

# **Publications - Slip And Fall Analysis**

## **OVERVIEW OF THE LAW APPLICABLE TO SLIP AND FALL CASES AND THE VALIDITY OF INDEMNITY HOLD HARMLESS AGREEMENTS IN THE STATE OF MARYLAND, DISTRICT OF COLUMBIA AND THE COMMONWEALTH OF VIRGINIA**

### **I. SLIP AND FALL ANALYSIS**

#### **A. MARYLAND**

In order to make out a prima facie case of negligence in the State of Maryland, the Plaintiff must prove the following elements:

- 1. A legal duty on the part of the Defendant to use due care toward the Plaintiff;**
- 2. A failure by the Defendant to perform the duty he owes to the Plaintiff;**
- 3. Damage to Plaintiff; and**
- 4. That the damage to Plaintiff was caused by the Defendant's failure to perform a required duty.**

**MacCubbin v. Wallace, 42 Md. App. 325, 328, 400 A.2d 461, 463, cert. denied, 285 Md. 732 (1979).**

As to the standard of care and duties owed to particular Plaintiffs, Maryland, unlike the District of Columbia, has retained distinctions based upon the status of the Plaintiff, i.e., is the Plaintiff an invitee, bare licensee or trespasser.

As to invitees, one who by invitation or permission enters the property of another for purposes connected with or related to business (customers in a store for example) the property owner is charged with the duty to use ordinary and reasonable care to keep the premises safe and to protect the invitee from injury from hazardous conditions which by exercise of ordinary care the invitee would not have discovered **Caspar v. Chas F. Smith & Son, 71 Md. App. 445, 526 A.2d 87 (1987). Pahanish v. Western Trails, Inc., 69 Md. App. 342, 517 A.2d 1122 (1986).** It is important to note that under Maryland law, a social guest is considered to be an invitee.

A bare licensee is one who is privileged by consent to enter for his own purposes or convenience onto the property of another and is owed no duty by the property owner or occupier except that of not being wantonly injured by the owner or occupier. **Mech v. Hearst Grp., 64 Md. App. 442, 496 A.2d 1099 (1985).**

A trespasser is one who intentionally or without consent enters upon the property of another, and again the sole duty owed to such an individual is that of not wantonly injuring the intruder. The age of the trespasser has no effect on the duty owed. Mondshour v. Moore, 256 Md. 617, 261 A.2d 482 (1970).

Even in the case of invitees, where the highest standard of care is applicable to Defendants, the owner or person in charge of a property is not deemed to be an insurer of Plaintiff's safety, but has only a duty to provide reasonable precautions against foreseeable dangers. Thus, a garage owner cannot be held to a duty to continuously inspect and sand down any leakage of oil and grease from autos parked in a self-service garage. Lexington Market z. Zappala, 197 A.2d 197 (1969). Furthermore, even if a duty is found to be owing on the part of the property owner, the Plaintiff must demonstrate that the owner had actual knowledge or should have known of the existence of the dangerous condition which caused the slip and fall. Western Md. v. Griffis, 253 Md. 643, 253 A.2d 889 (1969). The duty of a property owner to an invitee extends, however, not only to eliminating obvious hazards, but to seeking out and correcting those hazards not readily apparent to invitees. Western Md. v. Griffis, supra. With respect to slip and falls occurring in the produce aisle of a supermarket, the Maryland courts have held that a store owner has no duty to conduct a continuous inspection tour. Moulden v. Greenbelt Consumer Service, Inc., 239 Md. 229, 210 A.2d 724 (1965). Unless the Plaintiff can demonstrate that a dangerous condition existed, and that the Defendant was aware of the condition or should have been aware of the condition and did not remedy the condition, it is likely that a Defendant's verdict will result.

Maryland has declined to adopt a comparative negligence standard, and as a result, the Plaintiff's contributory negligence and/or assumption of the risk continues to be an absolute bar to recovery in actions involving slip and fall injuries. Regardless of the nature of the duty owed by the defendant, the defenses of contributory negligence and assumption of the risk are absolute affirmative defenses to most negligence actions, including actions involving slip and fall injuries.

Contributory negligence is the failure to take proper precautions for one's safety and the failure to conduct oneself in a reasonable manner, G.C. Murphy Co. v. Greer, 75 Md. App. 399, 541 A.2d 996 (1988), conduct on the part of the Plaintiff which "falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the Defendant in bringing about the Plaintiff's harm." Diffendal v. Kash and Karry Service Corporation, 74 Md. App. 170, 536 A.2d 1175 (1988); Menish v. Polinger Company, 277 Md. App. 553, 356 A.2d 233 (1976).

The Plaintiff is bound to exercise reasonable care, and, therefore, in the slip and fall context, to circumvent obvious dangers that a reasonably prudent person would avoid. Robertson v. Shell Oil Company, 34 Md. App. 339, 369 A.2d 962 (1977). Although contributory negligence, no matter how slight, bars recover, the Maryland courts have tempered the severity of this rule in slip and fall cases by recognizing that “under normal conditions,” store patrons or business invitees are “entitled to rely on the presumption that the proprietor will see that the passageways. . . are unobstructed and reasonably safe.” G.C. Murphy v. Greet, supra.; Diffendal v. Kash and Karry Service Corp., supra. The courts have permitted a store patron to exercise less attentiveness and less vigilance than, for example, a pedestrian on a city street, without finding the patron contributorily negligent. Nevertheless, if a store patron or business invitee imprudently ignores a known hazard, the invitee will likely be adjudged contributorily negligent.

