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JLO Newsletter March 2014

## Watch Your Step - It is Too Cold to Apply Salt to that Ice!

**Elisa M. Hatlevig & Kate Jirik**

With this seemingly endless cold weather and this winter on pace to be one of the coldest recorded, most Midwesterners are concerned that the ice and snow might never leave. And when you live in a state where half of the year leaves the ground covered in snow and ice, everyone at one point or another has slipped on ice. So after that winter storm, how long do you have to clear the ice before a simple accident evolves into negligence?

Generally, a slip and fall case is brought on the basis of negligence, requiring four elements. In most states, the four essential elements are duty, breach, injury, and causation linking the breach to the injury. *Funchess v. Cicil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001). In those states, property owners have a duty to keep and maintain their premises in a reasonably safe condition, and those on the premises have a duty to use reasonable care when traversing the property. *Presby v. James*, 781 N.W.2d 13, 18 (Minn. Ct. App. 2010).

In reasonable care states, to be negligent, a property owner must have notice (knew or should have known) about the hazardous snow and ice conditions. Whether a property owner should have known (referred to as constructive notice) of a hazard can be established through proving the condition was present long enough for the property owner to know about it. *Rinn v. Minn. State Agric. Soc'y*, 611 N.W.2d 361, 365 (Minn. Ct. App. 2000). In Minnesota, "speculation as to . . . How long [the condition] existed warrants judgment for the landowner." *Rinn*, 611 N.W.2d at 365.

Certain states, such as Wisconsin, by statute or otherwise, impose a higher standard of care for property owners. *See e.g.* Wis. Stat. § 101.11 (1987); *Coffey v. Milwaukee*, 74 Wis.2d 526, 532, 247 N.W.2d 132, 135 (Wis. 1976). In these states, property owners shall construct, repair or maintain a place so as to render it safe. Wis. Stat. § 101.11.

Notwithstanding the higher standard of care, these states, like the reasonable care states, also require evidence that the owner had actual or constructive notice of the unsafe condition prior to finding negligence. *Kaufman v. State Street Limited Partnership*, 522 N.W.2d 249, 187 Wis.2d 54 (Wis. App. 1994). But, whether a property owner has notice, is more easily established by simply determining that an unsafe condition will occur because of the nature of the business and the manner in which it was conducted. *See Strack v. Great Atlantic & Pacific Tea Co.*, 150 N.W.2d 361, 35 Wis. 2d 51 (Wis. 1967). In other words, constructive notice may be charged to the property owner without proof that the hazard existed for a period of time. It is a plaintiff's burden to show that a defendant had notice.

From a defense perspective, premises liability claims are often evaluated for early dismissal in those states adopting a reasonable standard of care; such defense is generally not available in those states adopting the higher standard of care. Regardless of the standard of care used by the court, nearly all jurisdictions evaluate whether there is a breach of the duty of care by looking at certain common facts.

In the case of snow and ice-related slips and falls, the property owner's maintenance policy and the length of time the ice existed prior to the slip and fall can be deciding factors. Therefore, weather and maintenance records as well as identification of the person responsible for maintenance is critical to the investigation and defense.

Accidents happen. However, during the long, cold, icy months, property owners must take reasonable care to clear snow and ice, quickly and responsively. Otherwise, with notice and hidden conditions, an accident could turn into a lawsuit.•

## Industry News

Second only to motor vehicle accidents, slip, trip and fall accidents result in the majority of deaths and injuries in the USA with an estimated financial cost of $80 billion per year per the National Floor Safety Institute (NFSI). In conjunction with NFSI, new American National Standards Institute (ANSI) standards have been issued to address slip-resistance of various walking surfaces, ANSI B101.0, B101.3 and B101.1.

## Firm News

**Congratulations** to **Thomas L. Cummings** and **Allison A. Lindevig.** In *Schuette v. City of Hutchinson*, the Minnesota Supreme Court affirmed the denial of an employee's claim for workers' compensation benefits for PTSD and refused to reverse *Lockwood* on the grounds of equal protection.

The Firm welcomes new associate **Tessa M. McEllistrem.** Tessa will be working in the areas of Construction Law, Employment Law, Civil Liability, Government Liability, and Civil Litigation.

## Get the Scoop!

It is not too cold for
this salt and ice combo.

