Old, but Often Overlooked Defenses for Premises Liability Cases

By: Cathleen Kelly Rebar
McCumber, Daniels, Buntz, Hartig & Puig, P.A.

When approaching a premises liability case, attorneys occasionally overlook the obvious and neglect to pursue worthwhile and effective defenses and/or strategies. This article addresses some of the obvious, but sometimes ignored, defenses.

The first question any good lawyer should ask themselves when faced with a premise liability case is "what is the plaintiff's status on the property?" When dealing with a case involving a business owner, attorneys routinely concede that the plaintiff is a business invitee when in fact a legitimate argument may exist to have the plaintiff deemed a licensee.

The Restatement of Torts (Second) §330 defines a licensee as:

> A person who is privileged to enter or remain on the land only by virtue of the possessor's consent.

The Restatement of Torts (Second) §342 sets forth the liability of the possessor of land for physical harm caused to licensees by a condition on the land. Specifically, Section 342 provides as follows:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land **if, but only if,**
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> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, **and**
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, **and**
> **(c)** the licensees do not know or have reason to know of the condition and the risk involved.

The comments to Section 342 state the reasoning behind this standard; if a licensee discovers the condition or danger for himself without any warning, and understands and appreciates the risk, then he is in a position to make an intelligent choice as to whether the advantage to be gained is sufficient to justify his incurring the risk by entering or remaining on the land. Therefore, even where the possessor has given the licensee no warning of the dangerous condition, if the licensee is aware of the condition and the risk then there is no liability on the part of the possessor.[i]

Additionally, in the scenario where the licensee is not aware of the condition, the possessor of land is not liable unless the plaintiff can prove he had notice of the dangerous

condition. The possessor of land has no duty to inspect the property for dangerous conditions as to a licensee. This is a significant difference from the standard owed a business invitee.

The Supreme Court of Pennsylvania has adopted Section 342 of the Restatement (Second) and comment l as the standard on possessor liability to licensees. In *Cutler v. Peck Lumber Mfg. Co.,*[ii] the Supreme Court refused to hold the defendant lumber yard liable for plaintiff's injuries where the plaintiff was a licensee and attempted to transverse a muddy lumber yard by walking on a wood plank since plaintiff was clearly aware of the muddy conditions existing on the property before she entered. The Court held that it was the court's duty to deny liability where the plaintiff was aware of the dangerous condition and voluntarily assumed the risk of attempting or engaging in the activity.[iii]

Under the doctrine of assumption of the risk, a defendant is relieved of its duty to protect the plaintiff where the plaintiff voluntarily and deliberately proceeded to face a known and obvious risk.[iv] In such situations, the law considers the plaintiff to have assumed liability for his own injuries.[v]

Snowy and icy conditions during a storm constitute such an obvious risk. Pennsylvania courts have consistently stated that when a plaintiff sees "snow and ice everywhere," the plaintiff will be deemed to have perceived and assumed the risk.[vi] "There are some dangers that are so obvious that they will be held to have been assumed as a matter of law despite assertions of ignorance to the contrary."[vii] "Ice always is slippery, and a person walking on ice always runs the risk of slipping and falling."[viii]

When you can successfully argue plaintiff's status as a licensee, the plaintiff has the burden of proving the plaintiff's injuries were caused by a dangerous condition known to defendant and not known to the plaintiff.[ix] With proper discovery a defense attorney can successfully obtain dismissal on summary judgment if the plaintiff is a licensee and has produced no evidence of notice, or if there is clear evidence that the plaintiff was aware of the condition before the accident occurred.

Another approach often overlooked by defense counsel is pursuing immunity under the Workers' Compensation Act[x] where either the possessor of land is the direct employer of the plaintiff or the plaintiff is a "borrowed servant."[xi] If the plaintiff is an employee of the defendant and was working at the time of the accident at issue, the argument is simple because the Workers' Compensation Act is the sole means of recovery for the plaintiff.[xii]

In *Heckendorn v. Consolidated Rail Corp*.,[xiii] the Pennsylvania Supreme Court stated that "[t]he Workers' Compensation Act provides that '[t]he liability of an employer under this act shall be exclusive' and that the employer 'shall not be liable to a third party for damages, contribution or indemnity in any action at law, or otherwise . . . .'"[xiv]

