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In order to keep our clients abreast of pertinent recent developments in the law, Saunders & Schmieler, P.C. creates Recent Developments in the Law® to inform regarding the substance of several decisions of importance recently rendered in and on the jurisdictions of Maryland, Virginia, and the District of Columbia.

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MARYLAND MOVES INTO THE “BLACK ICE AGE”

FROM THIS POINT FORWARD, ALL SLIP AND FALL COMPLAINTS DRAFTED BY PLAINTIFFS’ LAWYERS CAN BE EXPECTED TO CONTAIN ALLEGATIONS THAT THE PLAINTIFF’S SLIP AND FALL ON ICE WAS CAUSED BY “BLACK ICE.” IT CAN TRULY BE SAID THAT THE BLACK ICE AGE HAS ARRIVED IN MARYLAND.

**COMMENT BY JEFFREY R.
SCHMIELER**

Poole v. Coakley & Williams Const., No. 130, 2011 Md. LEXIS 659 (Md. Oct. 27, 2011).

The case of *Poole v. Coakley & Williams Construction* arises from an incident where an employee of a business in a shopping center slipped and fell on black ice that had formed under a stream of running water a construction crew directed across a parking lot and to an available drain. Poole, the employee, at deposition indicated knowledge of some ice generally in the parking lot on the morning of the incident that occurred on December 21, 2005. *Poole v. Coakley & Williams Constr.*, No. 130, 2011 Md. LEXIS 659 at *2 (Md. Oct. 27, 2011). Poole, who had crossed the resulting stream of water approximately seven (7) times the day before and saw at least an inch of running water in the “stream,” nevertheless elected to walk through the stream to enter the building. Poole slipped on black ice situated under the stream of water and was injured.

The trial court concluded, as a matter of law, that Appellant Poole knew about the risk of black ice under the stream of flowing water in the parking lot and thus, granted Appellees motions for summary judgment based on assumption of the risk. The Judge for the Circuit Court of Montgomery County provided:

The Court of Appeals and the Court of Special Appeals have made it abundantly clear that when someone is aware of icy conditions in an area and nevertheless elect[s] to proceed through those areas[,] they assume the risk as a matter of law. While I agree that the various factual permutations of cases are somewhat different, they're not materially different. *Allen v. Marriott*, 183 Md. App. 460, is[,] in my judgment on point. As was further explicated by the Court of Special Appeals recently in the *Muscatello* case, 189 Md. App. 620. Both Judge Hollander in *Muscatello* and Judge Moylan in *Marriott*[,] extensively survey, review, discuss, dissect all of the appellate cases. There's no need for me to do it here. I conclude that the plaintiff assumed the

risk of falling on ice as a matter of law.

Poole v. Coakley & Williams Constr., No. 130, 2011 Md. LEXIS 659 at *14-15 (Md. Oct. 27, 2011). Appellant appealed this ruling and the resulting grant of summary judgment based on assumption of the risk as well as concerns about grants of summary judgment/dismissal to parties outside of three-years following the incident to the Maryland Court of Special Appeals. However, the Maryland Court of Appeals intervened prior to the Maryland Court of Special Appeals hearing the case.

In its review, the Court considered and reversed the Montgomery County Circuit Court's grant of summary judgment based on assumption of the risk. In Maryland, establishing a defense of assumption of risk requires a defendant to show that the plaintiff: "(1) had knowledge of the risk of the danger; (2) appreciated that risk; and (3) voluntarily confronted the risk of danger." *Id.* at *21 (citing *ADM P'ship v. Martin*, 702 A.2d 730, 734 (Md. 1997)). Here, the issue in dispute was the first element—whether Appellant Poole had knowledge of the risk of slipping and falling as a matter of law. The standard that must be met to achieve this element is an objective standard with a subjective aspect,

meaning that a person either "sees, knows, understands, and appreciates" the risk subjectively or the risk is of a nature that an adult of normal intelligence should understand as normal and ordinary risks for the premises/situation. *Id.* at *27 (quoting Restatement (Second) of Torts §496D cmts. c & d.). See also *C&M Builders*, 22 A.3d at 867, 882 (Md. 2011)("[T]he party must have known and appreciated the risk either because it is not credible that a *similarly situated person* would not have done so, or because the risk was so obvious that it could not have been encountered unwittingly."); *Schroyer v. McNeal*, 592 A.2d 1119, 1123 (Md. 1991) ("[T]he doctrine of assumption of risk will not be applied [as a matter of law] unless the undisputed evidence and all permissible inferences therefrom *clearly* establish that the risk of danger was *fully* known to and *understood* by the plaintiff") (internal quotations omitted) (emphasis added). The Court indicated through a survey of Maryland case law that grants of summary judgment as a matter of law based on the assumption of the risk objective theory require the danger to be "one that any person in the plaintiff's position *must* have understood, meaning either a foreseeable consequence of engaging in an activity, or an otherwise patent or obvious

danger.” *Poole, supra*, 2011 Md. LEXIS 659, at *33.

