STATE OF OKLAHOMA RETAIL & HOSPITALITY COMPENDIUM OF LAW

Prepared by

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OKLAHOMA RETAIL & HOSPITALITY LAW
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Guide to Oklahoma Retail and Hospitality Law
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Hailey's practice focuses on general insurance defense, including the defense of retail and hospitality establishments in premises liability matters, as well as defending transportation, medical malpractice, professional liability, dram shop, and personal injury matters. Hailey also has extensive experience in defending mass tort and construction related damage claims for energy service companies, contractors and public utilities. Hailey was selected by her peers as one of the Oklahoma Super Lawyers "Rising Stars" for 2016, 2017, 2018 and 2019. She is admitted to practice in the United States District Courts for the Western, Northern and Eastern Districts of Oklahoma, as well as the 10th Circuit Court of Appeals.

1. The Oklahoma State Court System

A. The State System

The Oklahoma Court System is made up of the Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals, and 77 District Courts. Administrative services for the Court System are provided by the Administrative Office of the Courts.

The trial-level court in Oklahoma is the District Court System. Each county in the state has a District Court that hears all manners of civil and criminal disputes. Virtually all personal injury actions filed in state court are filed at the District Court level. District Court judges are elected officials and serve 4-year terms.

Unlike most states, Oklahoma has two courts of last resort. The Supreme Court determines all issues of a civil nature, and the Oklahoma Court of Criminal Appeals decides all criminal matters. The Court of Civil Appeals is responsible for the majority of appellate decisions. These opinions may be released for publication either by the Court of Civil Appeals or by the Supreme Court. When the opinions are released for publication by the Supreme Court, they have precedential value. The Court of Civil Appeals is comprised of four divisions, each composed of three Judges.

The Oklahoma Supreme Court is Oklahoma's court of last resort in all civil matters and all matters concerning the Oklahoma Constitution. It consists of nine justices appointed by the governor to serve life terms, but unlike U.S. Supreme Court justices, they are subject to an election every six years in which voters choose whether or not to retain them. Appeals may be made to the Supreme Court from the District Court, Workers' Compensation Court, Court of Tax Review, and state agencies such as the Department of Public Safety, Oklahoma Tax Commission, Oklahoma Corporation Commission and the Department of Human Services. Many of these appeals are directed by the Supreme Court to one of four divisions of the Court of Civil Appeals. Most cases

reviewed in the Supreme Court are from the Court of Civil Appeals. These cases come before the Supreme Court on petitions for certiorari review.

Certiorari allows the Supreme Court to bring the record up from the Court of Civil Appeals and to review the Court of Civil Appeals' decision. A review of an opinion of the Court of Civil Appeals in the Supreme Court on writ of certiorari is a matter of sound judicial discretion, and will be granted only when there are special and important reasons–and if a majority of the Justices direct that certiorari be granted. Certiorari may be granted when the Court of Civil Appeals has decided a question of substance not previously determined by the Oklahoma Supreme Court or the United States Supreme Court, the Court of Civil Appeals' divisions have issued conflicting opinions, or when the Court of Civil Appeals' decision is a substantial departure from the usual course of judicial proceedings. When new first impression issues, or important issues of law, or matters of great public interest are at stake, the Supreme Court may retain a case directly from the trial court.

The procedural rules in Oklahoma are controlled by Statute and the Oklahoma Court Rules. These rules are very similar to the Federal Rules of Civil Procedure.

B. Oklahoma Federal Courts

There are three judicial districts in the state. The **Eastern District** is located in Muskogee and encompasses the following counties: Adair, Atoka, Bryan, Carter, Cherokee, Choctaw, Coal, Haskell, Hughes, Johnston, Latimer, Le Flore, Love, Marshall, McCurtain, McIntosh, Murray, Muskogee, Okfuskee, Okmulgee, Pittsburg, Pontotoc, Pushmataha, Seminole, Sequoyah, and Wagoner. The **Northern District** is located in Tulsa and encompasses the following counties: Craig, Creek, Delaware, Mayes, Nowata, Osage, Ottawa, Pawnee, Rogers, Tulsa, and Washington. The **Western District** is located in Oklahoma City and encompasses the following counties:

Alfalfa, Beaver, Beckham, Blaine, Caddo, Canadian, Cimarron, Cleveland, Comanche, Cotton, Custer, Dewey, Ellis, Garfield, Garvin, Grady, Grant, Greer, Harmon, Harper, Jackson, Jefferson, Kay, Kingfisher, Kiowa, Lincoln, Logan, McClain, Major, Noble, Oklahoma, Payne, Pottawatomie, Roger Mills, Stephens, Texas, Tillman, Washita, Woods, and Woodward.