With respect to some specific cases, the Maryland courts have applied the contributory negligence standard in the following ways:

In Berzups v. H.G. Smithy Co., 321 A.2d 801, 22 Md. App. 157 (Md. 1974), the Maryland Court of Appeals was faced with a slip and fall incident involving a patch of ice.

The Court stated: “In reviewing the testimony, it is patent that Mr. Berzups saw the ice, which he testified caused his fall, and could have stepped in a spot which was not covered by ice, thereby avoiding the accident. That he voluntarily chose an unsafe route is manifest from the testimony quoted at length above. Having seen the ice, and having decided not to pursue the safer route, he, an adult in full command of his faculties, cannot now be heard to say that he did not comprehend the risk. When knowingly faced with a danger, a Plaintiff who eschews the safe route to voluntarily and knowingly encounter the danger will do so at his legal and physical peril. “. . . [A] party cannot walk upon an obstruction which has been made by fault of another and avail himself of it, if he did not himself use common and ordinary caution.” Berzups v. H.G. Smithy, 321 A.2d 801 quoting Sutton v. Mayor and City Council of Baltimore, 214 Md. 581, 584, 136 A.2d 383, 384 (1957).

In Eyler v. Adolph Beauty System, Inc., 238 Md. 227, 208 A.2d 609 (1965). The Court held that where the Plaintiff (1) knew of the dangerous condition, (2) saw the dangerous condition as well as a clear strip of sidewalk, (3) saw the clear strip of sidewalk but did not stop on the clear strip and chose a place to the left or right, where he might have crossed without stepping on the hazard and, (4) without hesitating or planning his course elected to step on the hazardous area,

such a Plaintiff was so markedly negligent that he could not as a matter of law recover damages.

Thus, the Maryland Courts have consistently held that Plaintiffs with knowledge of a danger who disdain to follow a safe route in order to encounter an appreciated danger via a different route are contributorily negligent as a matter of law. Berzups v. Smith Co., 321 A.2d 801, 804; Craig v. Greenbelt Consumer Services, 222 A.2d 838, 244 Md. 95 (Md. 1966). The contributory negligence defense assumes that negligence has been established on the part of the Defendant.

With respect to the assumption of the risk defense, it is not necessary that negligence on the part of the Plaintiff be established. If the Plaintiff knowingly and voluntarily exposes himself or herself to a patent danger, then that Plaintiff is barred from recovery by virtue of the doctrine of assumption of risk regardless of whether Plaintiff was negligent or not. The Maryland courts hold that a Plaintiff who intentionally endangers himself or herself abandons the right to maintain a negligence action. Pfaff v. Yacht Basin Co., 58 Md. App. 348, 473 A.2d 479 (1984); Benedette v. Baltimore Gas and Electric Co., 30 Md. App. 171, 350 A.2d 712 (1976). Although the defenses of contributory negligence and assumption of the risk are analogous and often overlap, the latter is more draconian as it obviates the Defendant's duty to exercise due care.

To establish assumption of the risk, negligence on the part of the Plaintiff need not be established. The Plaintiff need only be aware of the risk which she then voluntarily undertakes. Shroyer v. McNeal, 592 A.2d at 1123. When it is clear that a person of normal intelligence in the position of the Plaintiff must have understood the danger, the question of assumption of risk is appropriate for the court. Gibson v. Beaver, 245 Md. 418, 226 A.2d 273 (Md. 1967).

### I. SLIP AND FALL ANALYSIS

#### **B. DISTRICT OF COLUMBIA**

In the District of Columbia, a Plaintiff can recover from the Defendant, landowner, only if the landowner has breached some duty which he owed to the Plaintiff. The duty which the owner of land owes to a person upon that land varies according to whether that person is a trespasser or lawfully upon the land.

According to the law in the District of Columbia, a trespasser is one who enters or remains on the land or premises of another without invitation, privilege or consent. Generally, a landowner owes no duty to a trespasser with respect to the management of the premises. According to Firfer v. United States, 93 U.S.

App. D.C. 216, 208 F. 2d 524 (1953), trespassers may only recover from landowners for injuries that were wilful, or that resulted from maintenance of a hidden engine of destruction. (i.e. a trap) However, unlike many other jurisdictions, the District of Columbia no longer distinguishes among licensees, guests or invitees. See Smith v. Arbaugh's Restaurant, Inc., 152 U.S. App. D.C. 86, 469 F.2d 97 (1972), cert. denied, 412 US 939 (1973), and Washington Metropolitan Area Transit Authority v. Ward, 433 A.2d 1072 (DC App. 1981). Therefore, much of the law that has dealt with the distinctions between licensees, guests or invitees is no longer applicable, and now the District of Columbia takes a general approach covering all three. Thus, in analyzing a slip and fall case it must first be determined whether or not the potential Plaintiff was lawfully upon the land.

Even when there is no alternative route available to a Plaintiff, her choice of walking in an area where she has knowledge of and appreciate a hazard, (for example walking in a garage that she knew was wet and slippery) would constitute assumption of the risk barring Plaintiff from any recovery. Benedette v. Baltimore Gas and Electric Co., 350 A.2d 712, 30 Md. App. 171 (Md. 1976). Even if the Plaintiff has no other route available which would have avoided the hazard, by choosing to continue on a dangerous path and traverse the hazard such behavior amounts to assumption of risk, Benedette v. Baltimore Gas and Electric Co., *Supra*. See also: Burke v. Williams, 223 A.2d 187, 244 Md. 1545 (Md. 1966), and Plaintiff would be barred from any recovery against Defendant.