**Salted Caramel Ice Cream**

It might seem odd to describe something cold—ice cream—as sultry, but there is no denying genuine come-hither appeal.

www.epicurious.com/recipes/food/views/Salted-Caramel-Ice-Cream-354517

## Keep Connected

# Dog: Man's Most Expensive Best Friend

**Jason A. Koch &**
**Rachel Sperling Leonard**

Claims for injuries caused by dogs more often than not result in hefty damages, which can pack a serious punch to your pocketbook. In Minnesota, if a dog, without provocation, attacks or injures a person acting peacefully in any place where he may lawfully be, the owner is strictly liable for all resulting injuries. Minn. Stat. § 347.22. Although the owner is primarily liable, the term "owner" has been widely construed to include any person harboring or keeping a dog, as well. A "keeper" manages, controls, or cares for the dog like a dog owner. *Verrett v. Silver*, 244 N.W.2d 147, 149 (Minn. 1976). A "harborer" affords lodging, shelter, or refuge to a dog for a limited purpose or time. *Anderson v. Christopherson*, 816 N.W.2d 626, 632 (Minn. 2012).

Even if you use reasonable care with your dog, you can still be found liable. *See Lewellin v. Huber*, 465 N.W.2d 62 (Minn. 1991) (dog owner's use of reasonable care makes no difference because in strict liability "negligence is beside the point"). But unlike strict liability, negligence does take reasonable care into account and requires the injured person to establish the "one-bite rule": that the defendant was aware the dog had bitten before. Between strict liability and negligence theories, dog injury law has left dog owners, harborers, and keepers with few defenses, resulting in exorbitantly large verdicts. *See Fleming v. International Polar Expeditions, Inc.*, No. C5-92-013571 (Minn. Ct. App. Feb. 18, 1994) ($725,000); *Kotz v. Olson*, No. 62-CV-09-8666 (Ramsey Cnty. Dist. Ct. Oct. 22, 2010) ($185,000); *Cheney v. Marsh*, No. 27-CV-08-1712 (Henn. Cnty. Dist. Ct. Sept. 25, 2009) ($139,000).

**What Defenses are Available?**

Defendants may have caught a break with a recent Minnesota Court of Appeals decision that found comparative fault may be used as a defense to both strict liability and negligence in a dog injury claim. *See Clark v. Connor,* A13-1110 (Minn. Ct. App. Jan. 21, 2014). Allowing comparative fault reduces plaintiff's recovery for any contributory negligence by the plaintiff or other parties.

Defendants can also reduce liability by showing the person provoked the dog while knowing of the risk. *See Engquist v. Loyas*, 803 N.W.2d 400 (Minn. 2011). It is not necessary to show the plaintiff intended to provoke the dog. Recent decisions have brought provocation almost indistinguishably close to the other available defense of assumption of the risk. Courts have occasionally recognized other defenses such as that the dog was not focused on the injured person or that the dog's actions were not directed at the person. *See Knake v. Hund*, No. A10-278 (Kandiyohi Cnty. Dist. Ct. Aug. 10, 2010.)

Ultimately, Minnesota courts make the path to recovery fairly easy for plaintiffs injured by dogs. Because of the strict liability law and the scarcity of defenses, the best policy for dog owners, harborers and keepers to avoid exposure to liability is to exercise particular care in monitoring, controlling, and confining dogs so as to prevent such injuries.

**Dog Injury? Find out:**

1. Who owns the dog?
2. Where the dog was kept or housed at the time of the incident?
3. Was the dog provoked?
4. Was the injured lawfully present?
5. Did the injured know of the risk posed by the dog?
6. Was the injury the direct and immediate result of the dog's conduct?

**Measures to Minimize Liability Exposure:**

- Socialize your dog.
- Get a fence if you keep your dog outside.
- Enroll your dog in obedience training.
- Take extra care when your dog is near children.
- Never go without homeowner's or renter's insurance. •

## Short Shots

Some federal, state and local government entities pass breed-specific laws that range from outright bans on possession of certain types of dogs (e.g. pit bulls) to restrictions and conditions on ownership, with a presumption that a particular breed is "dangerous" or "vicious."

## Referrals & Inquiries

If you know of anyone who may be interested in receiving this newsletter, please email their name, company, phone number & email address to info@jlolaw.com. To opt out, please reply with *Newsletter Opt Out* in the subject line.



## About The Authors

**Jardine, Logan & O'Brien, P.L.L.P.,** is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. **View our website at www.jlolaw.com to obtain additional information about our contributing authors and to view information on our Premises Liability Practice Group.** Please call us to discuss a specific topic.

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