Additionally, "the Workers Compensation Act provides that '[a]n employer is one against whom recovery can neither be 'sought nor allowed.'"[xv] This prohibition has been found to

include statutory employers.[xvi]

To determine whether a worker furnished by one person or business to another person or business becomes the employee of the person or business to whom he is loaned, a/k/a borrowed servant, courts look to whether the employee "passes under the latter's right of control with regard not only to the work to be done, but also to the manner of performing it."[xvii] The person or business "possessing the right to control the manner of the performance of the servant's work is the employer, irrespective of whether the control is actually exercised."[xviii] A business need not actually exercise its right to control the manner of performance, it is sufficient that the business had that right.[xix] In *JFC Temps*, the court noted that each case must be decided on its own facts but that additional, potentially relevant factors include the right to select and discharge the employee and the skill or expertise required for the performance of the work.[xx] "The payment of wages may be considered, but it is not a determinative factor."[xxi]

The success of this approach often turns on the agreement between the proposed statutory employer and the actual employer for whom the plaintiff works. Generally, a written agreement outlines the scope of work and who controls the work. For the most part, the plaintiff's actual employer will be cooperative in discovery because the contractual relationship between the proposed statutory employer and the actual employer is still in place. Accordingly, proper preparation for a deposition with a designee of the plaintiff's actual employer may yield substantial evidence to establish that plaintiff is a "borrowed servant" of the statutory employer. As counsel for the proposed statutory employer, the focus of the preparation for these depositions should be on establishing that the direct employer works at the direction of the statutory employer and that all work performed under the written agreement is done per the specifications of the statutory employer. If the direct employer is cooperative, requests for admissions are an excellent tool for creating an undisputed record to be used as the basis for a motion for summary judgment on this point.

Although the proposed statutory employer may be successful in establishing that the plaintiff is either a direct employee or a "borrowed servant," the party may have waived its right to statutory immunity under the Workers' Compensation Act by contractually agreeing to indemnify another for the specific negligence that caused the injury. This situation usually presents itself where the plaintiff (the statutory employer's employee and/or borrowed employee) is injured as a result of the actions of the statutory employer or an agent of the statutory employer.

To illustrate, consider the following factual scenario wherein you are counsel for the statutory employer. Your client's borrowed servant is the employee of a janitorial company that performs janitorial services for your business. Your client contracts with another party to provide snow removal at the property. The plaintiff is injured by falling on ice on your property on the way to his janitorial job. Your client has a written agreement with the snow removal company that provides indemnity in favor of the snow removal company. The snow removal company sues your client for indemnity and/or contribution. Your client's first defense is immunity under the borrowed servant doctrine. Under the above analysis your client cannot be

responsible in negligence for injuries to his employee or "borrowed servant." The snow removal company will assert that your client waived that protection under the indemnity provision of your client's agreement with the snow removal company. The response is often that the language is not specific enough. In order to indemnify someone for injuries to your client's employee and/or "borrowed servant," the language in favor of indemnity must "expressly say that the employer agreed to forgo its statutory protection . . ."[xxii] "The parties must specifically utilize language which indicates that the employer/alleged indemnitor intends to indemnify the third party against claims by employees of the alleged indemnitor; this must clearly appear from the terms of the agreement."[xxiii]

Moreover, specifically in the context of indemnification under the Workers' Compensation Act, Pennsylvania courts have held that if parties intend to include a provision within their indemnity agreement that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language.[xxiv] An inference from words of general import cannot establish such indemnification.[xxv] In Pennsylvania, a contractual indemnity clause encompassing personal injuries should not be construed to indemnify against the negligence of the indemnitee, unless it be so expressed in unequivocal terms.[xxvi] Contracts of indemnity are not ordinarily construed as covering liability for accidents caused by the negligence of the party indemnified.[xxvii]

The intent of both parties must be made apparent by clear, precise and unequivocal language before the contract will be construed to indemnify against the consequences of the indemnitee's own negligence.[xxviii] Provisions to indemnify for another party's negligence are narrowly construed, requiring a clear and unequivocal agreement before a party may transfer its liability to another party.[xxix]

