Jim's Perspective…

Premises Liability Claim

All of us have seen the value of a homeguard policy or business owners policy when someone is injured on the owner's land and pursues a premises liability claim against the owner. Recently, the Nebraska Supreme Court issued an opinion regarding a person who was staying at a hotel, and slipped and fell while showering.[1] (About a year ago, I wrote an article about premises liability, but this court case has a little bit different analysis which I thought might be interesting.) The injured person, Mike Strahan, filed a negligence action against McCook Hotel Group, LLC, alleging the floor of the shower was not slip resistant and presented an unreasonably dangerous condition. The District Court of Red Willow County granted summary judgment in favor of the hotel, and Strahan appealed to the Nebraska Supreme Court.

McCook Hotel Group's motion for summary judgment means that the McCook Hotel Group believes there is no dispute as to the material facts introduced in court, and based upon the undisputed facts submitted, and the civil tort law that applies to the factual evidence before the court, the court should enter judgment in favor of McCook Hotel Group. There are no factual issues for a jury to decide. The court ruled that based upon the facts submitted, there was no evidence to show that the shower was a dangerous condition on McCook Hotel Group's hotel property.

The Supreme Court opinion initially noted that a premises liability case generally falls into one of three categories:

(1) Those concerning the failure to protect lawful entrants from a dangerous condition on the land.
(2) Those concerning the failure to protect lawful entrants from a dangerous activity on the land.
(3) Those concerning the failure to protect lawful entrants from the acts of a third person on the land.

The parties to this case all agreed this case falls within category (1). The Court further noted that in Nebraska, a possessor of land is subject to liability for injury caused to a lawful visitor by a *condition on the land* if the following elements are proven:

(1) The possessor either *created the condition*, knew of the condition, or by the existence of reasonable care would have discovered the condition.
(2) The possessor should have realized the condition involved an *unreasonable risk of harm* to the lawful visitor. (called the "unreasonably dangerous" standard)
(3) The possessor should have expected that a lawful visitor such as the plaintiff, either (a) would not discover or realize the danger, or (b) would fail to protect himself or herself against the danger. (called the "open and obvious" standard).
(4) The possessor failed to use reasonable care to protect the lawful visitor against the danger.
(5) The condition was a proximate cause of damage to the plaintiff.

The hotel manager testified that the hotel was built in 2016. He said the Hotel Group did not have an active role in choosing the hotel shower to be installed. Instead, the Hotel Group allowed the builder to make all the decisions about the shower structure and material, and it was understood by the hotel owners that the builder would install showers that are approved and appropriate for hotels. Based on this testimony, the parties agreed that the hotel *created the condition of the shower*.

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[1] Strahan v. McCook Hotel Group, 317 Neb. 350 (2024)

Item (3) has always been described as a standard that generally provides that when a dangerous condition is open and obvious, the owner is not liable in negligence for harm caused by the condition, unless the owner should have expected that lawful visitors would not discover or realize the danger. The open and obvious legal doctrine assumes that item (2), an unreasonably dangerous condition, does exist. Item (2) is what the Court focused on. Was the shower a dangerous condition?

At the District Court proceeding, the plaintiff argued that the shower tub should have been an acrylic shower tub with a textured floor. However, there was no evidence to show that this type of shower tub is safer or less slippery than one with an ordinary floor.

The District Court said:

> The mere fact that Strahan slipped in a wet shower tub is not evidence of negligence and does not, without more, support a reasonable inference that an unreasonably dangerous condition existed. At the time Strahan fell, the hotel had been open for 31 months and had not received any complaints about the shower tub. More importantly, Strahan presented no evidence, expert or otherwise, tending to show that the shower tub in his room was unusually slippery or had a coefficient of friction that presented a uniquely or unacceptably high risk of harm. He presented no evidence of industry standards for shower tubs, generally, and no evidence that any code, regulation, ordinance, or similar provision that required the shower tub to have a textured or slip-resistant surface. In fact, the record contains no evidence that the shower tub failed to meet any applicable safety standard or that it was unsafe or defective in any respect.

The Supreme Court reviewed a number of published cases that involved injuries sustained in a shower or tub. The Supreme Court said these cases establish the following:

> These cases illustrate the critical importance, in a premises liability case such as this, of adducing evidence showing that a shower or tub presented "a uniquely or unacceptably high risk of harm -- something more than the usual risks commonly encountered." Here, Strahan alleged that a shower tub without a textured or slip-resistant floor is unreasonably dangerous, but in response to the hotel's motion for summary judgment, he adduced only speculation and conjecture to support that allegation.

The Supreme Court affirmed the District Court's order of Summary Judgment in favor of the hotel.

As I have mentioned in the past, during the 1980's and into the mid-1990's, at Farmers Mutual of Nebraska, I managed, on average, about 200 legal files at any one time. There were always a good number of premises liability files amongst my open and pending group of legal files. Below are a few factual examples of premises liability lawsuits that I managed many years ago! Just reminiscing, you know!

1984. The insured is a farmer in Custer County. The claimant is his adult son who was residing with the insured temporarily following a divorce. The son was walking through an area where the insured had placed discarded machinery and machinery scrap when the son slipped on something. The son was in this area looking for parts to build a hay bale mover for the insured. As he fell, he struck his face on some of the machinery, fracturing his skull and a facial bone.

1997. There was a prenuptial dinner at insured's house. After dinner, many of the guests went out into the backyard. There was a trampoline in the back yard. A 23-year-old young man had been drinking beer for a good portion of the prenuptial event. After dinner, in the back yard, he started jumping on the trampoline. At some point he fell off the trampoline and sustained a fracture to the cervical spine. No surgery was needed. He underwent conservative treatment. I remember there were always trampoline accidents as a part of my litigation files!

1988. Slip and fall in laundromat. Lady carrying a basket of clothes fell and injured her leg.

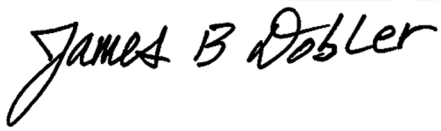
1986. Insureds just moved into a rental house. A friend of the insureds came to the rental house to see what kind of house they had. He proceeded down some stairs to the basement, but fell down these stairs and sustained serious injury. He died from the injuries.

1987. Claimant ran out the back door of the insured's rental property, and proceeded to vomit over the railing of the wooden back porch which was built up from the basement level of the house to the first floor where it was situated outside the kitchen sliding glass door. As she leaned over this railing, the railing board that sat on top of the vertical two-by-fours gave way, and the claimant fell face first onto a cement walkway located below the wooden back porch. There did not appear to be any obvious signs of a defective or rotted railing.

1986. Claimant was hired to combine insured's corn. Claimant was moving an auger from one grain bin to another when the auger hit a high-voltage line which electrocuted and killed the claimant.

1983. Claimant opened door to insured's hog confinement building. Claimant turned on a fan located inside the building, and a spark ignited the propane in the building causing an explosion. Claimant sustained significant burn injuries. Back in the 1980's, there were always some hog confinement building accidents involving either fire or an explosion.

I could go on-and-on. As we can all appreciate, there are an unlimited number of potential accidents associated with the premises liability risk exposure. Sure, it's nice to own real property, but ownership means responsibility for what occurs on the real property. It is what necessitates personal liability insurance and a personal umbrella as excess coverage. It also requires a business owners policy or OL&T policy for commercial property. As you know, this coverage also pays for the cost of a defense attorney. Of course, the property owner always needs to discuss the premises liability risk exposure with his or her agent!



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