Jim's Perspective…

Premises Liability

Rita Sundermann was struck by a pickup while she was inflating her car's tires at a Hy-Vee gas station and convenience store in Omaha. Sundermann sued Hy-Vee and the owner of the property, Sweetbriar II, LLC, for negligence. This case was finally resolved with a Nebraska Supreme Court opinion which was issued in August.[1]

The front of the convenience store faced east. There were parking stalls at the front of the store. There was an access drive to the north of the store. Vehicles could enter the convenience store area in an easterly direction on the access drive and vehicles could exit the convenience store in a westerly direction on the access drive. A small island of concrete space extended east from the north edge of the store to separate the parking stalls from the access drive. An air compressor was located on this concrete space. Consequently, the air pump could be used by parking in the northern-most stall east of the store, or a person could use the pump by parking in the access road on the north side of the concrete island. On the north edge of the access road there were additional parking stalls in which vehicles could park in a parallel north/south direction. When a vehicle backed out of these stalls, the vehicle could be backing into the area on the access road where the air compressor could be used.

Sundermann parked her car in the access drive next to the concrete island. Her vehicle was headed west, so technically she was parked headed west in the lane used by vehicles to go east into the Hy-Vee gas station. She crouched down and started to put air into a tire. She testified that she kept an eye out for east and west bound traffic in the access drive. A man started his pickup in one of the parking stalls along the north edge of the access road. As he began to back out of the stall into the access drive he noticed Sundermann crouched down in the access road putting air into a tire on the passenger side of the car. He placed his foot on the brake to stop the pickup and wait for Sundermann to finish, but unfortunately, his foot slipped off of the brake and onto the gas pedal. The pickup darted across the access road and struck Sundermann resulting in serious injuries to Sundermann that included placing a metal rod in one of her legs. The auto insurer settled the claim against the pickup driver which left only the premises liability claim unresolved.

Sundermann argued Hy-Vee and Sweetbriar were negligent because the location of the air compressor was a dangerous condition on the land since it was located in an area of high vehicular and pedestrian conflict, there were no barriers or signs to prevent patrons from stopping in the access drive to use the air compressor, and there were no posted warning signs about use of the air pump from the access drive. Hy-Vee and Sweetbriar denied negligence and alleged Sundermann was contributorily negligent by trying to fill the tires while parked in the access road.

At the trial court level, there was considerable discussion about whether the accident was something that might be foreseeable. Who would have thought that a driver's foot would slip off

[1] Sundermann v. HY-VEE, Inc, and Sweetbriar II, LLC, 306 Neb. 749 (2020).

the brake pedal and cause an injury? However, the Supreme Court focused on the standard of care owed by the owner or possessor of land. The Court said that premises liability cases fall 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 party on the land.

The Court said this case falls under item (1).

For the past thirty years, Nebraska law has applied a five-factor rule in premises liability litigation. The five-factor test is as follows:

A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if:

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

The Court said that in cases considering conditions on the land, Nebraska law draws a distinction between conditions which present ordinary or common risks, and those which present unreasonable risks. By limiting tort liability to only those conditions which pose an unreasonable risk of harm, Nebraska law is balancing two competing policies:

1. Requiring businesses to exercise reasonable care to maintain the premises in a safe condition.
2. Protecting businesses from becoming the insurer of their patrons' safety.

There is no fixed rule for determining when the risk of harm is unreasonable. But Nebraska courts have said, "The plain meaning of the term suggests a uniquely or unacceptable high risk of harm – something more than the usual risks commonly encountered. In some cases, Nebraska courts have approved of defining the phrase "unreasonable risk of harm" to mean "a risk that a reasonable person, under all circumstances of the case, would not allow to continue."

The Court noted that expert witnesses for both parties to the lawsuit recognized that there is some degree of risk represented in all convenience store parking lots, due to the mix of vehicular and pedestrian traffic. Some of the ordinary risks posed by common conditions in parking lots

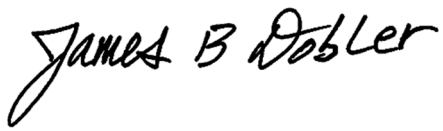
are familiar to drivers and pedestrians alike, including the absence of traffic signs, the presence of moving vehicles, concrete wheel stops, and curbs.

Nebraska law also provides that a land possessor is not liable to a lawful entrant on the land unless the land possessor has or should have had superior knowledge of a dangerous condition. Consequently, even where a dangerous condition exists, a premises owner will not be liable unless the premises owner should have expected that the lawful visitor such as Sundermann, either would not discover or realize the danger or would fail to protect himself or herself against the danger. When a dangerous condition is open and obvious the owner or occupier is not liable for harm caused by the condition.

In this case, the dangers of parking in the access drive to use the air compressor are obvious. They include the risk of being struck by another vehicle either backing into or driving through the access road. Furthermore, the dangers of kneeling next to a parked car in the access road are obvious, as are the dangers of turning one's back to vehicular traffic. Also, in this case, there was no evidence that Sundermann was distracted or forgot about the risk. She testified that she was aware of the danger of using the air compressor from the access road, and she was watching and listening for traffic. Finally, Hy-Vee had received no safety complaints about the location of the air compressor and there had been no accidents as a result of the air compressor's location. The evidence in this case showed nothing more than the usual and common everyday risks associated with visiting a convenience store, and the danger of using the air compressor from the access road was open and obvious to anyone using it. The Court found Hy-Vee and Sweetbriar were not guilty of negligence.

Two final points:

1. Note that both the owner of the land and the user of the land were defendants. If a client says he or she doesn't need liability insurance for land they have leased to someone because they are not using or controlling the land, this case shows they still have an exposure. It might be that the owner of the land is an additional insured under the possessor's policy, but if so, the possessor's liability limit should be checked and the owner's liability coverage may still apply as excess.
2. Premises liability cases involve significant risk and uncertainty since there is no "bright line" established to determine if the possessor of the land is negligent. The standard for negligence is very subjective. Whether a condition in the land is reasonable or unreasonable is not easy to determine and it is simply a subjective determination based on the facts presented at trial. Whether a condition in the land is open and obvious also involves a subjective determination.



Jim Dobler, CPCU
PIA Legislative Coordinator
Questions or Comments? Please email jbdobler@outlook.com