According to the District of Columbia, a person lawfully upon the land is one who goes upon the land of another for the purpose of carrying on some transaction either for the benefit of himself and the land owner, or for the benefit of the landowner alone or one who has been invited upon the land by the landowner or occupier, but not for the benefit of the landowner or occupier. This invitation may occur either by some affirmative act on the part of the landowner or occupier, or by appearances which would justify a reasonable person in believing that such landowner or occupier would give his consent to the presence of the land of that particular person, or of the public in general.

Assuming that the situation involved a person lawfully upon the land, a landowner owes to a person lawfully upon the land, the duty to exercise reasonable and ordinary care under the circumstances to keep the premises reasonably safe and to avoid injuring such person. In addition, he owes these persons the duty to repair dangerous conditions which are known to the owner or which are discoverable in the exercise of ordinary care and which would not be discovered by the person lawfully upon the land. Alternatively, if a landowner does not repair such dangerous conditions, then he has a duty to warn a person

lawfully upon the land of the existence of such dangerous conditions. See Holland v. Baltimore Ohio Company, 431 A.2d 597 (D.C. 1981) and Washington Metropolitan Area Transit Authority v. Ward, 433 A.2d 1072 (D.C. 1981). It should be noted that in the event that the potential Defendant is not the owner of the land and/or premises where the accident occurred, if the Plaintiff can show that he was the occupant thereof, and in the possession thereof, his rights and duties toward the Plaintiff are the same as if he had been both the lawful occupant and the owner of the property. See Clark v. O'Connor, 140 U.S. App. D.C., 435 F.2d 104 (1970).

With regard to the duty on behalf of landowner to exercise reasonable and ordinary care, according to the law in the District of Columbia, it is well established that the owner of property into which members of the public are permitted is not an insurer of their safety, but that he owes them the duty of exercising reasonable care to keep the property in a safe condition for their use. Therefore, in order for the Plaintiff to recover in a slip and fall case, the Plaintiff must prove by a preponderance of the evidence that an unreasonably safe condition caused him to fall and that this condition was caused by the Defendant or by one of its employees or that the Defendant or one of its employees had either actual or constructive notices of the condition in time to have taken precautions against it. According to the District of Columbia, actual notice has been defined to mean that the Defendant or one of its employees had either actual or constructive notice of the condition in time to have taken precautions against it. According to the District of Columbia, actual notice has been defined to mean that the Defendant knew of the existence of the condition.

Constructive notice means that the condition had existed for a significant length of time so that the Defendant in the exercise of reasonable care should have known of its presence in time to take action to guard against it. See ITT Continental Baking Company v. Ellison, 370 A.2d 1353 (D.C. 1977), and Smith v. Safeway Stores, Inc., 298 A.2d 214 (D.C. 1972).

Essentially, slip and fall cases center around the concept of negligence. In the District of Columbia, negligence has been defined as the theory to exercise ordinary care. Thus, negligence is doing something the person using ordinary care would not do, or not doing something a person using ordinary care would do. Ordinary care means that caution, attention or skill a reasonable person would use under similar circumstances. See McCord v. Green, 362 A.2d 720 (1976). It is important to note that in the District of Columbia, the law does not recognize comparative negligence. Therefore, the law forbids any jury to classify negligence into any degree or grades or to compare one person(s) negligence with another. Therefore, Plaintiff cannot recover if his negligence is the proximate

cause of his injury. In cases such as these, the Defendant has the burden of proving the Plaintiff's negligence was the cause of the Plaintiff's injury.

According to the law in the District of Columbia, there are certain defenses available to a Defendant in a suit involving a slip and fall claim. These are, contributory negligence and assumption of the risk. Contributory negligence has been defined as a failure to act with prudence demanded of ordinary reasonable persons under like circumstances. See Stagger v. Schnieder, 494 A.2d 1037 (D.C. App. 1985). Assumption of the risk is a voluntary assumption of a known risk. See District of Columbia v. Mitchell, 533 A.2d 629 (D.C. App. 1987). However, it should be noted that although contributory negligence is an absolute bar to recovery if his negligence was a substantial factor causing his injury. Therefore, if the Plaintiff's negligence was the proximate cause of his injury, recovery is barred. See Sinia v. Polinger Co., 498 A.2d 520 (D.C. App. 1985).

Essentially, the question as to contributory negligence or assumption of the risk is a question to be decided by a jury. However, it has been held that the mere fact that a person was not paying attention is not tantamount to contributory negligence. In ITT Continental Co. v. Ellison, 370 A.2d 1353 (D.C. App. 1977), a supermarket patron tripped over trays which were located in the extreme end of the aisle. It was held that he patron was not contributorily negligent merely because she was not looking down as she entered the aisle where the trays were located.

Regarding slip and fall cases with respect to landlord/tenant situations, essentially the landlord, like a landowner, owes a duty to those persons lawfully using approaches and entrances over which owner has control to exercise ordinary care, after notice or reasonable opportunity for notice, to keep them free from either temporary or permanent conditions of danger. See W. Simpson Company v. Langley, 76 U.S. App. D.C. 365, 131 F.2d 869 (1943). In addition, owners of apartment house who have retained the exclusive control of its common approaches, is, after notice, bound to exercise ordinary care so that persons lawfully using them may be safeguarded against conditions, whether permanent or temporary, which make them dangerous to tenants or their guests; and it is immaterial that particular condition giving rise to possible danger is a result of national accumulation of snow and ice. See Lord v. Lencshire, Ltd., 106 U.S. App. D.C. 328, 271 F.2d 557 (C.A.D. 1960). Thus, the same principals regarding slip and fall cases that deal with landowners apply equally to landlord/tenant situations.

