PREMISES LIABILITY CLAIMS IN COLORADO

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Historical Background on 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). For landowner liability prior to 1971, Courts determined landowner duties based upon the status of the plaintiff. The duties owed by landowners were different depending on whether the plaintiff was a trespasser, licensee or invitee. *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 541 n. 2, 489 P.2d 308, 311 (1971). But in 1971, the Colorado Supreme Court held that defendant landowners should instead meet a standard of reasonable care in view of the foreseeability of injury to others. *Id.* The Colorado legislature in 1986, during a period of tort reform, then enacted the Premises Liability Statute, §13-21-115(2), C.R.S. ("the 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).

Overview

When a plaintiff is injured on the real property of another due to a condition existing on the property or circumstances or activities conducted on the property, relief afforded by the Statute is plaintiff's exclusive remedy. Motions to Dismiss or Motions for Summary Judgment are appropriate for common law claims such as negligence, negligence per se, negligent supervision/training, *res ipsa loquitor*, etc. when those claims are brought in addition to, or instead of, a premises liability claim. The express language of the Statute itself precludes other common law claims, and the Supreme Court also addressed the issue in *Vigil v. Franklin*, 103 P.3d 322, 328 (Colo. 2004), and more recently in *Larrieu v. Best Buy Stores, L.P.,* --- P.3d ----, 2013 WL 3215477 (Colo. 2013). However, in *Legro v. Robinson*, 2012 COA 182, the Court of Appeals held that the Statute does not bar claims brought pursuant to other statutes, such as the civil dog bite statute, §13-21-124, C.R.S. It should also be noted that the Statute permits joint and several liability claims brought pursuant to §13-21-111.5(4), C.R.S.

[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 What Circumstances Will the Statute Apply?

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). In the past decade, the Statute was seen to have broad application and Colorado Courts have applied it even where claims arose out of dog bites or 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). As recently as 2010, a church was found to be a landowner 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).

The Federal Courts have not seen eye to eye with the Colorado Courts on the application of the premises liability statute to activities that are not "inherently related to the land." A question was recently certified to the Colorado Supreme Court by the Federal Courts on this issue in the case of *Larrieu v. Best Buy Stores, L.P*., Not Reported in F.Supp.2d, 2011 WL 3157011 (D.Colo. 2011). In the *Larrieu* case the plaintiff was allegedly injured when "walking backwards while carrying a heavy gate." *Id*. at *2. The Federal Court found that the statutory language, 'activities conducted or circumstances existing on such property' refers only to those activities and circumstances that are inherently related to the land: "[c]oncluding otherwise would subject landowners to broad potential liability in contravention of legislative intent." *Id*. at *3. *See also Phathong v. Tesco Corp. (US)*, Slip Copy, 2012 WL 5187751 (D. Colo. 2012) (plaintiff was injured on a drill rig. The Court found: "Activities such as using the wrong equipment on a drill rig and failing to properly train employees are not activities that are 'directly related to the real property itself' or that are 'inherently related to the land.' Therefore, the Colorado Premises Liability Act does not apply." *Id*. at *5. On June 24, 2013, the Colorado Supreme Court issued its decision in the *Larrieu* case, confirming that the Statute does afford broad protection to landowners, even when a plaintiff alleges injuries stemming from activities or circumstances not "inherently related to the land." *Larrieu v. Best Buy Stores, L.P.*, --- P.3d ---, 2013 WL 3215477 (Colo. 2013). The Court held that the Statute makes landowners liable for conditions, activities and circumstances "that the landowner is liable for in its legal capacity as landowner." *Id*. at ¶ 4.

The Colorado Supreme Court also accepted certiorari in 2011 on the issue of whether the Statute would have precluded claims of negligence and respondeat superior even though the acts of defendant's employees were unrelated to the land but occurred on proprietary property. *Adams v. Coyote Communications, Inc.* Not Reported in P.3d, 2011 WL 1420287 (Colo. App. 2011). Certiorari in that case was later dismissed by stipulation of the parties. It is interesting that in *Larrieu*, the Supreme Court seemed to go out of its way to say that it will "leave for another day the question of how theories such as respondeat superior and vicarious liability relate to the premises liability act." *Larrieu*, at FN8.

