Premises Liability: The Lay of the Land

By Ryan E. Hodge

It seems like certain types of cases come in batches in my office. For whatever reason, I have had several slip-and-fall/premises liability cases come through my door recently. Since these are not cases I handle on a daily basis, their presence required a re-review of the law that I had since forgotten that I knew about slip-and-fall cases.

If you're like me, you don't want to read a 300-page treatise on slip-and-fall cases to get yourself back up to speed. What I have started doing is to create documents that summarize the law, mostly from Kansas, in certain areas as they relate to a particular case. I add segments to these documents as I do research on new cases in similar areas. I also add notes about thoughts I may be having about a particular case at a certain time for reference later. After a period of time, I have a document that I can refer back to that refreshes my memory about what it is I need to do to prepare a certain type of case while minimizing the time I have to spend getting back up to speed.

The purpose of this article is two-fold. First, I want to share the format that I have used for my summary documents for anyone who wishes to try this technique as a way to keep up on a certain area of law.

Second, this article will provide an update on what has happened in the area of slip-and-fall practice in the last few years and may provide a handy quick reference for anyone who needs it. If anyone finds this technique helpful, I would be interested in hearing comments.

Ryan E. Hodge is a managing partner at the firm of Ray Hodge & Associates, Wichita. He has been in practice since 1994, practicing in the areas of criminal, domestic, bankruptcty and civil litigation. His current emphasis is on personal injury litigation. Ryan received his J.D. from the University of Kansas and an M.B.A. from Eastern College in Philadelphia, Pa. He serves as "Consumer Law" editor on KTLA's board of editors.

Summary of Premises Liability Cases in Kansas

Jones v. Hansen, 254 Kan. 499, 867 P.2d 303 (1994) The Kansas Supreme Court abandoned the distinction between trespassers, invitees and licensees. The duty owed by an occupier of land to invitees and licensees is one of reasonable care under all the circumstances.

In *Jackson v. K-Mart Corp.*, 251 Kan. 700, 840 P.2d 463 (1992), the court changed the requirements for placing liability on a business operator. The court adopted the "mode of operation rule." Under this rule, a proprietor can be held liable for damages to customers if he or she could reasonably anticipate that hazardous conditions would regularly arise from his or her operation and failed to take reasonable precautions against the conditions. This modification was significant for victims of carelessness in that the requirement for actual or constructive notice may be dispensed with when there is reasonable foreseeability that a dangerous condition would regularly occur.

In *Seibert v. Vic Regnier Builders, Inc.*, 253 Kan. 540 (1993, the Kansas Supreme court set out the standard for holding premise owners liable for acts of third parties as being a totality of circumstances test. Specifically, the court held that a duty is placed upon a landowner to provide security to its patrons when (1) the frequency and severity of criminal conduct substantially exceed the norm; or (2) when, under the totality of the circumstances, a business could reasonably foresee that its customers have a risk of peril above and beyond the ordinary. In this case, it must take those security measures which would be taken by a reasonable person under the totality of the circumstances.

Nero v. Kansas State University, 253 Kan. 567 (1993). Knowledge of specific acts of crime of a current tenant is sufficient to create an affirmative duty on the part of the landlord to protect other tenants from that tenant.

Gragg v. Wichita State University, 261 Kan. 1037 (1997). If a landowner has no knowledge of the individual committing the criminal act, has had only one prior similar incident and has adequate security, then as a matter of law under the totality of the circumstances there is no duty owed to an injured patron even in a high-crime area.

Weroha v. Craft, 24 Kan. App.2d 693 (1998). Under the totality of the circumstances test, when there is no evidence of previous violent activity at a business in the area where the business is located, in the industry which the business is a part of, or with the assailants at the business, the business does not have a general duty to provide additional security to its patrons.

Rogers v. Omega Concrete Systems, 20 Kan. App.2d 1 (1994). In a premises liability case, in order to be liable, the

party charged must have had control over the premises in question. Without control, the responsibility for the dangerous or hazardous condition cannot exist.

Schlobohm v. United Parcel Service, Inc., 258 Kan. 122 (1991). Violation of building code standards is negligence per se when the purpose of the standard is to provide minimum standards to safeguard health and public welfare.

Ryan Comment: Given this holding, it certainly seems reasonable that violation of the standards set forth in the Kansas Residential Landlord Tenant Act for minimum health and safety standards now constitute negligence per se. The *Schlobohm* court also noted that negligence per se is still subject to 60-258a comparative negligence standards unless wanton conduct is established.