## I. SLIP AND FALL ANALYSIS

## **C. VIRGINIA:**

### **I. INTRODUCTION**

**Slip and fall cases generally arise out of injuries which occur in inclement weather conditions, objects or spills that are on the floor and defects located on the premises. Most often suit is brought against the owner/occupier of the land where the slip and fall occurred.**

**In Virginia, there are three (3) categories of persons and depending on the status of the person, certain duties attach to the owner/occupier. The three (3) categories and a brief description of each is provided as follows:**

- Trespasser: A trespasser is one who goes onto the premises of another without any legal right to do so and without the invitation, authority or consent of the occupant if the premises [intentionally fails to leave the premises of another after being requested to do so by the occupant].**
- Licensee: A licensee is one who enters the premises of another for his own convenience, benefit or pleasure, with the knowledge and express or implied consent of the occupant. [A social guest is a licensee].**
- Invitee: An invitee is one who visits premises lawfully at the express or implied invitation of the occupant. He is one who visits other than for a social purpose or for his own convenience. An express invitation is one made directly or indirectly by spoken or written words to come on the premises. An implied invitation is one made by opening the premises to others for a particular purpose. It is important to remember, however, that issues of notice, status of the Plaintiff, open and obvious dangers, patent versus latent defects, the standard of a “reasonable man,” contributory negligence and assumption of the risk are ordinarily questions of fact, and therefore matters for the jury.**

### **II. Status of the Plaintiff**

**An invitee has the right to assume that the premises are reasonably safe for his visit. This assumption does not apply, however, if the invitee knows or should know of an unsafe condition or if the invitee uses the premises in a manner that exceeds the scope of the invitation.[\[1\]](#)**

**An occupant’s general duties to an invitee are to use ordinary care to have the premises in a reasonably safe condition for an invitee’s use consistent with an invitation, but an occupant does not guarantee an invitee’s safety. An occupant owes an invitee the duty to use ordinary care to warn an invitee of any unsafe condition which the occupant knows, or through the use of ordinary care, should**

**know about. An occupant has no duty to warn an invitee of an unsafe condition which is open and obvious to a person using ordinary care for his own safety. If an occupant fails to perform either or both of these duties, then he is negligent.[2]**

**An occupant also has the duty to an invitee to use ordinary care to remove foreign objects from the floor, if the foreign substance or object creates an unsafe condition, within a reasonable time after he knew or should have known it was there, regardless of how it got there. If an occupant fails to perform this duty, he is negligent.[3]**

**An occupant of a premises owes a duty to a licensee on the premises to use ordinary care in his activities or conduct to avoid injury to the licensee. If the occupant fails to perform this duty he is negligent.[4] An occupant of a premises has a duty to a licensee regarding the condition of the premises by the use of ordinary care and where: (1) the occupant knows or should know of an unsafe condition on his premises; (2) knows or should know that it involves an unreasonable risk or harm to a licensee; (3) knows or should know that a licensee will not discover or realize the unsafe condition; and (4) the licensee does not know or have reason to know of the unsafe condition or the risk involved, then the occupant has the duty to use ordinary care either to make the condition reasonably safe or a duty to warn the licensee of the unsafe condition.[5]**

**An occupant's duty to a trespasser is not to willfully or wantonly cause injury to a trespasser and thus, there exists a duty to warn the trespasser if he knows of the presence of the trespasser and knows [or by the use of ordinary care should know] of a danger not open and obvious to the trespasser. If an occupant fails to perform this duty, then he is negligent. An occupant of premises has no duty to a trespasser to keep his premises, however, in a safe and suitable condition for the trespasser's use.[6]**

**An occupant of a commercial premises has a duty to an invitee to use ordinary care to remove snow and ice from outdoor entrance walks such as steps, porches and stoops within a reasonable time after the end of the storm. If an occupant fails to perform this duty, and an invitee slips and falls, then the occupant will be held liable for his negligence.[7] The duty of an owner or occupier of a private residence to maintain his premises is a condition which is reasonably safe for an invitee does not extend to warning of, or removing a danger that is open and obvious.**

### **III. Landlord and Tenant**

A landlord who knows that a dangerous condition exists has a duty to warn the tenant about it before the tenant enters into possession of the premises. The landlord does not have this duty when the condition is open and obvious or if the tenant knew of the condition or should have discovered it by making a reasonable inspection. If the landlord fails to perform this duty then he is negligent.<sup>[8]</sup> A landlord also has a duty to a tenant to use ordinary care to keep common areas safe. Common areas are defined as those parts of the premises which the landlord retains control over and which may be used by all of the tenants.<sup>[9]</sup> If the landlord used ordinary care to inspect the premises and the inspection failed to disclose the defect, this may be a defense for the landlord.<sup>[10]</sup> A landlord who undertakes to make repairs has a duty to a tenant to use ordinary care in making them. This duty applies whether repairs are made voluntarily or not.<sup>[11]</sup> A landlord has a duty to use ordinary care to remove ice and snow from outdoor entrance walks (inclusive of steps, porches and stoops) under his control within a reasonable time after the end of the storm. If the landlord fails to perform this duty, he is negligent.<sup>[12]</sup>

#### **IV. Hotels and Motels**

The operator of a hotel has a duty to use ordinary care and diligence in providing honest employees and to take every reasonable precaution to protect its guests and their property.<sup>[13]</sup> If the operator of the hotel fails to perform this duty, then he is negligent.

