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Collecting the pieces of the premises-liability puzzle

INITIATE A POWERFUL PLAN OF ATTACK FOR INVESTIGATION AND DISCOVERY FROM THE GET-GO

In premises-liability cases, the practitioner who is aggressive and proactive from the outset will reap demonstrable benefits. Early on, witnesses' memories are fresh, evidence is more readily accessible, and surveillance videos have not yet "gone missing." Tackling investigation and discovery early also sends the tactical message to opposing counsel that you prioritize the case. By devoting energy to it from the start, you will give yourself and your client the best shot at maximizing success – by uncovering essential evidence and doing so in an efficient, timely manner.

Premises-liability cases come in diverse forms, ranging from a slip-and-fall at your neighborhood grocery store to a wrongful-death action against a city that failed to ensure the safety of its jagged sidewalk. For that reason, the practitioner who adopts a strategic yet flexible approach will be best positioned to prevail at trial.

Aim for the target – the CACI instructions

At the crux of every premises-liability case is the duty element. The law imposes a duty of care on property owners, which is clearly stated in the CACI Jury Instructions.

• ***CACI 1001: Basic Duty of Care***

"A person who [owns/leases/occupies/controls] property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others. In deciding whether [*name of defendant*] used reasonable care, you may consider, among other factors, the following:

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(a) The location of the property;
(b) The likelihood that someone would come on to the property in the same manner as [name of plaintiff] did;
(c) The likelihood of harm;
(d) The probable seriousness of such harm;
(e) Whether [name of defendant] knew or should have known of the condition that created the risk of harm;
(f) The difficulty of protecting against the risk of such harm; [and]
(g) The extent of [name of defendant]'s control over the condition that created the risk of harm.

• ***CACI 1003: Unsafe concealed conditions***

"[Name of defendant] was negligent in the use or maintenance of the property if:

1. A condition on the property created an unreasonable risk of harm;
2. [Name of defendant] knew or, through the exercise of reasonable care, should have known about it; and
3. [Name of defendant] failed to repair the condition, protect against harm from the condition, or give adequate warning of the condition."

• ***CACI 1004: Obviously unsafe conditions***

"If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the [owner/lessor/occupier/one who controls the property] does not have to warn others about the dangerous condition."

Informal Discovery

The client interview: Use your client as a resource

Meet with your client early on to gather information about the incident – long before formal discovery commences. Many of the data points you need to prove your premises-liability case will come directly from your client's mouth. Probe your client to find out exactly how the incident occurred and whether your client was at fault. Of course, you can count on the defense raising the issue of your client's own negligence. In a slip/trip-and-fall case, find out what type of shoes your client was wearing – no, not to quell your own curiosity about your client's fashion choices – but to determine if the footwear itself presented any trip hazard or fall risk. Then, ask the client to bring them in for inspection. It may be necessary to have an expert inspect the shoes to determine how the properties of the shoe may have impacted the friction of the particular floor surface and your client's shoe.

Ask the tough questions. "Were you walking while texting? Taking a "selfie"? Running? Carrying heavy objects? Walking backwards? Not wearing prescribed glasses or contacts?" You will also want to ask your client to describe the lighting, weather conditions, and time of day. This will help you gain a better picture of the scenario and determine if any other factors may have contributed to the incident. Importantly, ask for any and all photographs or video footage the client may have taken of the scene at or around the time of the incident.

Put it in writing: the preservation letter

A letter demanding the defense to preserve evidence should be sent as soon after the incident as possible. The purpose of the letter is two-fold: First, it allows the plaintiff the opportunity to request the relevant electronic surveillance footage or incident reports from the defendant before the lawsuit is filed; and second, it puts the defendant on notice that you will seek sanctions if the relevant evidence under the defendant's care or control is later learned to have been lost or destroyed. Under *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, once the defendant has been put on notice of the importance of the evidence to be preserved, the defendant can be sanctioned by the court for losing or destroying the evidence. Often, the preservation letter will serve as your first "appearance" in front of the defendant or defense counsel. Therefore, it is a solid opportunity for you to make your presence known and demand that to which you are entitled.

I-N-S-P-E-C-T: Show me what it means to me

Inspecting the scene early on is critical to working up any premises-liability case. Nothing compares to inspecting the scene yourself – particularly with an expert by your side. Walking the premises will give you a firsthand impression of the scene and will aid in your understanding of exactly how the incident occurred. Because your client is also intimately familiar with the scene because of the incident, you may benefit from having your client attend the initial inspection as well. Along the way, your client may be able to point out exactly where the incident occurred, the location of any liquid substance on the ground (in a slip-and-fall case), and any other relevant details. Simply being at the scene may refresh your client's recollection of particular pieces of information he or she might otherwise not remember.

Further, inspecting the scene early will also afford you the opportunity to honestly evaluate the case. By exploring and confronting the scene yourself, you will be able to recognize if a dangerous condition is not as dangerous as once believed (or as depicted in photographs). Should you choose to equip yourself with an expert at the initial inspection, you will likely gain insight on theories of liability, which will aid in your assessment of the case. Notably, inspecting the scene at the forefront will allow you to be informed as to whether you should avoid spending needless energy and money on a weak case – or, conversely, it will allow you to see the strength of case, in which case you may opt to dedicate more attention to it if you see potential for a high case value.

If the premises is accessible to the public, it is permissible to conduct an inspection without notifying the defendant. (See *Pullin v. Superior Court* (2000) 81 Cal.App.4th 1161.) However, it is important to note that if the premises in your case is private property, different procedures will apply. If the subject premises is private property (e.g., not a public restaurant, grocery store, or sidewalk), you must put the defendant on notice of your intention to inspect the scene. In such a scenario, you will need to request access to the defendant's property in writing via a Notice of Site Inspection, providing the date, time, and location of the inspection.

