American Educational Institute, Inc.

CLAIMS LAW UPDATE

A SUPPLEMENT TO CLAIMS LAW COURSES IN CASUALTY, PROPERTY, WORKERS COMPENSATION, FRAUD INVESTIGATION AND AUTOMOBILE

Fall, 2014

AEI CLAIMS LAW QUIZ

[Ref. Tort Theories and Defenses. Para. 1.09]

FACTS: Thomas Hougan drove his wife Susan to Ulta Salon, one of several commercial retail stores in a shopping center owned by Fridh Corporation (landlord). Thomas parked his car in the shopping center parking lot in a space facing Ulta's front entrance. Susan walked from the car to the sidewalk in front of Ulta and entered the salon to make a purchase. Thomas remained in the car while Susan went inside. Because it was raining when she came out a few minutes later she stood on the sidewalk under an awning in front of the salon. She tried to get her husband's attention because she didn't want to get wet and she wasn't sure if the car doors were unlocked. At about that time, Joseph Biddle drove into a parking space facing the salon but he accidentally accelerated which caused his car to jump the curb, go onto the sidewalk, strike Susan and injure her. Susan estimated that two or three minutes had passed from the time she exited the salon to the time she was hit.

Ulta's entrance and exit doors were side by side. The only way for customers to walk to and from the store and the parking lot was to cross the sidewalk in front of the store. Under the terms of the lease between Ulta and the landlord, the leased property was described as the store itself and did not include the sidewalk or the parking lot. The lease referred to these areas as the "Common Facilities" and stated that they were for the use of all shopping center occupants. The lease also clearly placed responsibility on the landlord for the maintenance and repair of the common areas.

The Hougans sued Ulta, the landlord, and Biddle. Among other things, the suit alleged that Ulta had a duty to use reasonable care to provide its business invitees with a reasonably safe means of ingress and egress to and from its store. More specifically, the suit alleged a duty of reasonable care to protect invitees on the sidewalk adjacent to its store from the foreseeable risk of injury from out-of-control motor vehicles in the parking lot.

The trial court granted Ulta's summary judgment motion and the plaintiffs appealed, arguing that Ulta owed a duty of care to Susan, its customer, while she was standing on the sidewalk in front of its store.

QUESTION: Can a commercial tenant in a multi-tenant shopping center be held liable for injuries sustained by its customer standing outside the store in a common area?

ANSWER: No, according to an Illinois appellate court in *Hougan v. Ulta Salon, Cosmetics and*

Fragrance, Inc., 2013 Ill. App. LEXIS 793 (Ill. App. 2013). The appeals court held that the defendant, Ulta Salon, did not owe a duty of care to the plaintiff because the sidewalk where she was standing when she was injured was under the landlord's exclusive control.

To prove negligence at common law, a plaintiff must establish that she was owed a duty of care, that the defendant breached that duty, and that she suffered damages that were proximately caused by the breach. Ulta challenged the first element of the plaintiff's claim, arguing that it did not owe Susan a duty of care while she was standing on the sidewalk owned and exclusively controlled by the landlord. Whether the defendant owed a duty of care is a question of law for the court to decide. If the defendant owed no duty, the plaintiff cannot recover as a matter of law.

In determining whether there is a duty of care, courts consider a number of factors, including:

- the foreseeability of injury
- the connection between the defendant's conduct and the resulting harm
- the moral blame attached to the defendant's conduct
- the public policy of preventing future harm
- the burden placed on the defendant and the public if a duty is imposed

The court in *Hougan* stated that using these factors it must determine whether the plaintiff and defendant had the type of relationship that would cause the law to impose a duty of reasonable care on the defendant for the plaintiff's protection. A business owner owes a duty of care to its invitees and the issue in this case was whether Susan was a business invitee when the accident happened.

In support of their position, the plaintiffs cited the case of *Marshall v. Burger King Corp*., 856 NE2d 1048 (Ill. 2006). In *Marshall*, a driver in a Burger King parking lot lost control of her car, and it crashed through the brick and glass exterior of the restaurant, killing a patron inside. The patron's father sued Burger King and the Supreme Court of Illinois determined that Burger King had a duty to protect its business invitees against an unreasonable risk of physical harm caused by a third party's negligence. The court in *Marshall* concluded that "it is reasonably foreseeable, given the pervasiveness of automobiles, roadways, and parking lots, that business invitees will, from time to time, be placed at risk by automobile-related accidents." The court in *Hougan*, however, pointed to an important distinction between the two cases. In *Marshall*, the restaurant patron was killed while inside the restaurant, but Susan's injury occurred on a sidewalk outside the store.