#### **V. Contributory Negligence Defense**

Under Virginia law, contributory negligence is a complete bar to an action based on negligence.<sup>[14]</sup> As such, a Plaintiff who is aware of a danger and fails to exercise reasonable care to avoid injury is generally precluded from recovering against the person who created the peril.<sup>[15]</sup> In Virginia, the negligence of the parties is not compared and any negligence of the Plaintiff which is the proximate cause of the accident will bar recovery.<sup>[16]</sup> The essence of contributory negligence is carelessness, while the essence of assumption of the risk is venturousness.<sup>[17]</sup> Contributory negligence involves an objective test of whether the Plaintiff failed to act as a reasonable person would have acted for his safety under the circumstances.<sup>[18]</sup>

#### **VI. Recent Virginia Case Law on Slip and Fall**

i **Knowledge of Defendant of Defect or Danger:** Under Virginia law, an invitee who is injured in a fall on the premises of another has the burden of proving negligence by a preponderance of evidence and must show that the

owner or occupant either knew or should have known, by exercise of reasonable care and diligence, of the defect or unsafe condition. Gauldin v. Virginia Winn-Dixie, Inc., 370 F.2d 167 (C.A. Va. 1966 - Evidence in invitee's action against supermarket owner to recover for injuries sustained in a fall on the premises did not support a finding that the store owner, in exercise of reasonable care and diligence, should have known of the presence of a radish or other hazard in store aisle.); Winn-Dixie Stores, Inc. v. Parker, 396 S.E. 2d 649, 240 Va. 180 (1990 - Patron failed to establish that store placed a bean on the floor during his mopping where nothing in the record suggested that anyone connected with the store placed the bean on the floor. Moreover, the evidence did not show that the store worker missed the bean when he mopped the produce section, and the jury could not have inferred that worker missed the bean simply because it was present on the floor where the patron fell.).

ii. Duty to Observe Defects and Precautions Against Known Dangers: Evidence at trial demonstrated that the snow covered conditions of the private resident's driveway and steepness of the driveway's incline were as obvious to a farmer delivering eggs, who slipped and fell on the driveway, as they were to the occupiers. The Court held that the lack of evidence of a latent defect or hidden condition of the driveway, known to the occupiers but not apparent to the invitee, was insufficient to demonstrate primary negligence on occupier's part. Tate v. Rice, 227 Va. 341, 315 S.E. 2d 385 (1984).

iii. Degrees of Proof: In order to establish the defense of the janitor's contributory negligence in slipping on snow or ice on a walkway outside of the building as a matter of law, the building owner would be required to establish that the janitor perceived and appreciated the danger before embarking on the walkway, and that the danger would be so obvious and patent to be a person exercising reasonable care for his own safety. King v. Bondurant Development Corp., 227 Va. 206, 315 S.E. 2d 390 (1984).

iv. Proximate Cause of Injury: Evidence in an action against the owner of an office building supported a jury verdict for the invitee who slipped and fell despite the building owner's claim that the invitee/Plaintiff failed to produce direct evidence of what caused the Plaintiff to fall or any evidence that the floor was unsafe, dangerous, hazardous, or that such condition proximately caused her injuries. The Court in upholding the jury verdict for the invitee said that the Plaintiff's evidence that rain had been falling for a protracted period of time before the accident and people had been entering the building all night and invitee testified that she slipped on something very slippery was sufficient to uphold the jury verdict. Fobbs v. Webb Bldg. Ltd. Partnership, 232 Va. 227, 349 S.E. 2d 355 (1986). Property owners were not liable for injuries sustained in a fall

by a neighbor on their porch, in absence of showing that owners knew of alleged unsafe condition or that the condition had existed for such a length of time that in the exercise of ordinary care they [owners] should have known it.

v. **Duty to Observe And Avoid Danger:** Person who trips and falls over an open and obvious condition or defect is guilty of contributory negligence as a matter of law. **Scott v. City of Lynchburg**, 241 Va. 64, 339 S.E. 2d 809 (1991); Store customer was a business invitee who had a duty to be aware of open and obvious dangers. **Clark v. Chapman**, 238 Va. 655, 385 S.E. 2d 885 (1989); Even if the Plaintiff was a bare licensee on the Defendant's premises, the Plaintiff was contributorily negligent in advancing at night into an unlighted field with which he was unfamiliar, from paved parking lot where, instead of returning by the same route which he had just traveled in safety, Plaintiff elected to take a shortcut into an unknown area and in doing so attempted to wade through brush and fell over a chain obscured therein. **Rouse v. Great Atlantic & Pacific Tea Co. Inc.**, 216 Va 293, 217 S.E. 2d 891 (1975); Plaintiff who sustained injuries when he fell on ice and snow on the curbing in front of grocery store in shopping center on date of accident, **Kings Markets, Inc. v. Yeatts**, 226 Va. 174, 307 S.E. 2d 249 (1983), could not be said, as a matter of law, to be contributorily negligent in exiting the premises where the store was open for business and the store had made some effort to clear snow and ice from its parking lot and premises it used and it was inviting customers to park their vehicles and to enter and depart its store in the usual and customary manner. In this case, the Court stated that the Plaintiff had successfully negotiated his entrance to the store, and had no reason to believe he could not safely exit.

vi. **Private Grounds In General:** Homeowners were not guilty of negligence in connection with business invitee's fall while attempting to ascend their driveway. The Court noted that the homeowner testified that he had added sand to driveway sealant to change its texture and increase the traction of surface of pavement in accordance with the manufacturer's recommendations and that the homeowner provided a staircase with a handrail leading directly to front door so that visiting pedestrians would not have to climb steep driveway designed for motorists. **Runyon v. Geldner**, 237 Va. 460, 377 S.E. 2d 456 (1989).