From this, the Court distinguished recent Maryland cases based on assumption of the risk for situations involving snow and ice. Specifically, case law indicated that “visible snow and ice may be imputed to the plaintiff as a matter of law. *Id.* at *34-35 (citing *Morgan State Univ. v. Walker*, 919 A.2d 21, 27 (Md. 2006) (involving a plaintiff who slipped and fell on visibly icy parking lot while visiting her daughter's college); *ADM P'ship, supra*, 702 A.2d at 733 (involving a plaintiff who slipped and fell on a visibly icy walkway while making a delivery at a building owned by the defendants); *Schroyer, supra*, 592 A.2d at 1125-26 (involving a plaintiff who slipped and fell while traversing a visibly icy hotel parking lot); *see Warsham v. James Muscatello, Inc.*, 189 Md. App. 620, 645, 985 A.2d 156, 171 (2009) (noting “our appellate courts have strictly applied the doctrine of assumption of the risk in suits brought by persons who were injured when they fell on ice that was plainly visible”)).

After considering the case law, however, the court found the “black ice” situation/incident as unique from other “visible ice” situations. “Black ice,” at least for the purposes of this matter, is not something that an adult of normal intelligence should be

expected to objectively understand and comprehend, specifically because of its concealed and camouflaged nature. *Id.* at 41-42. Specifically, the Court articulated “[i]n the absence of this level of proof, any determinations as to ‘bits and pieces of information’ required to achieve a ‘critical mass’ sufficient to impute knowledge to a plaintiff, is a puzzle properly put together by the jury.” *Id.* at *25-26. Importantly, though, the Court makes clear that its opinion does not mean that a black ice slip and fall could never be resolved as a matter of law as to assumption of the risk. *Id.* at *36 n.13. In the matter at hand, the Court of Appeals determines that the Circuit Courts actions improperly stepped over into the providence of the trier of fact, i.e. the jury, based on the record.

In its opinion, the Court also overrules that portion of a holding by the Court of Special Appeals which effectively altered the standard for establishing a risk as a matter of law, by creating/imposing a constructive knowledge standard akin to contributory negligence. *Allen v. Marriott Worldwide Corp.*, 961 A.2d 1141 (Md. Ct. Spec. App. 2008). In articulating the error of the Court of Special Appeals, the Court of Appeals provides:

Notwithstanding the fact that black ice is, by its nature, invisible or difficult to see, the *Allen* Court stated “the path to knowledge is not limited to the sense of sight alone. . . . [k]nowledge springs not only from direct sense perception but from the drawing of inferences from circumstantial evidence. Induction is as worthy a highway to knowledge as is sensation.”

Id. at *43 (quoting *Allen, supra*, 961 A.2d at 1149). The Court overrules the Court of Special Appeals’ opinion, “as diminish[ing] the requirement that a plaintiff actually and fully know and understand the risk he or she is confronting and propos[ing] that a plaintiff may be judicially charged with knowledge in a circumstance where he or she should *infer* the existence of a dangerous condition.” *Id.* at *46.

In addition to this major portion of the case, the Court of Appeals ruled on other actions of the Circuit Court for Montgomery County. The Court of Appeals reversed a grant of summary judgment to an impleaded party where there was “sufficient evidence” of the “contingent liability” of the impleaded party to impleading defendant in the event that impleader was found liable to Appellant. *Id.* at *52 (citing *Harford Accident & Indem. Co. v. Scarlett Harbor*

Assocs. Ltd. P'ship, 674 A.2d 106, 138 (Md. Ct. Spec. App. 1996), *aff'd*, 695 A.2d 153 (Md. 1997)).

Additionally, and of relatively minor comparative importance, the Court affirmed the dismal/grant of summary judgment for the two parties added after the running of the three-year statute of limitations, a matter secondary to the primary ruling of the matter.