Negligence per se standards apply even for trespassers. *Kerns v. G.A.C, Inc.*, 255 Kan 264, (1994). ***Ryan Comment:*** In this case the trespasser was a six-year-old who drowned in a swimming pool. Don't expect the same legal standard for a jewel thief who trips and falls down a rickety set of steps in a would-be victim's home.

A reasonable expectation that distractions that would prevent a plaintiff from seeing an open and obvious danger creates an affirmative duty on the part of the landowner to minimize the risk. *Miller v. Zep Manufacturing Co.*, 249 Kan. 34 (1991). The court also found that admitted knowledge of potential for distractions by the defendant gives rise to an even stricter duty to minimize known and obvious risks.

Ryan Comment: Boxes left in the middle of the floor are not as obvious if there are "for sale" signs all over the store screaming look at me and not where you're walking.

In *Falls v. Scott*, 249 Kan. 54 (1991), the court held that a landowner could be liable for injuries to a third party caused by the negligence of an independent contractor when the independent contractor is engaged in an inherently dangerous activity.

Barnett-Holdgraf v. Mutual Life Ins. Co. of New York, 27 Kan. App.2d 267 (2000). The slight defect rule applies to private as well as public sidewalks, and a hole which measures between one-half and one-inch deep and five inches across is a slight defect. However, if the slight defect is the result of the defendant's affirmative negligence, the slight defect rule does not apply. *See Lyon v. Hardee's Food Systems, Inc.*, 250 Kan. 43, 824 P.2d 198 (1992).

Graham v. Claypool, 26 Kan App.2d 94 (1999). A contract for deed seller of property owes no duty to the tenants of that property when the buyer is in complete control of the property.

Klose v. Wood Valley Racquet Club, Inc., 267 Kan. 164 (1999). An association sponsoring an event owes no duty to warn of dangerous conditions.

Brock v. Richmond-Berea Cemetery Dist., 264 Kan 613 (1998). A governmental entity or an employee acting within the scope of employment is not liable for the failure to make an inspection, or for making an inadequate or negligent inspection, of any property other than the property of the

governmental entity to determine whether the property complies with or violates any law or regulation, or contains a hazard to public health or safety.

Brock v. Richmond-Berea Cemetery Dist., 264 Kan. 613 (1998). Before an occupier of land may be held liable for an injury resulting from a dangerous condition, the plaintiff must show that the defendant had actual knowledge of the condition or that the condition had existed for such a length of time that in the exercise of ordinary care the landowner should have known about it.

Pate v. Riverbend Mobile Home Village, Inc. 25 Kan. App.2d 48 (1998). Mobile home lessee brought action against lessor to recover damages for personal injury that occurred when lessee tripped over a round, iron pole that protruded an inch or two above the ground. Held that lessee knew or should have known of protruding pole's existence and location in yard prior to tripping over it.

Kansas maintains a general rule of nonliability upon the landlord to either the tenant or to others entering upon the land for defective conditions existing at the time of the lease. This general rule, however, has six recognized exceptions:

1. Undisclosed dangerous conditions known to the lessor and unknown to the lessee;
2. Conditions dangerous to persons outside of the premises;
3. Premises leased for admission of the public;
4. Parts of land retained in the lessor's control which the lessee is entitled to use;
5. Where the lessor contracts to repair; and
6. Negligence by the lessor in making repairs. *Borders v. Roseberry*, 216 Kan. 486 (1975) cited in *Pate v. Riverbend Mobile Home Village, Inc.*, 25 Kan. App.2d 48 (1998).

Wilson v. Daytec Const. Co., 22 Kan. App.2d 401 (1996). A contractor who is not in control of the business premises it is working on cannot be liable for acts of independent contractors it hired. A contractor has no affirmative duty to minimize risk of an non-inherently dangerous activity when the plaintiff is aware of the risk.

Mozier v. Parsons, 256 Kan. 769 (1995). Swimming pools, whether public or private, generally are not subject to attractive nuisance doctrine, although consideration of doctrine for injuries sustained in swimming pool might be supported by a highly unusual and aggravated factual situation.

Hardesty v. Coastal Mart, Inc., 259 Kan. 645 (1996). Evidence of six prior falls or injuries to customer over three-year period was not admissible to prove habit of not looking where she was going.

Agnew v. Dillons, Inc., 16 Kan. App. 2d 298 (1991). A business has no duty to clear snow and ice from the premises during a snow or ice storm or during a brief period of time after the storm stops. However, it is a question of fact whether the failure to have a handrail in an icy area is a negligent act.

Conclusion

This system of maintaining a summary of my research and thoughts as I work on a case has proven to be very helpful to me, particularly in cases that I don't handle regularly. I've chosen to share my summary of slip-and-fall/premises liability cases as an example, but this system would work equally well for other types of cases. ❖