vii. **Buildings And Other Structures:** Under Virginia law, the duty of owner or occupier of premises to use reasonable care to maintain floor in a safe condition for the safety of invitees applies, even where someone other than the employee of an establishment has caused foreign substances or objects to be spilled, dropped or placed on the floor. **Gauldin v. Virginia Winn-Dixie, Inc.**, 370 F.2d 167 (1966).

viii. **Duty of Pedestrian to Look Down:** The Plaintiff was guilty of contributory negligence, as a matter of law, in failing to look and, therefore, see an obvious depression in the parking lot surface. **Rocky Mount Shopping Center Assoc. v. Steagall**, 235 Va. 636, 369 S.E. 2d 193 (1988); When a Plaintiff knows of the existence of a condition but, without any reasonable excuse, forgets about the condition and falls in, off, or over it, he is guilty of contributory negligence as a matter of law. **Scott v. City of Lynchburg**, 241 Va. 64, 399 S.E. 2d 809 (1991).

## **II. INDEMNITY HOLD HARMLESS**

### **A. MARYLAND**

By statute, Maryland has imposed limitations on indemnity agreements. section 5-305 of the Courts and Judicial Proceedings Section of the Maryland Code states that indemnity agreements “relating to the construction, alternations, repair or maintenance of building, structure, appurtenance or appliance” which purport to indemnify the promisee against liability for damages arising out of bodily injury to any person, or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees is against public policy and is void and unenforceable.

Thus, it would be void as against public policy for a condominium association to attempt to indemnify itself against its own negligence, or the negligence of its agents or employees in an agreement with a third party contractor. Where an indemnity clause only indemnifies an owner for liability arising from a sub-contractor’s negligence and in no way seeks to indemnify against an owner’s own negligence, section 5-305 does not apply and the agreement is enforceable. **Mason v. Callas Contractors, Inc.**, 494 F. Supp. 782. Indemnity contract provisions must be carefully drawn to avoid running afoul of the public policy provisions of section 5-305, as such clauses are interpreted against the party which prepared the clause. **Companio Anonima Venezolana De Navegacion v. Cottman Co.**, 145 F. Supp. 761.

Moreover, the Courts have held that section 5-305 will not void an entire indemnity contract, but rather renders void and unenforceable that section of an agreement which purports to indemnify a promisee against liability for damages caused by a promisee’s sole negligence. If, however, the contract can be properly construed as reflecting two agreements, one providing for indemnity if the promisee is solely negligent and one providing for indemnity if the promisee and promisor are concurrently negligent, only the former agreement is voided by the statute. **Bethlehem Steel Corp. v. G.C. Zarnas and Co., Inc.**, 498 A.2d 605, 304 Md. 183, Md. 1985. In light of the above-stated statutory and case law, any

indemnification agreement which intends to hold the contractor liable for the condominium's negligence must be carefully drafted to provide indemnification only in cases where there is concurrent negligence of the contractor and the condominium.

Aside from the limitation on indemnifying against the indemnitee's negligence in certain contracts expressed in section 5-305, indemnity contracts are lawful in Maryland. Outside of the scope of section 5-305, an indemnitee is permitted to contract for indemnification even for its own negligence; however, such intent must be clear and unambiguous from the language of the indemnification contract. Crockett v. Crothers, 254 Md. 222, 285 A.2d 612 (1972) and expenses, attorney's fees and costs are allowable as items of damages in an indemnity action. Davis v. Naviera Aznar, S.A., 37 F.R.D. 223.

## **II. INDEMNITY HOLD HARMLESS**

### **B. DISTRICT OF COLUMBIA**

There are no special provisions in the District of Columbia Code pertaining to indemnification and hold harmless agreements for outside services provided to condominiums.

The general case law of the District of Columbia with respect to indemnification clauses is that indemnification is a form of relief available in the District of Columbia, and may be provided for by contract. Such clauses are not void as against public policy Cokas v. Perkins, 252 F. Supp. 563 (D.C. 1966). Where one party agrees to indemnify a second party from claims and suits arising out of the first party's performance of a contract, the first party must bear ultimate liability injured third parties, whether or not the second party was also liable. Lesmark, Inc. v. Pryce, 334 F.2d 942 (D.C. 1964).

The Courts in the District of Columbia have developed a very broad interpretation of indemnity provisions and have held that an indemnity agreement in a subcontract which provided for indemnity for losses imposed by law on general contractor for damages whether or not due to any negligence of the sub-contractor, his employees, his agents or servants required the sub-contractor, his employees, his agents or servants required the sub-contractor to indemnify the general contractor for losses caused by the sole negligence of the contractor itself. Bland v. L'Enfant Plaza North, Inc., 473 F.2d 156 (D.C. Cir. 1972).

Furthermore, a sub-contractor's agreement to indemnify a general contractor against any and all loss on account of any claim, demand or suit by or on behalf of any employee of a subcontractor was sufficient to indemnify the general contractor for its own affirmative negligence, Moses-Ecco Co. v. Roscoe-Ajax Corp., 320 F.2d 685 (D.C. Cir 1963).

Despite the above-cited cases, which give broad interpretation to indemnity agreements, the D.C. Courts have held that the intent to cover losses incurred by an indemnitee's negligence must plainly appear from the language in an indemnity agreement if the agreement does not specifically refer to such losses. Moses-Ecco Co. v. Roscoe-Ajax Corp., 320 F.2d 685. However, the courts have held that an indemnity agreement may be so broad that although it contains no express stipulation indemnifying against a party's own negligence it accomplishes the same purpose. Princemont Const. Corp. v. B&O Railroad Co., 131 A.2d 877 (D.C. App. 1957).