When practicing in Oklahoma Federal Courts, be sure to read the district's local rules, as well as the assigned judge's chamber rules (available online) for guidance unique to that particular venue (font size, whether a motion and supporting brief should be filed together, etc.).

2. Negligence

Since statehood in Oklahoma, the courts have been steadfast in following the common law regime in premises liability cases. Negligence is applied within the restrictive framework of relational, status based duties. *Pickens v. Tulsa Metropolitan Ministry,* 951 P.2d 1079 (Okla. 1997). "Negligence" is the failure to exercise ordinary care to avoid injury to another's person or property. "Ordinary care" is the care which a reasonably careful person would use under the same or similar circumstances. The law does not say how a reasonably careful person would act under those circumstances. Oklahoma Uniform Jury Instruction 9.2

3. Invitee

An invitee is one who is on the premises at the express or implied invitation of the owner or occupant thereof for some purpose in which the owner/ occupant has some interest of business or commercial significance, which business may be of mutual interest, or in connection with the owner's or occupant's business. Oklahoma Uniform Jury Instruction No. 11.3.

An invitee is one who comes upon the premises of another under the authority of an express or implied invitation. Where a person comes onto the premises of another and there is a common

interest or mutual advantage, an invitation is inferred and the term business invitee is often used. *McKinney v. Harrington, 855* P.2d 602, 604 (Okla. 1993).

A. Application of Invitee Status

In addition to the common invitor / invitee relationships (bank / bank customer, supermarket / shopper, hotel / guest, and restaurant / patron), Oklahoma Courts have applied invitee status more liberally. For example, a roofing company's employee who was hired to repair homeowner's roof was deemed an "invitee" for purposes of his negligence claim against the homeowner. *McKinney v. Harrington, 855* P.2d 602 (Okla. 1993).

1) Duty

Oklahoma premises liability law provides that a business owes a duty to its invitees or customers to exercise ordinary care in keeping parts of the premises used by customers in a reasonably safe condition and to warn customers of dangerous conditions on the premises that are known or should be known to the business. *Brown v. Wal-Mart Stores, Inc.*, 11 F.3d 1559, 1563 (10th Cir. 1993); *Beatty v. Dixon*, 1965 OK 169, ¶ 8, 408 P.2d 339, 342. However, a premises owner "is not an insurer of the safety of others and is not required to prevent all injury occurring on the property." *Taylor v. Hynson*, 1993 OK 93, 856 P.2d 278, 281.

A premises owner's duty to keep its premises safe "applies only to defects or conditions which are in the nature of ***hidden dangers, traps, snares, pitfalls, and the like***, in that they are not known to the invitee, and would not be observed by him in the exercise of ordinary care. The invitee assumes all normal, obvious, or ordinary risks attendant on the use of the premises, and the owner or occupant is under no duty to reconstruct or alter the premises so as to obviate known and obvious dangers." *Beatty v. Dixon*, 1965 OK 169, 408 P.2d 339, 342 (emphasis added). A premises owner or occupant "is [not] liable for injury to an invitee resulting from a danger which was

obvious or should have been observed in the exercise of ordinary care." *Williams v. Tulsa Motel*, 1998 OK 42, 958 P.2d 1282, 1284.

Oklahoma recognizes a nondelegable duty to maintain one's premises in a reasonably safe condition to protect invitees. *Thomas v. E-Z Mart Stores, Inc.*, 2004 OK 82, P12, 102 P.3d 133, 137. This nondelegable duty applies primarily where the premises owner attempts to delegate his duty to an independent contractor. For example, a landowner's duty may not be delegated in the sense that an invitor may be held liable for certain acts of its independent contractors. Allocation of the risk is placed on the invitor who is in control of its premises, including the injury-causing condition thereon, when the invitor either knew or should have known of its existence. *West v. Spencer*, 2010 OK CIV APP 97, P12 (Okla. Ct. App. 2010).

The burden of proof is on the plaintiff in a slip and fall case to show that the item causing the fall was negligently left there by storekeeper or some employee or had been there for sufficient time after the latter had actual or constructive knowledge thereof to have removed it in exercise of ordinary care. Alternatively, plaintiff may show that storekeeper negligently failed to inspect or maintain premises, or **did** not use ordinary care in policing premises. *Hodge v. Morris, 945* P.2d 1047 (Okla. Civ. App. 1997).

