

# NJ Appeals Court Holds New Jersey Businesses May Be Liable for Off-Site Injuries

by Donald M. Pepe on January 22, 2013

The Appellate Division recently held that New Jersey businesses could be held liable for injuries that occur on surrounding property, even if it is owned and maintained by another party.

In *Nielsen v. Wal-Mart Store #2171*, A-2790-11, a pest control worker was injured when he allegedly fell on loose gravel as he walked around the perimeter of the building rather than through it, at the request of Wal-Mart store management. In defending the suit, the defendant store argued that there was no duty owed to the injured worker where the injury occurs in an area that the developer, Nassau Shopping Center Condominium Association, was contractually bound to maintain and repair.

In an apparent expansion of the Stewart Doctrine, referring to a 1981 New Jersey Supreme Court case that held a commercial property owner could be found liable for injuries that occur on adjoining, publicly owned sidewalks, the court here held that the “particular relationship of the parties, the nature of the attendant risk, Wal-Mart’s opportunity and ability to exercise care, and the public interest all balance in favor of the imposition of a duty on Wal-Mart.” It specifically found that ownership of the property was “simply one factor to be considered in determining whether a duty of care should be imposed.”

In its opinion, the court further noted that imposing liability “advances important policy interests by fostering the land occupier’s constant vigilance” and “encourages a business owner ... to alert the contractually responsible entity about hazardous conditions.” The notion that a land occupier’s duty of care extends only as far as the boundaries of its property — the ostensible central thesis of Walmart’s argument — is simply out of step with the modern course of the common law,” the court said.

The court also acknowledged that its decision “may seem inconsistent” with a ruling by a different Appellate Division panel in *Kandrac v. Marrazzo’s Market*, which we previously discussed on this New Jersey Business Law Blog. In that case, the Appellate Division declined to extend liability when a customer was injured in a common parking area.

“We view *Kandrac* as unduly dependent upon the assignment of responsibility for a common area defined by the defendant’s lease,” the panel stated in a footnote. “The content of the lease is a factor to be considered but we do not view it as having the great weight assigned by *Kandrac*.”

These cases highlight that premises liability is rarely clear-cut. Rather, it may depend on a number of factors, including the relationships between the parties, the underlying contract, and public policy considerations.

An interesting footnote to the main holding in the case is the fact that Wal-Mart's trial counsel failed to seek contractual indemnification from the condominium association as a third-party defendant. The court declined to comment on whether indemnification might be available to Wal-Mart in a separate action, an obvious nod to the Entire Controversy Doctrine. While not related to the main holding in the case, an important tip that can be taken from the case is when negotiating indemnification provisions in leases, operating agreements, master deeds and other documents relating to maintenance obligations, it may prove useful to include an express waiver of the Entire Controversy Doctrine. While not a bullet proof solution in light of the court's interest in the efficient administration of cases that in part underpins the doctrine, there is little doubt that Wal-Mart would be in a better position if such a waiver were included in its agreement with the condominium association.

*If you have any questions about business records or would like to discuss how to improve your company's policies and procedures, please contact me, Donald Pepe, or the Scarinci Hollenbeck attorney with whom you work.*