In summary, in defending a premises liability case, the starting point should be identifying the status of the plaintiff with the goal of designating the plaintiff as a licensee or "borrowed servant." If you can show that the plaintiff was a licensee, then you can attempt to establish that the plaintiff was aware of the condition that caused the injury or that your client had no notice of the condition. If you can establish that the plaintiff was a borrowed servant, then you should raise immunity under the Workers' Compensation Act. When faced with opposition pursuant to an indemnity agreement, look closely at the language of the agreement. Absent clear, unequivocal terms that specifically indemnify the other party for its negligence in causing injuries to your employee or "borrowed servant," a written indemnity provision will be invalid to defeat your client's immunity under the Workers' Compensation Act for injuries to a plaintiff deemed a "borrowed servant."

Cathleen Kelly Rebar is a Shareholder at McCumber Daniels in the firm's Philadelphia, Pennsylvania office, focusing her practice on the defense of Nursing Homes and Assisted Living Facilities, Hospitals, Clinics and Health Care Institutions, Medical Malpractice Defense, Third Party and Professional Liability, Health Care Law, Appellate Practice, Real Estate/Transactional, Errors and Omissions, Product's Liability and Premises Liability. Ms. Kelly Rebar is licensed in the States of Pennsylvania and New Jersey.

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[i] Restatement of Torts (Second) §342, comment l.
[ii] 350 Pa. 8 (1944).
[iii] *Id*. at 12; *Jones v. Counties Gas & Elec. Co.*, 289 Pa. 128, 130 (1927); *Onstott v. Alleghany County*, 338 Pa. 206, 210 (1940).
[iv] *Struble v. Valley Forge Military Academy*, 445 Pa.Super. 224, 229 (1995).
[v] *Id*.
[vi] *Freudenvol v. Stavros*, 49 Pa. D. & C.4th 328, 333-36 (Pa.Comm.Pl. 2000).
[vii] *Howel v Clyde*, 533 Pa. 151, 159 n9, (1993).
[viii] *Barrett v. Fredavid Builders, Inc.*, 454 Pa. Super. 162, 167 (1996).
[ix] *Sharp v. Luksa*, 440 Pa. 125, 129 (1970); *Matthews v. Spiegel*, 385 Pa. 203, 206 (1956).
[x] 77 P.S. § 1, *et seq*.
[xi] *Vandervort v. Workers Compensation Appeal Board (City of Phila.)*, 899 A.2d 414 (Pa.Cmwlth 2006).
[xii] *Id*. at 418.
[xiii] 502 Pa. 101 (1983).
[xiv] *Id. at 106-07.* (internal citations omitted).
[xv] *Id.*
[xvi] *Bartley v. Concrete Masonry Corp.*, 322 Pa.Super. 207, 212 (1983).
[xvii] *JFC Temps, Inc. v. Workers' Compensation Appeal Board*, 545 Pa. 149, 153 (1996).
[xviii] *Id.*
[xix] *Id. at 156.*
[xx] *Id.* at 153.
[xxi] *Id.*
[xxii] *Bester v. Essex Crane Rental*, 422 Pa.Super 178, 183-84 (1993) (citing 77 Pa. Cons. Stat. Ann. §481 (b)); *see Snare v. Ebensburg Power Co*., 431 Pa.Super 515, 522 (1993).
[xxiii] *Snare*, 431 Pa.Super at 522.
[xxiv] *Ruzzi v. Butler Petroleum Co.*, 527 Pa. 1, 7 (1991); *Remas v. Duquesne Light Co.*, 371 Pa.Super. 183, 187 (1988); *Babjack v. Mt. Lebanon Parking Authority*, 102 Pa.Cmwlth 499, 503-04 (1986).
[xxv] *Perry v. Payne*, 217 Pa. 252, 262 (1907).
[xxvi] *Perry*, 217 Pa. at 259; *Ersek v. Springfield Tp*., 160 Pa.Cmnwlth. 79, 84 (1993).
[xxvii] *Brotherton Const. Co. v. Patterson-Emerson-Comstock, Inc*., 406 Pa. 400, 402 (1962).
[xxviii] *Koontz v. East Hopewell Tp*., 1968 WL 6689, *2 (1968).
[xxix] *Bernotas v. Super Fresh Food Markets, Inc*., 581 Pa. 12, 20 (2004).