Another interesting case with respect to the Statute's exclusivity provision is *Marcellot v. Exempla, Inc*., 2012 COA 200. No. 12CA0233 (Nov. 8, 2012). Here a psychiatric nursing educator took her students to Exempla West Pines to the Psychiatric Intensive Care Unit. She asked before entering if there were any patients that presented a risk to her safety and was told

there was not a risk. She was assaulted by a patient after entering the unit and Exempla knew that the patient may pose a threat. She brought negligence claims and claims under the Statute. When Exempla claimed it was immune from suit, Marcellot contended that the Premises Liability Act evinces an intent by the General Assembly that it be the sole statute delineating the obligations and liabilities of landowners in tort, and that its provisions conflict with the immunity provisions contained in section § 13-21-117. However, since she did not raise this issue in trial court, the claim was dismissed.

The Statute may not apply in certain types of living situations, such as in situations where a plaintiff is an owner/member in a homeowners or condominium owners association. *Trailside Townhome Ass'n, Inc. v. Acierno*, 880 P.2d 1197, 1202-3 (Colo. 1994). (When injured party is a member of a homeowners/condominium owners association and is injured in the common area, the Statute may or may not apply depending on the wording of the documents defining association and owner rights and obligations.)

Who is Entitled to Protection Under the Statute?

The Statute applies broadly to "landowners", which includes 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 the accident occurred. Most recently, in *Jordan v. Panorama Orthopedics & Spine Center, PC*, --- P.3d ----, 2013 WL 2448744 (Colo. App. 2013) the Colorado Court of Appeals pointed out that whether a person or an entity is a landowner under the Statute is a mixed question of law and fact that must be decided on a case by case basis. The Court clarified that on review, the question of fact should be reviewed for clear error while the application of the law will be subject to de novo review. *Id.* at ¶ 13. Tenants of leased premises can be landowners. *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1219 n. 4 (Colo. 2002). However, tenants may only be landowners with respect to the actual area leased, and not "common areas." *Jordan*, --- P.3d at ¶ 24. Janitors can be held responsible under the Statute as landowners over staircases in a slip and fall case. *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612, 615 (Colo. App. 2003). The Statute even contemplates that there may be more than one landowner in a given case. §13-21-115(4), C.R.S. 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 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

[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. *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 relationship to the accident other than the ownership of the property where the accident occurred. It is not clear how *Larrieu* will impact this analysis.

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*, 41 Colo. App. 191, 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 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); *but 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).

One recent case from a Colorado Court of Appeals panel restricted the applicability of the Statute not by restricting who might be a "landowner" but by holding that the landowner must be exercising control over the property at the time of plaintiff's accident. *Collard v. Vista Paving Corp*., 292 P.3d 1232 (Colo. App. 2012). This decision, which was not appealed to the Colorado Supreme Court, is questionable. *Collard* relies for its 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 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*.

In contrast to *Collard* and *Land-Wells* is the Supreme Court case of *Pierson v. Black Canyon Aggregates, Inc.,* 48 P.3d 1215 (Colo. 2002), in which there is no "at the time of the accident" requirement:

> [the Statute] offers its protection to a person who is legally conducting an activity on the property or legally creating a condition on the property. Such a person or entity is "responsible" for the activity or condition and, therefore, **prospectively** liable to an entrant onto the property. The common definition of "responsible" is: "[a]nswerable, accountable, (to); liable to be called to account; having authority or control; being the cause." II New Shorter Oxford English Dictionary 2567 (1993). Therefore, the focus becomes whether the defendant is someone who is legally entitled to be on the real

property and whether that defendant is responsible for creating a condition on real property or conducting an activity on real property that injures an entrant. In our view, such focus properly serves the intent of the statute by: (i) limiting the protection of the statute to a person or entity with legal authority to be on the property; and (ii) placing **prospective** liability with the person or entity that created the condition or conducted the activity on the real property that, in turn, caused injury to someone. Of course, the cause of action must arise out of an injury occurring on the real property of another and by reason of the condition of the property or activities or circumstances directly related to the real property itself in order to be within the rubric of the statute. See § 13–21–115(2).

Id. at 1221 (emphasis added).

What Duties Do Landowners Owe Under the Statute?

The duties owed by a Landowner are determined according to the status of the injured party plaintiff. A plaintiff's status under the Statute is determined as a matter of law. "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 this 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), unless the doctrine of "attractive nuisance" applies. Certiorari is pending in a case analyzing whether the attractive nuisance should apply only to trespassing children, rather than licensees or invitees. *S.W. ex re Wacker v. Towers Boat Club, Inc*., 2012 COA 77.

