

COLORADO PREMISES LIABILITY: THE EVOLVING LIABILITY OF LANDOWNERS

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Colorado's Premises Liability Law- How Did We Get Here?

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).

When Can The Premises Liability Statute Be Invoked?

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, that person’s exclusive remedy against the landowner is pursuant to Colorado’s Premises Liability 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). 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). Recently the Colorado Court of Appeals found that a church was a landowner under the Statute because it sponsored an activity where participants were towed on an innertube 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

¹The 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.

“undisputedly was responsible for the ATV activity” and therefore it was a landowner under the Statute.

Premises Liability is an Exclusive Remedy

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).

On Whom Does the Statute Impose Duties?

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 the accident occurred. Tenants of leased premises can be landowners. *Pierson v. Black Canyon Aggregates, Inc.*, 48 P.3d 1215, 1219 n. 4 (Colo. 2002). 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 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 Statute², 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 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

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 other relationship to the accident than the ownership of the property where the accident occurred.

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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).

Duties Imposed by the Statute are Non Delegable

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 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. *Sofford v. Schindler Elevator Corp.*, 461 (D. Colo. 1997), *Jules v. Embassy Properties, Inc.*, 905 P.2d 13, 14 (Colo. App. 1995) and *Kidwell v. K-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 only be held liable for more damages than are associated with its own share of fault.

What Duties are Owed by Landowners?

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).

The Colorado Court of Appeals recently analyzed the distinction between an invitee and a social guest in the ATV case previously mentioned, *Wycoff v. Grace*, 251 P.3d at 1267. In that case 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.

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.*, --- P.3d -- -, 2011 WL 3616755 (Colo. App. Aug. 18, 21011) 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 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.

Premises Liability for Tavern Owners Includes Foreseeability Requirement

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. *Observatory Corp. v. Daly*, 780 P.2d 462 (Colo. 1989). 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.

Recently 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, but it must be noted that *Strauch* was a Dram Shop Act case and not a premises liability case. The *Strauch* Court 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.”

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.

What Jury Instructions Are Most Useful in Premises Liability Cases?

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).

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 the most recent *Lombard* case. *Lombard*, --- P.3d at *2-*6.

What are the Pros and Cons of Proceeding Under Premises Liability Theories?

The primary reason for either plaintiffs or defendants to proceed under premises liability theories is that the Statute has been heavily litigated and 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, plaintiffs have a significant evidentiary burden to proving that liability should enter and Courts have routinely required plaintiffs to meet that burden well before the time that a case goes to a jury. If plaintiffs fail 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, plaintiffs may find their 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 or not the premises liability statute is applicable in a given case can be critical to an effective case evaluation, proper evidentiary preparation, and obtaining an efficient and favorable outcome.