Practice Tip:

Samuel T. Wolf, an associate at Saunders & Schmieler, P.C., suggests that, in light of this decision, attorneys must: (a) always try to establish through discovery that the plaintiff saw the ice, get a description of light shining off of the ice, etc., to show that the plaintiff knew the ice was there; (b) if the plaintiff argues that he/she did not see or otherwise observe the ice before he/she slipped, fully develop how he/she concluded that what he fell on was ice; (c) have the plaintiff acknowledge that he knew ice could have been there; (d) have the plaintiff describe what he/she did to make sure that the path was clear, *i.e.*, whether he/she checked for ice before walking to the area, whether he/she tested the surface with his/her foot to see if it was slippery (this is because the objective test is still applicable for

contributory negligence); and (e) attempt to obtain enough from the plaintiff to show that the ice was so undetectable in advance, that the defendant should not reasonably be required to discover it.

MARYLAND COURT OF APPEALS FURTHER AFFIRMS ITS PREVIOUS RULING ON ASSUMPTION OF THE RISK

Thomas v. Panco Mgmt. of Md., No. 133, 2011 Md. LEXIS 671 (Md. 2011).

The case of *Thomas v. Panco Mgmt. of Maryland* further builds upon the Maryland Court of Appeals' ruling in *Poole v. Coakley & Williams Constr.*, decided a mere four days earlier, on the assumption of the risk defense. In *Thomas*, the Plaintiff lived in an apartment complex with her daughter and granddaughter. The primary method of egress from the apartment complex to the parking lot is a covered stairway. There is also an alternative back exit from the stairway to a dirt covered area that is unpaved. The Plaintiff testified that because the main stairway does not get much direct sunlight, during the winter, the snow and ice on the stairway and the sidewalk would melt slower than in other places. On the day of the incident, the Plaintiff traversed over the area

at issue a total of three times before slipping and falling the fourth time in the evening on ice, which she could not see and did not know was on the ground, when picking up her granddaughter from youth group from a nearby church. The Plaintiff's expert witness in forensic architecture testified that the high temperature that day was fifty-one degrees, and the temperature did not go below freezing until approximately an hour before the Plaintiff's fall. At the end of the Plaintiff's presentation of her case, the Defendants, the owner of the Plaintiff's apartment complex and the apartment management company, moved for judgment based on the defenses of contributory negligence and assumption of the risk. The trial court denied the defense of contributory negligence, but granted the motion on the basis that the Plaintiff had assumed the risk as a matter of law because she had knowledge of the risk of slipping on black ice. Moreover, the trial court rejected the Plaintiff's argument that *Rountree v. Lerner Dev. Co.*, 52 Md. App. 281 (Md. Ct. Spec. App. 1982) controlled as to the voluntariness requirement of the defense of assumption of the risk, and, as such, ruled that the Plaintiff had encountered the danger of the black ice voluntarily. The Court of Special Appeals affirmed the Circuit Court's decision.

The Maryland Court of Appeals granted the Plaintiff's writ of certiorari and held that the Court of Special Appeals erred when it affirmed the Circuit Court's judgment that the Plaintiff voluntarily assumed the risk of slipping and falling on black ice when walking from her apartment to her car. The Court of Appeals noted that *Allen v. Marriott Worldwide Corp.*, 183 Md. App. 460 (2008), which has been overturned by the Court of Appeals in *Poole v. Coakley & Williams Constr., Inc.*, No. 130, 2011 Md. LEXIS 659 (Md. Oct. 27, 2011), which was decided during the course of the present case's trial, was relied on by both the Circuit Court and the Court of Special Appeals in deciding that the Plaintiff had knowledge of the risk of slipping on black ice as a matter of law. The Court of Appeals held that the Circuit Court erred when ruling that the Plaintiff had knowledge of the risk of black ice for the same reasons that it explained in *Poole*, specifically, that the *Allen* case "expanded the knowledge prong of the assumption of the risk test to permit the trial judge to impute knowledge under circumstances where the risk of danger may not have been fully known to and understood by the plaintiff." *Thomas v. Panco Mgmt. of Md., LLC*, No. 133, 2011 Md. LEXIS 671, at *14 (Md. 2011). The only circumstances where Maryland courts may impute

knowledge to the plaintiff, as a matter of law, is when there is "undisputed evidence of awareness, e.g., physical interaction with or sensory perception of the dangerous condition[,] the risk of danger is so obvious that any person of normal intelligence will be taken to comprehend it, . . . or the risk is an usual and foreseeable consequence of the plaintiff's conduct." *Id.* at 17. Otherwise, the assumption of the risk defense cannot be applied as a matter of law unless there is evidence which clearly demonstrates that the risk of danger was completely known to and understood by the plaintiff. *See Schroyer v. McNeal*, 323 Md. 275, 283 (1991). Therefore, for a plaintiff to have assumed the risk as a matter of law, the court "require[s] that a plaintiff 'must' have known that the risk was 'actually present,' not that he or she 'would,' 'should,' or 'could' have known that the risk 'might well be present.'" *Thomas, supra*, 2011 Md. LEXIS 671, at *15.