The Colorado Court of Appeals analyzed the distinction between an invitee and a social guest in the ATV case previously mentioned, *Wycoff v. Grace*, 251 P.3d at 1267. The court found that the plaintiff was properly characterized as an invitee rather than a licensee (or social guest) primarily because the plaintiff had paid $40 and signed a permission slip prior to engaging in activities with the church. Importantly, this case explains that it is not necessary for there to be a profit element to the plaintiff-defendant relationship in order for plaintiff to obtain "invitee" status. *Id*. In a companion case, *Wycoff v. Seventh Day Adventist Ass'n of Colorado*, 251 P.3d 1258 (Colo. App. 2010), the Court of Appeals held that the Seventh Day Adventist Association was also a landowner and that plaintiff's status was an invitee with respect to the Association because it received money from the church for the plaintiff's participation in activities. In *Corder v. Folds*, 2012 COA 174, 292 P.3d 1177 (Colo. App. 2012), the Court of Appeals addressed whether there was a requirement for express consent, rather than implied consent, to change a plaintiff's status from trespasser to licensee. In a case where a neighbor borrowed a landowner's propane tank and fell and injured himself when returning it, the Court found the neighbor had implied consent to be on the property and therefore was a licensee.

What Does Plaintiff Have to Prove Regarding a Landowner's Knowledge for the Imposition of

Liability?

Invitee plaintiffs must only show that 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 this issue was first 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.,*266 P.3d 412 (Colo. App. 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 418-419. 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 is *Sofford*, in which a 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. The language most applicable to the instant issue is found in a footnote to the *Sofford* decision:

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.

What Affirmative Defenses are Available in Premises Liability Cases?

On November 12, 2002, a vehicle driven by 16-year-old Maureen Martin stalled near railroad tracks outside of Castle Rock, Colorado. A train began to approach and the crossing gate descended upon her vehicle. At this time, the vehicle was not directly in the path of the oncoming train. However, the plaintiff's boyfriend was operating a truck behind her vehicle, and, in an apparent effort to push Ms. Martin's vehicle across the tracks, he rear ended it and pushed it directly into the path of the oncoming train. The defendant railroad company asserted that the only relief available to plaintiff was under the premises liability act, and they claimed the affirmative defenses of comparative negligence and pro-rata fault (that is, that any fault of the railroad company should also be reduced by the proportionate share of fault of plaintiff and her boyfriend). The trial court struck both affirmative defenses on the grounds that because the Statute provided plaintiffs "exclusive" remedies, it also provided defendants "exclusive" defenses.

Subsequent to the *Martin v. Union Pacific Railroad Company* trial, in 2004 Colorado's Court of Appeals issued the *Vigil* decision, holding that common law affirmative defenses such as "open and obvious danger" were not available to landowners under the Statute.[3] But the Court did not specifically analyze whether affirmative defenses otherwise available to landowners by statute (as opposed to by common law) were abrogated by the Statute. Thus it remained unclear whether the statutory affirmative defenses claimed by defendant in the *Martin* case were, in fact, available to landowners. In June, 2009, the Colorado Supreme Court ruled in *Union Pacific Railroad Company v. Martin,* 209 P.3d 185 (Colo. 2009) that the Statute did not preclude the application of other statutory defenses. This did not change the holding in *Vigil* that non-statutory defenses which would have been available at common law (ie, "open and obvious danger") are not available under the Statute. At this time the only defenses available to landowner defendants are statutory.

Interplay between Workers Compensation Statutes and Premises Liability Statutes

Recently in *Cavaleri v. Anderson, 2012 COA 122* the Court of Appeals considered whether the premises liability claims of an independent contractor who was injured while putting tile the defendant's home would be impacted by Colorado Worker's Compensation statutes when the contractor declined to carry workers' compensation insurance on himself. The Trial Court

[3] [w]hile a landowner may argue that he owes no duty to an injured plaintiff, he may do so only pursuant to the defenses set forth in the statute. *Vigil v. Franklin*, 103 P.3d 322, 331 (Colo. 2004).

held that pursuant to § 8–41–401(3), C.R.S., the contractor was precluded from recovering anything more than $15,000. Defendants then tendered the $15,000 and the Court entered a dismissal with prejudice. The Court of Appeals affirmed, finding that the exclusive remedy for a sole proprietor who does not have worker's compensation insurance in an action against a homeowner is the damage limitation of § 8-41-401, C.R.S..

In *Humphrey v. Whole Foods Market Rocky Mountain*, 250 P.3d 706 (Colo. App. 2010), a plaintiff delivery driver brought a premises liability action against a food market defendant for injuries sustained while making delivery. Defendant argued that the food market was a statutory employer under §8-41-401(1)(a), C.R.S., and was thus immune. The trial court agreed and the Court of Appeals affirmed.

