Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2020

Steve Rosen
ROSEN LAW OFFICES

Chelsee Sachs
CARPENTER, ZUCKERMAN & ROWLEY, LLP

The good, the bad and the ugly in premises liability

CONFESSIONS OF FORMER PREMISES-DEFENSE ATTORNEYS: WE PLAN TO MAKE YOUR LIFE DIFFICULT AND EXPENSIVE

We spent a combined 12 years on the defense side at two large insurance-defense firms. In that time, we both successfully handled dozens of premises-liability cases. The plaintiffs and premises were almost always different, but we approached nearly every case with a similar defense strategy.

As two reformed defense attorneys whose hearts have since doubled in size, we now submit to you the insurance defense attorney's playbook for handling premises-liability/dangerous condition cases.

Step 1: I didn't do it. No one saw me do it. You can't prove anything

The origin of "Deny, Deny, Deny" is not easily found (at least not with a Google search while writing this article). However, its presence in any premises-liability case is as prevalent as pleading paper in the clerk's office. Denial is Step 1 for every premises-liability defense strategy. California law is such that any defense attorney can come up with a number of straight-faced arguments as to why their respective client is without fault. Here are a few common arguments:

No notice

Whether it was their employee who spilled the mop water or didn't secure the construction plate, a company is almost always going to argue that they had no idea of the existence of the dangerous condition. Even if they repaired that loose stair railing no less than four times, you still are going to get a denial based on lack of notice.

Most defense attorneys love this part of the law. They get to argue that their client did nothing wrong. They will assert arguments like their client's cleaning policies and procedures were reasonable; that the dangerous condition was created by anyone else; that they weren't aware of the code violation since they reasonably relied on the contractor; that they left the site in pristine shape; and, sometimes, that the dangerous condition was created by an act of God, outside of their control. Each one of these defense arguments requires digging through discovery, so be prepared to get your hands dirty.

When getting assigned premises-liability cases, defense attorneys think they get to start off ahead in the race and, frankly, they're right. The way the law works, there is always going to be at least one question of fact related to notice and whether they acted reasonably in responding. And if you catch opposing counsel in a lie, or an obvious case of actual notice, all they have to do is act ignorant and say, "well, I guess we'll see."

Here's our tip from our experience on the other side: just accept it and be empowered. When speaking to defense counsel, acknowledge that you don't expect them to accept liability and are looking forward to seeing the jury punish them for failing to take responsibility. Be continually dismissive of this tactic and the good defense attorneys will just move on.

No custody or control

Coupled with the "no notice" excuse, property owners and managers often try to point the finger at someone else. In a very general sense, this isn't usually a bad thing for plaintiffs. While having multiple parties (and defense attorneys) in a case may seem like it's just more work, it often translates to more insurance and more facts supporting negligence. The truth is that most defense attorneys really dislike working with other defense attorneys. Unlike the plaintiffs' bar, the defense bar becomes very petty and competitive.

Multiple defendants also often lead to them pointing fingers at each other, while the good guys can sit back and gain the benefits. So, when you get a custody-and-control argument, it's often best to play along, welcome in the additional parties, and let defendants do a lot of the necessary discovery for your client.

It's trivial and, therefore, not our fault

We could write multiple articles on how cases like *Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092 have only empowered the defense's efforts to avoid liability. The court's determination of what is trivial, as a matter of law, has grossly impacted how a lot of us pursue, or decide not to pursue, cases against government entities. In essence, the Court made already very difficult government claims even more difficult, expensive, and uncertain.

The "trivial" argument doesn't just include sidewalk cracks and definitely didn't start with *Huckey*. It's long been a strategy of the defense to deny that the condition is *actually* dangerous. Car accidents have accident reconstructionists and premises cases have civil engineers. As a defense attorney, you almost always assume and assert that the coefficient of friction (the slipperiness of the floor) is always within standards. After all, why would anyone construct and install slippery material on the surface of a pool area or food court? (But they actually do!)