These views are in line with the now prevailing general rule which rejects the position that an indemnity contract purporting to absolve the indemnitee for liability for his own negligence is void as against public policy. General contractors may contract for indemnity against their own negligence, provided the contract makes is sufficiently clear that the parties so intended. 41 Am. Jur. 2d, section 10, p. 696.

With respect to the exemplar of the indemnification agreement provided (attached as Exhibit #1), it appears that the agreement would easily pass muster under D.C. law. The indemnification agreement provides that the contractor hold the condominium harmless and indemnify it against all actions of whatever nature, including actions arising from the contractors own negligence. While the agreement does not specifically state that the contractor shall indemnify the condominium against the condominium's own negligence, under the Court's rulings in Moses-Ecco v. Roscoe-Ajax, supra, and Prince Mount Construction Corp. v. Bro. R.R. Co., the language in the agreement which indemnifies the condominium against "any and all claims whatsoever" may be broad enough to encompass indemnification even for the condominium's own negligence. However, since such indemnification is not void as against public policy in D.C., the better practice would be to specifically include such coverage, if in fact it is desired.

## II. INDEMNITY HOLD HARMLESS

### C. VIRGINIA

## **I. Validity of Hold Harmless/Indemnification Agreements in Virginia**

**In Virginia, indemnification contracts and/or contracts including Hold Harmless Agreements whereby one entity agrees to indemnify, defend and hold harmless another entity or individual against any and all claims, suits, judgments, damages or causes of action of any kind, nature or description are recognized and generally upheld. Virginia recognizes the right to indemnity which is defined as a bilateral agreement between an indemnitor and an indemnitee, in which the indemnitor promises to reimburse the indemnitee for a loss suffered or to see him harmless from liability.[19] Under Virginia law, parties to a contract can contract for indemnification as well as any other type of provision as long as it is not against Virginia Public Policy.**

## **II. The Validity of the Addendum Containing a Hold Harmless Agreement for Outside Services Provided to Condominiums**

The Addendum Agreement (Exhibit #1) by and between the condominium contractor and the condominium owner/shareholders, partners, agents, servants or employees of the owner, inclusive of any members tenants, guests or licensees or invitees of the condominium, is an acceptable contractual Addendum under Virginia law. The Addendum Agreement does not contain any language which is against Virginia Public Policy. Moreover, Virginia recognizes a property owner's rights to engage in such contractual indemnification and/or hold harmless clauses.[20] Moreover, the Addendum which contains language whereby the contractor agrees to indemnify the owners, its agents, etc... including any and all costs, attorney's fees and expenses arising out of any such claims, suits, judgments, damages, causes of action, etc. will also be upheld under Virginia law. In Virginia, an indemnity agreement or provision under which the contractor agrees to pay the owner's attorney's fees is not against public policy and will be upheld.[21] Moreover, in Virginia an owner of property may lawfully contract to indemnify itself against its own negligence without offending public policy where the terms are clear and explicit.[22]

There exists also in Virginia a Condominium Act found in Volume 8 (1996) of the Virginia Code, Section 55.79.40 through 55.79.97. Under 55.79.80:1, there is a Condominium Act Statute entitled Tort and Contract Liability; Judgment Lien. One should be aware that this section gives a unit owner a cause or right of action against the declarant or the Condominium Association for torts alleging wrongs done (I) the agents/employees of declarant/unit owners' association or (ii) in connection with condition of any portion of the condominium which the declarant or the Condominium Association has the "responsibility to maintain." Although this section does not give the unit owners a cause or right of action for such torts, it does not say

that the Condominium Association is prohibited from delegating any responsibility to maintain any of its areas within its province such as the common areas. Therefore, if the Condominium Association is prohibited from delegating any responsibility to maintain any of its areas within its province such as the common areas. Therefore, if the Condominium Association does not contract with an independent contractor and the contract contains an Addendum clause similar to the Addendum provided herein, then the hold harmless/indemnification clause would still be valid and would not contravene 55.79.80:1 of the Virginia Condominium Act.

### ADDENDUM

This addendum made this \_\_\_\_\_ day of \_\_\_\_\_, between \_\_\_\_\_(Contractor) and \_\_\_\_\_(Agent) for \_\_\_\_\_(Owner).

This document shall be an Addendum to that certain Agreement between the parties hereto dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

To the extend that this Addendum shall be in conflict with any provision of the aforesaid agreement, the provisions of this Addendum shall prevail, and be binding upon the parties who do hereby affirm the provisions of this Agreement of \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

By Acceptance of this contract Addendum, the contractor represents that he is an independent contractor. The contractor agrees to indemnify, defend, and hold harmless the property manager, its officers, agents, servants, employees, successors and assigns, and further agrees to indemnify, hold harmless, and defend the owner, and any shareholders, partners, agents, servants or employees of the owner, as well as any members, tenants, guests, licensees and invitees thereof from and against any and all claims, suits, judgment damages, or causes of action of any kind, nature or description whatsoever, including any and all costs, attorneys fees and expenses arising from any such claims, suits, judgments, damages causes of action, or from the contractor's performance of this contract by any of the contractor's officers, shareholders, agents, servants, employees, guests, subcontractors, invitees and those doing business with the contractor or any subcontractor.

Wherever and whenever in the Contract or Agreement to which this Addendum is attached, there is a provision requiring Agent or Owner to indemnify, defend, or hold harmless the Contractor, as the case my be, shall be deemed to have been deleted and to be null and void, and any provisions of this Addendum shall, when in conflict with any provision of the Contract or Agreement, take precedence over and supersede such conflicting provision, or any part thereof.