Interplay Between Dram Shop and Premises Liability Statutes

There is a sub-set of premises liability case law dealing with the liability of tavern owners to patrons. Essentially this line of cases holds that if a tavern proprietor does not have "actual or constructive notice that the tavern patron causing the injury to the plaintiff constituted an unreasonable risk of harm to others legitimately on the tavern premises" then the tavern proprietor has no legal duty to protect the injured plaintiff from bodily harm. In *Observatory Corp. v. Daly*, 780 P.2d 462 (Colo. 1989), plaintiff filed a tort action against the Observatory Corporation, which owned and operated a tavern, and a tavern customer, Russell Sheard, for damages resulting from an incident in which Sheard, while leaving the parking lot of the tavern, drove his automobile into the rear of a car occupied by the plaintiff, Daly. Daly's claims based on the Observatory's negligence in breaching its statutory and common-law duty not to serve alcoholic beverages to a visibly intoxicated person, see § 12-47-128(5)(a)(I), 5 C.R.S. (1985), and, independently of that claim, on the Observatory's negligent failure to protect Daly from the physical harm inflicted on him by Sheard while Daly was on the Observatory's premises. The Observatory asserted that the complaint failed to state a claim for relief and denied any negligence. Under *Daly*, "the foreseeability of harm plays a prominent role in resolving the tavern proprietor's legal duty of care to patrons and other persons legitimately on the tavern premises". *Id*. at 467-468. For plaintiffs to establish a tavern owner's liability under the Statute (as distinguished from under Colorado's Dram Shop Act, §12-47-801, C.R.S.) plaintiff bears the burden of proving that the tavern owner had actual or constructive notice ("knew or should have known"), that a particular activity or patron "constituted an unreasonable risk of harm to persons legitimately on the tavern premises". *Id.* at 468. But the Court must also consider, "the social utility of the proprietor's conduct, the magnitude of the burden of guarding against the injury, the consequences of placing that burden upon the defendant, and any other relevant factors implicated by the facts of the case". *Id*. at 469. The *Daly* opinion states:

> While there is not such a significant degree of social utility in operating a tavern as to tilt the balance in favor of negating any legal duty to protect persons legitimately on the tavern premises from the harmful conduct of a tavern patron, we nonetheless must be mindful of the magnitude of the burden that would be implicated by imposing a legal duty to protect Daly from the physical harm perpetrated by Sheard under the circumstances of this case. To impose such a duty would be tantamount to requiring a tavern employee to divine future violence on the part of a tavern patron notwithstanding the absence of any objective evidence indicating that the patron constituted an unreasonable risk to the safety of others. The practical consequences of such a rule would be to render the tavern

> proprietor a virtual insurer of the safety of all persons legitimately on its premises. We decline to adopt such a rule. We accordingly conclude that the Observatory had no legal duty to protect Daly from the physical harm perpetrated against him by Sheard, a tavern patron, under the circumstances of this case.

Daly, 780 P.2d at 469.

Keep in mind that *Daly* was decided when the legal standard for premise liability and negligence cases were evaluated under the framework of *Mile High v. Radovich* ,175 Colo. 537 (1971) and its progeny.

More recently the Colorado Supreme Court issued *Build It and They Will Drink, Inc. v. Strauch*, 253 P.3d 302 (Colo. 2011). In this case an assault victim who was stabbed approximately a block and a half away from a night club brought an action against the night club and its owner for serving alcohol to a visibly intoxicated patron who ultimately stabbed him. The Court found that the Colorado Dram Shop Act, C.R.S. §12-47-801, C.R.S. expressly abolishes any common law action against a vendor of alcoholic beverages, adopting a general rule that the consumption of alcohol, rather than the sale, service or provision of alcohol is the proximate cause of injuries inflicted on another by an intoxicated person. It replaces the common law proximate cause determination with specific statutory elements, eliminating civil liability for liquor licenses except when there is a willful and knowing sale of alcohol to a visibly intoxicated person and the injury resulting from the intoxication. Under these circumstances, the sale or service of alcohol is the proximate cause of a plaintiff's injuries, and a vendor of alcohol is liable for the limit of damages. Because the plain language of the statute defies the criteria for a proximate cause and liability without mention of foreseeability, the Court held that liability under §12-47-801 does not require that the plaintiff's injury be a foreseeable consequence of the sale or service of alcohol. It must be noted that *Strauch* was a Dram Shop Act case and not a premises liability case, because the *Strauch* Court acknowledged explicitly that it was "not presented with an issue of general premises liability" such that the foreseeability element necessary for the imposition of premises liability was "irrelevant to our discussion of dram-shop liability."