The *Hougan* court did acknowledge that a business owner's duty might, under certain circumstances, extend beyond the boundaries of its business. In *Haupt v. Sharkey*, 832 NE2d 198 (Ill. App. 2005), for example, the defendant tavern owner told both the plaintiff and another patron to leave after the patron shoved the plaintiff. Due to prior incidents, the tavern owner was aware of the patron's propensity toward violence. When the plaintiff stepped outside, the other expelled patron struck and injured him. The sidewalk and parking area outside of the tavern were owned by the county. The Illinois appellate court concluded that the plaintiff remained a business invitee because of the owner's continuing duty to protect patrons from criminal acts of third parties. The *Hougan* court distinguished the *Haupt* decision because in the *Haupt* case the owner chose to send two people out of the tavern knowing that it was likely an altercation would ensue.

The plaintiffs in *Hougan* argued that Susan remained Ulta's invitee when she was struck by the car because the sidewalk was used exclusively by Ulta for the safe ingress and egress of its patrons. Courts have held that a business owner's duty of care includes the duty to provide its patrons with a reasonably safe means of ingress and egress, but not when the business owner does not have control

over the areas of ingress and egress. Ulta was merely one of several commercial tenants in a large shopping center. The sidewalk was a common area and patrons of any of the other stores in the shopping center were able to park in front of Ulta and make use of the sidewalk to reach their destinations. The sidealk and parking lot were under the exclusive control of the landlord.

The court found the *Hougan* case more analogous to *St. Phillips v. O'Donnell*, 484 NE2d 1209 (Ill. App. 1985), a case in which the plaintiff, St. Phillips, and a man named O'Donnell were patrons at a tavern in a shopping center. O'Donnell had been involved in two fights with patrons other than St. Phillips and was told to leave. A few minutes later, St. Phillips went to the parking lot to move his car closer to the tavern. When he exited his vehicle, O'Donnell attacked him. The tavern's lease provided that the parking lot, walkways, and roadways were common areas, subject to the landlord's control, and that the operation and maintenance of the common areas were at the landlord's sole discretion. The court concluded that the tavern owed no duty to the plaintiff because the injury did not occur on the leased premises. The court explained:

> Under these facts, defendant could not undertake measures to control the operation of the common parking areas in order to protect plaintiff and control third persons' actions once they were off the premises defendant leased. The landlord here has retained the right to control and to operate the common areas in the shopping center and is best able to prevent harm to others on the common areas. Additionally, this is not a case where defendant in fact exercised control over the common area or negligently performed a voluntary undertaking. ... Normally, where only a portion of the premises is rented and the landlord retains control of other parts for the common use of tenants, the landlord has the duty to exercise reasonable care to keep those premises in a reasonably safe condition and is liable for a foreseeable injury from a failure to perform such duty.

The *Hougan* court held that the salon did not owe a duty of care to the plaintiff. Its holding is in accord with other jurisdictions that have considered the issue on similar facts and have held that a commercial tenant in a multi-tenant shopping center does not have a duty to maintain common areas controlled by the landlord. These cases include:

Alabama	*Raspilair v. Bruno's Food Stores, Inc*., 514 So2d 1022 (Ala. 1987)
Idaho	*McDevitt v. Sportsman's Warehouse, Inc*., 255 P3d 1166 (Idaho 2011)
Kansas	*Hall v. Quivira Square Dev. Co.*, 675 P2d 931 (Kan. App. 1984)
Louisiana	*Honore v. Family Dollar Stores of Louisiana,* 115 So3d 1234 (La. Ct. App. 3d Cir. 2013)
New Mexico	*Stetz v. Skaggs Drug Centers, Inc*., 840 P2d 612, (N.M. App. 1992)
New York	*Marrone v. S. Shore Props.*, 816 N.Y.S. 2d 530 (N.Y. App. Div. 2006)
Tennessee	*Berry v. Houchens Mkt. of Tenn,* 253 SW3d 141 (Tenn. Ct. App., 2008)
Texas	*Johnson v. Tom Thumb Stores, Inc.*, 771 SW2d 582 (Tex. Ct. App. 1989)
West Virginia	*Durm v. Heck's Inc.*, 401 SE2d 908 (W. Va. 1991)