\_\_\_\_\_ Contractor \_\_\_\_\_ Owner/Agent

\_\_\_\_\_ Date

\_\_\_\_\_ Date

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**Endnotes:**

[1]Washbaugh v. Northern Va.

Construc. Co., 187 Va. 767, 48 S.E. 2d 276 (1948); Tazewell Supply Co.

Tuner, 213 Va. 93, 189 S.E. 2d 347 (1972).

[2]Runyon v. Geldner, 237 Va 460, 377 S.E. 2d 456

(1989). "Premises" includes equipment and other items on the premises.

[3]Memco Stores, Inc. v. Yeatman, 232 Va. 50, 348

S.E. 2d 228 (1986).

[4]Reagan v. Perez, 215 Va. 325, 209 S.E. 2d 901

(1974).

[5]Bush v. Gaglio, 207 Va. 343, 150 S.E. 2d 110

(1966); Reagan v. Perez, 215 Va. 325, 209 S.E. 2d 901 (1974). An occupant or premises always owes a duty to a licensee not to injure him wantonly or intentionally.

[6]APCO v. LaForce, 214 Va. 438, 201 S.E. 2d 768

(1974). An invitee, while using the premises in a way that exceeds the scope of the occupant's invitation to him, ceases to be an invitee and becomes a trespasser. City of Suffolk v. Hewitt, 226 Va., 20, 307 S.E. 2d 444 (1983).

[7]Walker v. Memorial Hospital, 187 Va. 5, 48 S.E.

2d 898 (1948); FAD Ltd., Pt'ship. v. Feagley, 237 Va. 413, 377

S.E. 2d 437 (1989); Mary Washington Hospital v. Gibson, 228 Va. 95,

319 S.E. 2d 741 (1984). The Walker and Mary Washington Hospital case,

supra, explicitly states that the duty to clear ice and snow does not

arise until a reasonable time after the storm is over. The duty imposed to

remove natural accumulations of snow and ice within a reasonable length of time

after the end of a storm is apparently limited to commercial establishments, carriers, municipalities and landlords.

[8]John Aragona Enters v. Miller, 213 Va. 298, 299,

191 S.E. 2d 804, 805 (1972). The duties and liabilities of the landlord to

guests and invitees of the tenant, with respect to personal injuries, are

ordinarily the same as those which the landlord owes to the tenant. "They

stand in the shoes of the tenant." Oliver v. Cashin, 192 Va. 540,

65 S.E. 2d 571 (1951). Note: the common law duty of the Virginia Residential

Landlord and Tenant Act where a duty is imposed on the landlord to comply with

the requirements of the applicable building and housing codes materially affecting health and safety.

[9]Colonial Nat. Gas Co. v. Sayers, 222 Va. 781, 284 S.E. 2d 599 (1981). See also Love v. Schmidt, 239 Va. 357, 389 S.E. 2d 707 (1990) which held that a landlord's duty to maintain the premises cannot be delegated to an independent maintenance contractor.

[10]Revell v. Deegan, 192 Va. 428, 65 S.E. 2d 543 (1951). Moreover, as a general rule, a landlord does not owe a duty to protect his tenants from a criminal act by third parties. An exception to this rule arises where a "special relationship," such as an innkeeper-guest or business proprietor-invite, or a statutory duty arises. A landlord tenant relationship is not a "special relationship" giving rise to such a duty to protect tenants from criminal acts of third parties. See Klingbell Mgt. Group Co. v. Vito, 233 Va. 445, 357 S.E. 2d 200 (1987); Love v. Schmidt, 239 Va. 357, 389 S.E. 2d 707 (1990).

[11]Kesler v. Allen, 233 Va. 130, 353 S.E. 2d 777 (1987).

[12]FAD Ltd. Pt'ship v. Feagley, 237 Va. 413, 377 S.E. 2d 437 (1989). For an extensive analysis of an owner's or occupant's liability for snow and ice accumulations of non-residential property, see 95 A.L.R. 3d 15 (1979).

[13]Ely v. Blevins, 706 F.2d 479 (4th Cir. 1983).

[14]Jones v. Meat Packers Equipment Co., 723 F.2d  
370 (C.A. Va. 1983).

[15]Exception to this rule is where the exposure to danger  
was for the purpose of rescuing another from peril. Lassiter v.  
Arinner, 235 Va. 274, 368 S.E. 2d 258 (1988).

[16]Litchford v. Hancock, 232 Va. 496, 352 S.E. 2d  
335 (1987).

[17]Hubbard v. U.S., 295 F. Supp. 524 (D.C. Va.  
1969).

[18]Artrip v. E.E. Berry Equipment Co., 240 Va.  
354, 397 S.E. 2d 821 (1990).

[19]First Virginia Bank - Colonial v. Baker, 25 Va.  
72, 301 S.E. 2d 8 (1983).

[20]Appalachian Power Co. v. Saunders, 232 Va.  
189, 349 S.E. 2d 101 (1986).

[21]Chesapeake and Potomac Telephone Co. of Virginia v.  
Sisson & Ryan, Inc., 234 Va. 492, 362 S.E. 2d 723 (1987); Holly v.  
The Manfred Stansfield, 187 Fed. Supp. 805 (D.C. Va. 1960 - An indemnity  
may recover attorney's fees and expenses from an indemnitor under either

an express or implied contract of indemnity.)

[22]Appalachian Power Co. v. Saunders,

supra.; U.S. v. Newport News Shipbuilding Co., 130 Fed. Supp.

159, aff'd 226 Fed. 2d 137 (D.C. Va. 1955).