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ALSO IN THIS ISSUE:

- 2– Rhode Island Supreme Court Clarifies Duty Owed to Business Invitee to Remove Snow and Ice
- 3– Safety Decision From New Hampshire’s Supreme Court: Employer’s Sober Driving Policy Will Not Impose Duty of Care to General Public

Massachusetts SJC Extends Implied Warranty of Habitability to a Tenant’s Lawful Visitors

A primary source of a Massachusetts’ landlord’s legal responsibilities is the “implied warranty of habitability,” that imposes certain minimum requirements and standards to ensure that residential rental properties comply with State building and sanitary codes. While the warranty traditionally runs from a landlord to a tenant, a recent decision by the Supreme Judicial Court of Massachusetts (“SJC”) expands the reach of the warranty to third parties outside of this contractual relationship.

In *Scott v. Garfield*, 454 Mass. 790 (2009), Charles Scott was injured when helping his friend, a second-story tenant in the defendant’s building, pack for her upcoming move. At some point, Scott, who had consumed a glass of wine over lunch and drank at least one beer while socializing with other friends at the tenant’s apartment, took his friend’s rug out to the porch to shake out. When he leaned over a section of the porch railing, the railing gave way and Scott fell, seriously injuring his shoulder.



Scott filed suit against the landlord, asserting claims for negligence and breach of the implied warranty of habitability. Scott contended that the landlord’s failure to repair the porch area constituted a failure to meet the minimum standards imposed by the State Building Code. In defense of the claims, the landlord argued that due to Scott’s alcohol consumption, Scott was comparatively negligent for his accident.

At trial, the jury found in favor of Scott relative to both his claims of negligence and breach of warranty. The jury also found that Scott had been twenty percent comparatively negligent. However, comparative negligence is not a defense to a warranty claim and, therefore, Scott stood to receive the full \$450,000 in damages awarded for his injuries without any reduction for his own comparative fault.

The landlord appealed and, because the right of a guest to recover under the warranty had never been recognized under Massachusetts law, the SJC transferred the matter to itself on its own motion.

Why Extend this Cause of Action?

The SJC affirmed the decision, holding that “a lawful visitor may recover for personal injuries caused by a breach of the implied warranty of habitability.” While recognizing that the warranty arises out of the residential leasing contract, the SJC also noted that the warranty sounds in tort and that Massachusetts negligence law for nearly 30 years has allowed a tenant’s guest to recover damages from a landlord for injuries caused by negligent maintenance of the rented premises. The SJC reasoned that a lawful visitor, like a tenant, has “the expectation that a tenant might invite a guest into his home, and the concomitant expectation that the tenant’s home must be safe for a guest to visit.”

Impact Going Forward:

The decision provides a clear example of the practical difference between a breach of warranty and negligence claim. The SJC recognized the breach of warranty cause of action for “all lawful visitors,” and we can expect the theory to be asserted by more than tenants’ guests, including such broad classes of visitors as service providers hired by tenants.

Finally, the *Scott* decision left open at least two important and related questions that arise in implied warranty cases: will plaintiffs need to prove that the landlord had notice of the allegedly defective condition or violation? And, where the

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“... a lawful visitor, like a tenant, has ‘the expectation that a tenant might invite a guest into his home, and the concomitant expectation that the tenant’s home must be safe for a guest to visit.’”

plaintiff seeks to recover for physical injuries (as opposed to only economic loss), will the standard be one of negligence or strict liability? Because of the negligence findings returned, the Scott court concluded that the answers to these questions would not affect the disposition of this case and, therefore, chose not to decide these issues.

Note:

The *Scott* decision also contains a discussion of the spoliation issues involved with the loss of evidence (the porch columns) in that case, as well as, a discussion of a potential challenge to the “collateral source rule” (that prohibits a defendant

from offering evidence that the plaintiff has received other compensation for his/her injury from some other source) where the plaintiff’s health care providers agreed to accept as full payment an amount less than was billed. The first issue confirms that Burns & Farrey’s spoliation seminar presentations are very relevant to what we as attorneys, insurers, and self-insureds must deal with when a claim includes the loss or destruction of evidence. The latter issue is currently before the SJC in the case of *Law v. Griffith*, and will likely be revisited and more fully analyzed in a future Newsletter. 

Rhode Island Supreme Court Clarifies Duty Owed to Business Invitee to Remove Snow and Ice

In *Berardis v. Louangxay*, 969 A.2d. 1288 (R.I. 2009), the Rhode Island Supreme Court affirmed a Superior Court order granting summary judgment in favor of the owners of a bar, holding they had no duty to clear a natural accumulation of snow and ice from the bar’s entrance area while a winter storm was ongoing.

On the evening of March 13, 2005, the plaintiff and a friend arrived at Lei’s Bar & Grill during a severe winter storm. When they arrived, the walkway was covered in snow and ice. During the three hours they remained at the bar, the winter precipitation continued. The plaintiff left at about 12:30 a.m. to 1 a.m., at which time he slipped and fell on a thick sheet of ice about one foot from the door, and was injured.

The plaintiff filed suit against the owners of the property and the company that operated the bar, alleging that they negligently caused a dangerous and excessive amount of ice to accumulate on the entranceway to the premises, and that defendants knew or should have known of the dangerous condition yet failed to remove it or to warn him of the danger.

Unlike Massachusetts, which does not impose a duty upon an owner or occupier of land to remove a natural accumulation of snow and ice, Rhode Island follows the “Connecticut Rule.” As adopted by Rhode Island courts, this Rule provides that a landlord or business inceptor’s duty of reasonable care includes a duty to clear a natural accumulation of snow and ice. However, absent unusual circumstances, the duty is suspended while storm is ongoing and is not triggered until a reasonable period of time after a storm ends.


