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Premises Liability Act I – A Brush Up on the Basics

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Overview

- What is the PLA?
- Exclusive Remedy Provision
- Is Your Client a Landowner?
- What is the Plaintiff?
- Duties Owed
- Defenses
- No Defense?



The Colorado Premises Liability Act

C.R.S. 13-21-115

- *to promote a state policy of responsibility by both landowners and those upon the land as well as to ensure that the ability of an injured party to recover is correlated with the injured party's status as a trespasser, licensee, or invitee*
- *PLA focuses on duties owed by a landowner in their capacity as a landowner; that is, someone who is legally responsible for the condition of the property, or for the activities conducted or circumstances existing on the property.*



Exclusive Remedy

“[o]ur analysis of the premises liability statute convinces us that the General Assembly clearly and manifestly expressed its intent...A countervailing construction would fail to give effect to the preemptive language in subsection (2), the clear delineation of landowner duties in subsection (3), and the limited role of the court in subsection (4), rendering it a nullity—a result we seek to avoid.” *Vigil v. Franklin*, 103 P.3d 322, 329 (Colo. 2004).

Practice Pointers

- Over pleading by plaintiff as an opportunity for early conferral
- Consider other viable causes of action



Who is a Landowner?

The Law

- “Landowner” means, without limitation, an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property.

C.R.S. § 13-21-115, C.R.S.

- Title...is not dispositive in determining who is a “landowner” under the Premises Liability Statute. *Perez v. Grovert*, 962 P.2d 996, 999 (Colo.Ct.App.1998) *Wark v. United States*, 269 F.3d 1185, 1188 (10th Cir. 2001).
- A non-exclusive right to use premises does not confer landowner status on to a party. *Jordan v. Panorama Orthopedics & Spine Center, P.C.*, 346 P.3d 1035, Colo. 2015.
- “[M]erely promising to indemnify another party (here, the landlord) for its liability does not transform a defendant into a landowner.” *Jordan v. Panorama Orthopedics & Spine Ctr., PC*, 346 P.3d 1035, Colo. 2015.

Practice Pointers

- Can you admit your client is a landowner?
- Documents to guide you in this inquiry?
 - Leases are your friends!
 - Vendor/Subcontractor Contract
 - Property Management Agreements
- Do you want to admit your client is a landowner?
- Other defendants?



Landowners Have Non-Delegable Duty

- Under the PLA, a landowner has a non-delegable duty to maintain a safe premises.
- Under the non-delegable duty doctrine, a landowner, by delegating a task to an independent contractor, cannot thereby delegate his or her legal responsibility to maintain the premises in a safe condition. *Restatement (Second) of Torts § 422.*
- A landowner cannot escape liability for conditions created by negligent subcontractors.
- The nondelegable duty burdens the landowner with full liability under the PLA regardless of the fault imputable to other defendants or nonparties.



Tender

- Contractual Duty to Defend and Indemnify
- Sometimes multiple possible contractors
- Early and Often



Colorado Governmental Immunity Act

- C.R.S. 24-10-101, et. seq. provides state and local government agencies and employees with immunity for certain claims.
- Waivers of this immunity for certain exceptions – relevant here, “dangerous condition of public building” but dangerous condition is narrowly construed to be “physical improvement to property.”
- CGIA also requires notice to the entity within 180 days after the date of the discovery of the injury. C.R.S. 24-10-109.



Plaintiff's Status Determines Duty - Invitees

Status

“Invitee” means a person who **enters or remains on the land of another to transact business in which the parties are mutually interested** or who enters or remains on such land in response to the landowner's express or implied representation that the public is requested, expected, or intended to enter or remain. Colo. Rev. Stat. Ann. § 13-21-115(7)(a) (West)

Duty

“[A]n invitee may recover for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers the landowner actually knew about or should have known about.” Colo. Rev. Stat. Ann. § 13-21-115(4)(c)(I) (West)

Practice Pointers

- Status can change or be revoked throughout time on premises
- Be wary of admitting status early on



Plaintiff's Status Determines Duty - Licensees

Status

“[A] person who enters or remains on the land of another for the licensee's own convenience or to advance the licensee's own interests, pursuant to the landowner's permission or consent. “Licensee” includes a social guest.” Colo. Rev. Stat. Ann. § 13-21-115(7)(c) (West).