Our advice is to invest in an expert civil engineer early and have

See Rosen & Sachs, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2020

them inspect the site as soon as possible. Get an honest opinion as to whether the dangerous condition exists (or existed) based on their expertise. By spending a little money up front, you can save a lot of money on bad cases and have the appropriate ammunition to respond to the defense's assertions with "well, my expert disagrees."

Step 2: It's the plaintiff's fault, not ours

Even if the defense relents on whether the dangerous condition existed and whether their client had notice, you can still expect significant pushback on liability. Step 2 is to blame the plaintiff. Here are a few common ways they plan on doing just that:

Plaintiff must be clumsy

One of the more misleading arguments made by the defense is that plaintiff is just clumsy and/or wasn't paying attention. They will request the shoes they were wearing that day and their cell phone records. They will ask your client to admit that they were texting and will imply that your client was in some type of rush. If you are unable to provide the shoes, cell phone records, or evidence disputing these assertions, they will point to the omission as evidence that plaintiff is hiding something.

All in all, the defense will come up with a myriad of different potentially distracting sets of "facts," in order to try to make the plaintiff just look silly. Don't fall for it. If it is a dangerous condition, and your expert (see above) agrees, then push back. Good people don't voluntarily make fools of themselves by falling around crowds nor do they eagerly sign up for broken bones. People avoid injuries by nature. If you trust your client, then stand your ground.

Causation is weak

Weak causation arguments can be a defense attorney's best friend. Keep in mind that the defense will want nothing more than to file a motion for summary judgment, to test the boundaries of a plaintiff and their counsel. The element they seem to hang the MSJ hat on the most is causation.

We all hear that without damages, there is no case. Plaintiffs' attorneys are conditioned to look for and emphasize injuries, economic damages, and impact on our clients' lives. However, overlooking the necessity of an ironclad causation argument can quickly be fatal to our clients' cases, and the defense knows that. It's important to remember, in order to have causation in a premises-liability case, you must prove that defendant had control over the property and that defendant's conduct was a *substantial factor* in causing plaintiff's harm. You need to get the causation facts established early and stick by them.

When it comes to causation, defense attorneys will always be looking for the basis for a solid motion for summary judgment. Don't underestimate this. A plaintiff may have traumatic injuries and appear to be a sympathetic and flawless witness, but if there is no causation to the alleged incident, you will never get to the point where you can even put that plaintiff on the stand.

First and foremost, when building a solid premises-liability case, know that the defense will be ready to pounce on any inconsistency and try to attack any of the separate elements necessary to prove your case. This is why it is so important to establish a solid theory of liability, coupled with strong facts supporting causation, as early as possible.

In addition to investing in an expert early on, make sure to review the elements necessary to prove your case; reviewing the CACI sample jury instructions at the onset is always the best practice (See, CACI 1000 through 1012). If you seek to bring a cause of action against a public entity, be mindful of the CACI 1100 series, in addition to any Government Tort Claims you must bring beforehand. (See, Gov. Code, § 911.2 et seq.) In addition, look into the governmental immunities that will likely come into play and build your case around these, just like you would with jury instructions in other cases.

We are fortunate enough to have jury instructions put out by the Judicial Council of California. Use these to ensure you have an understanding of the battle you will face. Defense attorneys use these instructions and the cases cited in the comments to report and determine whether plaintiff has enough or will ever have enough to prove their case. Far too often plaintiffs' attorneys hope to lean on a few favorable facts and try to push for resolution. The defense isn't interested in this approach unless it favors them (like in the example of a flat fee case). Instead they will work to get what they need to dismantle your case. Get yourself started with a solid foundation of facts supporting the necessary elements of your cause of action.

Second, make sure plaintiff can articulate how they were injured. Such a simple concept is often lost on the plaintiff, lost in translation to their attorney, and capitalized on by the defense. In a premises-liability case, more often than not, the defense will pin liability on plaintiff and will boil it down to simple common sense. Be prepared to get around such a defense by knowing it will occur and enabling plaintiff to understand how to articulate the how, why, where, and when of the injury-causing event. Then, prepare for the Motion for Summary Judgment.