Exception to the “Connecticut Rule” Rejected

As the storm was ongoing at the time of the

plaintiff’s fall, the defendants filed motions for summary judgment. After the bar’s motion was allowed, the plaintiff appealed. The Plaintiff argued that the location of his fall, in an entranceway, removes this case from the Connecticut Rule. The Supreme Court disagreed, explaining that the rationale for the rule “does not depend upon how the location of the snow and ice is characterized, but rather on the scope of the burden of the obligations imposed upon a landowner, the relationship between the parties, the public policy implications, and concerns about fairness.”

The Plaintiff also argued that the case presented unusual circumstances, in that the bar’s general manager had shoveled the walk and applied ice melt when he arrived at the premises around noon, inspected the walkway every two hours or so, and did not notice any snow or ice on the walkways when he left work. The Court disagreed, noting that it saw nothing unusual about these circumstances which would heighten the defendants’ duty. “[T]he plaintiff has failed to point to any conduct by the defendants that ‘exacerbated the risk that the plaintiff voluntarily undertook by commuting to and from [a restaurant and bar] during a severe winter storm.’”

Impact Going Forward

The decision declines to expand the duty owed by a business to an invitee with regard to the removal of natural accumulations of snow and ice, and reiterates that when evaluating whether the facts of a case present unusual circumstances warranting an acceleration of the duty to clear snow and ice, Rhode Island courts will focus on whether the defendant’s conduct created a heightened risk of injury. 



Safety Decision From New Hampshire's Supreme Court: Employer's Sober Driving Policy Will Not Impose Duty of Care to General Public

A recent decision from New Hampshire's highest court promotes public safety by not imposing a duty of care upon employers based upon an employer's stringent company guidelines. In *Everitt v. General Electric Company*, 979 A.2d 760 (N.H. 2009), the employer of an off-duty employee was held not to owe a duty of care to the public at large based upon company guidelines aimed at preventing employee drunk driving.

Sarah Everitt was injured when the vehicle in which she was a passenger was struck by a vehicle driven by Jeremiah Citro, an employee at General Electric's Hooksett plant. The day before the accident, (a Friday), a GE company nurse sent Citro home because he appeared confused and disoriented. At that time he was also instructed not to return to work until the following Monday. Despite this instruction, Citro appeared for work the next day, looking disheveled and slurring his speech. GE called the police to remove Citro from the premises, but Citro left before the police arrived.

Within hours, Citro returned to the GE plant. This time, he was detained by security personnel until the Hooksett police arrived. The police officers conducted several field sobriety tests, and ultimately determined that Citro could safely drive. Unfortunately, the accident occurred approximately two hours later.



The plaintiff argued that GE owed her a duty of care to prevent Citro from operating his motor vehicle on the day of the accident. Everitt reasoned that GE voluntarily assumed this duty to her as a member of the general public by adopting guidelines that prohibited impaired employees from being allowed to drive, and by outlining the procedure to be followed when an employee was suspected to be impaired. The company's policy, "Reasonable Suspicion/Reasonable Cause Guidelines," ordered that a

manager must escort the employee to the medical clinic. It further provided: "An impaired employee should never be allowed to drive, to protect the employee and others and to avoid being held liable for any accidents that occur."

Another section of the policy stated that after a positive alcohol or drug test, the employer should arrange transportation for the employee off premises. "Under no circumstances should an employee be allowed to drive. Taxis or family members can be used to transport [the] employee off the premises. If the employee insists on leaving the premises before transportation can be arranged, the supervisor should call security and the employee should be informed that local police will be contacted."

Liability should not be extended where it would discourage internal policies aimed at protecting employees.

The New Hampshire Supreme Court concluded that the adoption of such a corporate policy did not create a duty of care to the plaintiff. Although this issue was one of first impression, the Court agreed with the reasoning articulated in other jurisdictions, that to impose a duty to the general public upon an employer who undertakes to address the problem of alcohol abuse "would encourage employers to abandon all efforts that could benefit such employees in order to avoid future liability." "The public is better served by having the problem [of alcohol and substance abuse] addressed with policies such as the one at issue here."

The Court also concluded that, under the circumstances, GE fulfilled any duty owed by contacting the police, at which point any duty to control Citro on the part of GE ended.

Impact Going Forward

Whether this reasoning will extend to other situations where the employer/employee relationship may be argued to create a duty of care to the general public is unclear. However, by choosing broad language to make its ruling, employers are likely to try and extend this decision's application. At the same time, by emphasizing that the mere existence of a safety policy, without more, fails to create a duty to the general public on the part of the employer, creative plaintiffs' attorneys will likely try to establish that their case has some additional factor or circumstance to create such a duty. ☞

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This newsletter reports developments in the law. It is not intended to provide legal advice. It is circulated to our clients and others in the insurance industry and may be considered advertising.




James P. McLarnon, Jr. of our Worcester office was recently published in the UK-based "Post Magazine" magazine for his piece, "Articles of Faith." The article details steps insurers can take to avoid and defend bad faith claims, and a link is available on our website, www.burnsandfarrey.com. 



Timothy J. Smyth of our Boston office was published in the "Fall 2009 Volume 3 Number 4" issue of "Claims Advisor" magazine for his article, "OSHA Standards in General Contractor Claims." A link to the article is available on our website, www.burnsandfarrey.com. 



Erik J. Tomberg and **Edward B. McGrath** of our Boston office have authored a chapter, "Torts to Property," in the updated "Torts Law Manual," which was published by Massachusetts Continuing Legal Education, Inc. (MCLE) in November. The chapter provides a broad overview of Trespass to Land, Nuisance, Waste, and Trespass to Chattels/Conversion. 



The attorneys and support staff of Burns & Farrey wish you Peace, Health and Happiness in the New Year.