There is a slight advantage to the defense in a premises liability case. The Statute's purpose is to define and limit landowner liability. Under the Statute, a plaintiff has a significant evidentiary burden, and courts have routinely required plaintiffs to meet that burden well before the time that a case goes to a jury. If a plaintiff fails to meet the evidentiary burden either prior to the motion for summary judgment deadline or even in the presentation of their case in chief at trial, that plaintiff may find his or her claims dismissed as a matter of law. See *Justi v. RHO Condominium Association*, --- P.3d ----, 2011 WL 2474460, No. 10CA0521 (Colo. App. June 23, 2011) (dismissal of case on directed verdict was proper where plaintiff failed to offer any evidence, or make any offer of proof, to show that landowner failed to use reasonable care with respect to an allegedly dangerous condition). Analyzing whether the Statute is applicable in a given case can be critical to an effective case evaluation, proper evidentiary preparation, and obtaining a favorable outcome.

There is no formula for a "winning" premises liability brief, of course. As with writing any brief, the more you know about your case and the more supporting evidence you can find will determine the success of your motion. However, as you can see from some of the cases above, researching the specifics of your premises liability case could mean the difference between success and failure because of the many idiosyncrasies inherent to the premises liability realm.