The plaintiff is a liar

We've all dealt with this issue on nearly every case we've handled. Rarely does the defense not argue that the plaintiff is lying about something. Whether it's how the incident occurred, the extent of their injuries and pain, or the impact it has had on their life. Assuming you get past the hurdles above, the next step is to attack the plaintiff's credibility. And the favorite way to do this is the famed sub-rosa.

The oft-times creepy tactic of sub-rosa has been around since ancient times. Typically, it involves a hired "investigator" following the plaintiff around until they find them doing something they previously said they couldn't do. If your

See Rosen & Sachs, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2020

client claims they can't run anymore, you can bet someone will be down at the beach videotaping them running after their kids (even if for only 15 feet).

Most commonly, these videos are utilized by the defense in pre-trial settlement negotiations; court-ordered settlement hearings; private mediations; and ultimately as the best kept stealthy weapon in trial for impeachment purposes, once plaintiff has testified as to their inabilities due to injury. The impact of sub-rosa should not be undervalued, as it can destroy even the best case.

To avoid the shock and horror that is case-killing evidence, make sure plaintiff does not exaggerate their activity level, claims, or injury. In addition, utilize discovery, and not just Form Interrogatory Nos. 13.1 and 13.2, to dive deeper into the likelihood of sub-rosa after your case has been in litigation. Using pointed discovery after a deposition, DME, or other key event has occurred will get you a starting point for continued discovery and ultimately factor into your supplemental discovery requests later.

Keep in mind that good defense attorneys will even complete sub-rosa late in the litigation process, (i.e., after supplemental discovery and before trial) to avoid requests posed in discovery to utilize in eleventh-hour settlement negotiations or again, to yield as a mighty sword during trial. Anticipating this can help you strategize and fight this tactic for plaintiff's advantage.

Step 3: We plan to make your life difficult, your case expensive, and we plan to do it for a long time

Hiding the ball (and how to find it)

As prior defense attorneys, we understand the importance of well-worded, code-compliant, and thorough discovery requests. Much like how plaintiffs attempt to shield certain facts or information from being provided, if and when possible, due to an improperly worded, overly generalized, or compound request, defendants will do the same. However, when a defendant does so, you may never know what information truly lurks behind their evasive response.

Generally speaking, internal investigative reports, incidents of prior occurrences, notes, notices and internal memorandums, may all be hiding in the shadows of discovery. Instead of providing this evidence, or even a privilege log, defense attorneys will often attack the language in the discovery requests, force you to meet and confer, and force you to revise the language prior to ever finding out if this evidence exists. Then when you finally have an agreement that they'll answer, that's when they'll hit you with a privilege log.

Writing discovery in the appropriate style and using clear, succinct language can get you past a real headache. When you do eventually get the privilege log, then make sure to push to a meet and confer. Demand to know, pursuant to Code of Civil Procedure section 2031.240, subdivision (c)(1), the description of the document, the author of the document, recipients of the document, the date of the document, and the specific privileged claimed. This can then be used in a motion seeking release or at least court review of such document to determine if it can or should be produced.

Additionally, pay particular attention to demands relating to witnesses. Often the defense will fail to add a key witness to the incident or its aftermath, by simply providing some information, but not all that exists. This could be a deliberate hiding of evidence, or in some cases, the defense simply did not inquire further with their client and failed to obtain the entirety of the information available. Either way, you will suffer. Form Interrogatories and even Special Interrogatories leave several holes whereby employers, investigators, managers, etc. can all be hidden away, as can the documents they author.

The "hiding" of witnesses can take many forms and occurs in terms of Person(s) Most Knowledgeable, third-party witnesses, and potentially even parties that you may consider vital to your case, which fail to be mentioned. Maintenance crews, builders, property management companies, prior owners, employees, supervisors, etc., should all be on your radar in a premises-liability case and should be explored in discovery. While most defense attorneys are willing and do provide this information, often a specific individual or record may not be mentioned and may be kept concealed. Do your due diligence, take depositions, and keep going to make sure you have the information you need for your case to survive and that you don't let the other side play hide and seek without even tagging you in.