In the instant case, the Court found that the facts do not absolutely conclude that the Plaintiff fully knew and understood the risk of danger, and, as such, assumed the risk of her injuries. For example, the weather the few days prior to the day of the incident was warm and dry, the temperature reached a high of fifty-one degrees at

one point on the day of the incident, the Plaintiff had walked across the walkways several times on the day of the incident without any problems, and there were no visible puddles of water. Moreover, the Plaintiff's neighbor also testified that when she came out to help the Plaintiff after her fall, she did not see ice around the walkway in the area where the Plaintiff fell. The Court again stated its ruling in *Poole* that "knowledge should not be imputed as a matter of law if the facts or the reasonable inferences from the facts are in dispute." *Id.* at *22-23. As the facts and inferences regarding the issue of the Plaintiff's knowledge have more than one conclusion, the Court held that the question of whether the Plaintiff assumed the risk of her injuries was one for the jury instead of for the court.

Another issue the Court decided was whether the grant of the Defendant's motion for judgment was improper because the Plaintiff did not voluntarily encounter the danger and, as such, did not assume the risk of her injuries. The Court stated that it endorsed Prosser's principle that:

There can be no restriction on the plaintiff's freedom of choice either by the existing circumstances or by coercion emanating

from the defendant. This is so because even where the plaintiff does not protest, the risk is not assumed where the conduct of the defendant has left the plaintiff no reasonable alternative. Where the defendant puts the plaintiff to a choice of evils, there is a species of duress, which destroys the idea of freedom of election. Thus . . . a tenant *does not assume the risk of the landlord's negligence in maintaining a common passageway when it is the only exit to the street.*

Id. at *24.

The Court then clarified the trial court's confusion that *Rountree v. Lerner Dev. Co.*, 52 Md. App. 281 (1982) was no longer good law and that a tenant assumes the risk of injury "as a matter of law despite having no reasonably *safe path* to exit the apartment, as long as there is a reasonably safe alternative *course of action.*" *Id.* at *42. The Court held that the trial court erred when it stated that the Plaintiff could have "not taken her granddaughter out" to church and stayed home. The Court explained that "[i]f this were the law in the landlord-tenant context, it would mean that a tenant, faced with a danger brought on by the landlord's negligence in failing to maintain

a reasonably safe means of ingress to and egress from the leased premises, will have consented to relieve the landlord of this duty solely by exercising his or her right of access." *Id.* at *43. Specifically, a plaintiff's "acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to . . . exercise or protect a right or privilege of which the defendant has no right to deprive him." *Thomas v. Panco Mgmt. of Md., LLC*, No. 133, 2011 Md. LEXIS 671, at *44 (Md. 2011). Therefore, in the instant case, the Maryland Court of Appeals held that the trial court erred when ruling that the Plaintiff's reasonable alternative to encountering the danger was to give up her right of egress. As a tenant has the right to a reasonably safe means of ingress and egress from the building he or she rents, there will only exist a "choice of risks" sufficient to relieve the landlord of his/her duty when a tenant chooses to travel over the more dangerous route if the tenant has a "reasonably safe *alternative path.*" *Id.*

Brian E. Hoffman, a principal attorney at Saunders & Schmieler, P.C., notes that the Maryland Court of Appeal's ruling in both of these cases essentially obliterates Comment A. 1. c. of the Maryland Civil Pattern Jury

Instructions. Comment A. 1. c. provides that the issue of the assumption of the risk defense is for the jury unless it is clear that a normal person in the plaintiff's position would have understood the danger. Following the Court of Appeals' recent decisions, a normal person in the plaintiff's position would never understand the danger of black ice because he/she cannot see it. Moreover, according to the Court's logic, an assumption of the risk defense will not be available unless the plaintiff actually observed the hazard at issue and evidence supports the contention that he/she appreciated the hazard. In sum, with these two decisions, the Court of Appeals has finally put an end to the lower courts' confusion over the defenses of contributory negligence and assumption of the risk. While contributory negligence has always been an objective standard, assumption of the risk has always been a subjective standard. A plaintiff is said to have assumed the risk if he or she observed the danger and persists in his or her normal course. However, an exception to this rule had previously been carved out for those situations where the risk is so obvious that any reasonable person would have recognized it. With the rulings in *Poole*

and *Panco*, this exception no longer exists. If the person did not see the risk or danger, even if a reasonable person in his or her position would have seen it, he or she cannot be said to have assumed the risk.