Duty

“....exercise reasonable care with respect to dangers created by the landowner that the landowner actually knew about.”

Practice Pointers

- Was there a contract?
- Invitation versus permission.



Plaintiff's Status Determines Duty - Trespasser

Status

a person who enters or remains on the land of another without the landowner's consent. Colo. Rev. Stat. Ann. § 13-21-115 (West)

Duty Owed

Depends on landowner's knowledge of trespasser's presence.

Practice Pointer

- Attractive Nuisance - children and exciting stuff!
- Investigation! What did your client know?



What is Reasonable Care?

- Reasonable care is that degree of care which a reasonably careful person would use under the same or similar circumstances.
- Industry Standards are not dispositive, but are relevant.
- Policies and Procedures? *Johnson v. Liberty Mutual Fire Ins. Co.*, 648 F.3d 1162, 1165 (10th Cir. 2011) “[w]hen you violate a corporate policy you may well be in trouble with your boss, but that doesn't necessarily mean you have committed a tort.”
- Violation of Statute or Ordinance (not quite negligence per se) *Lombard v. Colorado Outdoor Educ. Center, Inc.*, 266 P.3d 412 (Colo. App. 2012).



Knowledge

Actual (Knew)

- Knowledge of the particular dangerous condition or activity.
- Imputed knowledge?
- *Henderson v. Master Klean Janitorial, Inc.*, 70 P.3d 612 (Colo. App. 2003).

Constructive (Should Have Known)

- Foreseeability - “includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct.” – *Taco Bell, Inc. v. Lannon*, 744 p.2d 43, 48 (Colo. 1987).
- “knowledge that one exercising reasonable diligence should have.” *Lombard v. Colorado Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008).



Causation

“But For” Test

- whether, but for the alleged negligence, the harm would not have occurred.” *Smith v. State Comp. Ins. Fund*, 749 P.2d 462, 464 (Colo. App. 1987).
- This “but for” test is met if the breach of duty of care “in a ‘natural and continued sequence, unbroken by any efficient, intervening cause, produce[s] the result complained of, and without which that result would not have occurred.’ ” *Id.*

“Substantial Factor”

- The breach of duty must have been a substantial factor in causing the plaintiff’s claimed injury.
- An intervening cause that has such an effect is often referred to as a “superseding cause.”



Causation – Third Party Criminal Act

Pre-*Wagner* / *Axelrod v. Cinemark Holdings, Inc.*,

- Liability under the PLA requires proof of proximate cause.
- Third party criminal conduct constitutes a substantial factor in producing the injury.
- Intentional and premeditated criminal conduct predominate cause, even in light of landowner's failure to undertake certain safety procedures.

Wagner

- Liability under the PLA requires proof of proximate cause.
- Intentional, premeditated third party criminal conduct could be construed as not the predominate cause of a plaintiff's injuries.
- Foreseeability of third party criminal conduct can be based on whether goods or services are controversial.

Legislature

- 13-25-115(2)(e)(1)
 - The *Wagner* decisions do not accurately reflect the intent of the general assembly regarding landowner liability and must not be relied upon
- Colo. Rev. Stat. Ann. § 13-21-115 (West)



Common Defenses

- Comparative Negligence
- Jury Instructions
 - 9:13 – Look but Fail to See
 - 12:17 – Alternate Choice of Route
- No Notice/No Constructive Knowledge
- Notice, But Exercised Reasonable Care



No Liability Defenses? Not the End of the Road

- Admission of Liability
- Don't be afraid!
- Later Admission Concerns





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Questions? Comments?

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