Defense plays the long game

It is vital to know that the defense is not afraid to spend money on litigation and on defending their client. It's a difficult concept to grasp, but know, that in our experience, most insurance adjusters would rather pay $100,000 in defense fees to save $50,000 in liability settlements. And while we believe that a defense attorney's desire to bill, bill, bill is overstated by plaintiffs' attorneys, you can expect that defense attorneys aren't going to be in a hurry to dispose of every case. To that end, when you have a premises-liability case that lacks appeal or a fact or element that defense can sink their teeth into and hold on for the long haul, they will.

One of our favorite pastimes as defense attorneys, and one of the things we believe most defense attorneys are phenomenal at, is playing the long game. A "win the war, not the battle" mentality is instilled in most young defense lawyers and such becomes a way of life. What that translates to is an ever-growing number of subpoenas; several rounds of discovery; the taking of seemingly excessive depositions of third parties and medical treaters; numerous expert witnesses retained to fight liability and damages; motions for every kind of battle; and multiple trial continuances. These tactics serve several purposes.

You may think, what is so special about these long-term tactics? In our

See Rosen & Sachs, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2020

experience, they are driven to wear plaintiff down and separate the truly meaningful and worthwhile claims from those that are not of high value. For example, after the 32nd subpoena for plaintiff's medical records (oh yes, we have sent that many), you may find yourself uninterested in fighting back with a meet and confer, let alone filing another motion to quash. Maybe you are simply too busy and fail to review the subpoena in time or do not have the manpower to employ to continue fighting. Either way, defense will obtain records that will inevitably help them stack evidence against plaintiff or if there is none, will be assured your claim is one to resolve.

Rounds and rounds of discovery are poised to test you and plaintiff and weed out the weak suits from those that will ultimately pass muster. Can plaintiff keep this "charade" going? Are plaintiff's injuries really that terrible four years later or will plaintiff look greedy and unsympathetic?

Depositions of treating doctors are also a minefield. Sure, some doctors might be great witnesses for the plaintiff, but by and large most doctors, outside of the med-legal world, seem to strongly dislike lawyers and personal injury lawsuits. Defense attorneys know this and will stop at nothing to get any soundbites showing that plaintiff is a liar or malingerer.

This will continue into expert discovery, where the defense will retain every potential expert that can fight plaintiff. Plaintiff has a civil engineer? Fantastic! Defense will get a civil engineer expert, a security management expert, a property management expert, a botanist or tree management expert. You name it, they will get more. Why? Because they can. Be certain to look closely at expert disclosures and argue, wherever possible, that certain experts are duplicative and should be excluded; but make sure they aren't helping your cause before you do.

Finally, the defense loves to play the postponement game, with trial continuances being their favorite ammunition. Trial continuances could really have their own article. As the case proceeds, the defense will argue that a trial continuance is based upon lack of plaintiff's deposition, lack of DME, lack of available third-party witnesses, lack of availability of expert witnesses, vacations or other attorney availability, and so on. Working to keep your case evolving, rather than revolving is a never-ending cycle. We both like to continue to write the defense letters offering updates for our client's depositions, "reasonable" defense medical examinations, and sometimes even provide available dates for percipient/lay witnesses. We take this approach to keep the defense on their toes and to work in our favor when we are ultimately opposing that third request for a trial continuance.

In the end, remember, above all things, that defense attorneys have the money, manpower, and time to make you and your client work for justice. Plan well and be mindful of these common tactics and you will have a shot at making a difference.

Steve Rosen is the founder of Rosen Law Offices *in Dana Point. He formed the firm after spending more than seven years at a large national defense firm. Since forming Rosen Law Offices, Steve has focused his energy on helping the people within Southern Orange County. He received his J.D. from Loyola Law School and practices in both California and Nevada.*

Chelsee Sachs is a former defense attorney turned plaintiff attorney, managing offices and attorneys on both spectrums. She received her J.D. from Michigan State University.