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Witnesses: Pursue them aggressively and early

Just as it is wise to inspect the scene early on, so too is it essential to identify and interview witnesses early on. You will want to undertake these tasks before memories fade and before crucial information is lost. We all know how difficult it can be to remember the simplest things, such as what we ate for breakfast yesterday, so it is important to catch your witnesses as soon after the incident as possible. Make sure to take witnesses' statements while the events are still ripe in their minds. You may also want to make the worthwhile investment of hiring an investigator to visit the scene to locate witnesses. Of course, when you are initially interviewing your client, be sure to take note of the names and contact information of anyone who may have been present at the time of the incident. Then, try to talk to those individuals while the events are fresh in their minds and while they are still able to recall more specific details.

Formal discovery

Serve demands for inspection to access vital documents

Written discovery is an indispensable cornerstone of litigation, and requests for production will be especially useful in proving your premises-liability case. One of the most important objectives in discovery is proving the defendant *knew* of the dangerous condition that caused your client's injury. Since the plaintiff bears the burden of proving that the dangerous condition existed *and* that the owner/controller of the premises had notice of the dangerous condition prior to your client's injury, always make sure to request documents that establish the defendant's notice – whether actual or constructive. Actual notice is established when there is evidence that the owner/controller of premises *created* the dangerous condition. (*Hatfield v. Levy Bros.* (1941) 18 Cal.2d 798, 806).

You want to look for scenarios in which an employee spilled something on the floor and failed to clean it up within a reasonable amount of time or where a hazard was created when repairs were started but not completed and the public was exposed to that danger without being provided with adequate warning of the hazard. Constructive notice can be established when the owner of the premises fails to carry out periodic inspection where had the inspections taken place, the hazard or dangerous condition would have been discovered (and presumably remedied). (*Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1205). Based on this, you will want to request documents pertaining to the regular inspection and maintenance of the premises.

Even if you are successful in obtaining surveillance footage, photographs, and/or an incident report through *informal* discovery, requesting this evidence in *formal* discovery is a necessity. Under the Civil Discovery Act, the defense is required to produce such evidence in their possession upon request. You should request documents pertaining to or memorializing similar incidents, such as prior slip-and-fall or trip-and-fall incidents in the same area or prior customer complaints regarding the safety (or lack thereof) of the area. Prior similar incidents will potentially reveal that the defendant knew or should have known of the dangerous condition the caused your client's injury. Further, similar incidents that occurred *after* your client's incident are also relevant in that they may demonstrate that a dangerous condition in fact existed at the time of the incident at the heart of your case.

You will also want to request any records relating to the inspection and/or maintenance of the premises. Such records not only help establish constructive notice, but they may also show that the defendant had the chance to remedy the dangerous condition or to warn of the hazard, whether by putting up a sign or some other means. In slip/trip-and-fall cases, this would encompass sweep sheets and training materials, such as manuals and/or videos, regarding safety.

In brief, to arm yourself with the most helpful documents, make sure to request: (1) photographs and diagrams of the area where the incident occurred; (2) any video or electronic surveillance of the scene; (3) the defendant's safety manuals; (4) the defendant's policies and procedures regarding safety, e.g., cleaning policies; (5) all contracts between the involved parties (and third-party entities, such as management companies and cleaning companies) regarding the maintenance of the premises; (6) all maintenance logs and/or reports; (7) all inspection logs and/or reports; (8) all reports of prior similar incidents; and (9) all reports of prior subsequent incidents. Certainly, this list is not exhaustive, and you should always tailor your document requests to the specifics of your premises-liability case.

Depose the persons most knowledgeable to unveil important truths

Unsurprisingly, one of the most effective ways to prove your case is to get the defendant to admit fault. This can most easily be achieved through deposing the defendant's Person Most Knowledgeable ("PMK") under Code of Civil Procedure section 2025.230. In your deposition notice, make sure to specify the topics regarding which the deponent should be most qualified to testify, such as: (1) the safety of the premises; (2) inspection of the premises; (3) maintenance of the premises; and (4) policies regarding safety. As with any deposition, you should go into your PMK deposition with specific goals you want to achieve. In particular, you should walk into your PMK deposition with razor-sharp focus on proving: (1) the defendant knew of the dangerous condition (by showing actual or constructive notice); (2) the defendant was aware that if certain precautions or measures were taken, foreseeable harm to others could be avoided; (3) the defendant had the means and opportunity to eliminate, reduce, remedy, or provide warning of the danger; and (4) the defendant failed to take the necessary steps to eliminate, reduce, remedy, or provide warning of the danger.

Depose key witnesses

In nearly all premises liability cases, the individuals with the most useful information regarding your case will be employees of the defendant. When deciding who you want to depose, identify all key personnel (a security guard,

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maintenance worker, property manager, etc.) that possess knowledge of the condition of the premises. Typically, you can locate the names of these individuals and their contact information in the defendant's responses to form interrogatories. You may also discover the identities of key witnesses when you take the deposition of the defendant's person most knowledgeable. In addition, you may obtain this information directly from your client. You may also want to depose the workers who were on duty at the time of the incident, the person who authored the incident report, and anyone who was with your client at the time of the incident.

Last but certainly not least – civility

Premises-liability cases are made in the early stages – combining informal discovery with formal discovery. As with all else in litigation, maintaining civility throughout the investigation and discovery phase is crucial – not only in the spirit of good faith, but also in the pursuit of maximizing results. By handling your case professionally and in a courteous manner, you will garner the respect and credibility of your opponent, which will pay dividends when it comes to settling your case or taking it to trial. For best results, throw a hard one-two punch with investigation and discovery at the outset, and weave the thread of civility throughout the life of your case.

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