Mere speculation on behalf of the jury to conclude the condition was present for a sufficient amount of time to impose constructive notice will fail. In *Lewis v. Dust Bowl Tulsa, L.L.C.,* 377 P.3d 166 (Okla. Civ. App. Div. 4, 2016), a patron brought an action against a bowling alley for injuries sustained while competing in a bowling match. Plaintiff alleged that the bowling alley negligently failed to maintain a clean and safe floor in the bowling alley and failed to warn Plaintiff of a hidden and dangerous condition, a splinter in the bowling lane, however the Plaintiff failed to provide any evidentiary materials supporting these contentions. Defendant argued that Plaintiff

failed to demonstrate that Defendant had any notice (actual or constructive) of any dangerous condition prior to Plaintiff's fall. In support, the bowling alley presented affidavits of its employees stating that the area was dust mopped and cleaned prior to the incident, that there were no reports of any issues with the bowling lane prior to the incident, and that employees were instructed to look for any lane areas in need of repair. The bowling alley prevailed on summary judgment, and the Oklahoma Court of Civil Appeals affirmed the trial court's decision.

In 2018, the 10th Circuit Court of Appeals affirmed a Motion for Summary Judgment on a similar basis. In that case, the Plaintiff visited the Defendant restaurant where she slipped and fell on an unknown substance and brought suit claiming the defendant breached its duty to keep the restaurant premises safe. Summary Judgment was granted because the Plaintiff failed to present evidence sufficient to establish a genuine dispute of fact that Defendant breached is duty. On appeal, Plaintiff asserted that it was reasonable to infer from the evidence that the Defendant either caused the unknown substance to be present on the floor where she fell, or it knew or should have known of its presence there in time to warn her or remove it before her accident because she fell in the hallway leading to the restaurant's bathroom, near the bar and a beverage station, on one of the busiest nights of the year.

The 10th Circuit Court of Appeals affirmed the district court's ruling. First, the Court noted that the Plaintiff didn't present any evidence that Defendant created the condition. Instead, the jury would have to speculate that the Defendant caused the spill because, it was "within the realm of possibility, if not probability," that the substance came from the bar, beverage area or bathroom, or was spilled by an employee. The Court also noted that, the unknown substance could have been present as a result of the actions of a customer, and "[w]here one conclusion would be as sound as

another, the evidence may then be said to leave the matter wholly within the realm of mere conjecture, and any conclusion would be the result of a common speculation.

The Court went on to say that the Plaintiff's claim that it would be reasonable to infer actual or constructive knowledge of the dangerous condition in sufficient time to act was "flawed" as Plaintiff had failed to present any evidence that Defendant was aware that the substance was on the floor before her fall. The Court likewise rejected Plaintiff's claim that a genuine dispute existed as to constructive knowledge, explaining that constructive knowledge could only be imputed to a business owner if the condition "existed for such time [that] it was his duty to know of it." Because the Plaintiff did not know how long the offending substance had been on the floor before her fall, it was just as likely that the spill occurred just moments before she fell. The Court concluded that "[s]uch speculation isn't sufficient to prove breach of a business owner's duty of care under Oklahoma law."

In *Wood v. Mercedes-Benz of Oklahoma City*, 336 P.3d 457 459-60 (Okla. 2014), the Court found that Mercedes–Benz owed a duty to take remedial measures to protect invitee from the icy conditions surrounding the entry to its facility, even after Plaintiff had successfully traversed the icy area once without incident. The accumulation of ice throughout the dealership's facility was caused by the activation of the dealership's sprinkler system during freezing temperatures; not by a natural condition. Thus the dealership had notice of the icy conditions surrounding the entire building and knew that the catering company was sending its employees to the facility to cater the dealership's scheduled event. As such, it was foreseeable that catering employees would encounter the icy hazards created by the sprinkler system and would likely proceed through the dangerous condition in furtherance of their employment.

Oklahoma deems possession and control of real property the fundamental requirement for ascribing liability for injury suffered thereon, and that once an owner parts with possession and control of the premises, the responsibility and liability, if any, for injury suffered on the property falls on the new owner. *See Shipley v. Bankers Life and Casualty Company*, 1962 OK 264, 377 P.2d 571, (vendor who had surrendered possession, management and control of apartment hotel for six years to buyer under contract for sale was not liable for tenant's injury sustained as result of defect in elevator that existed when contract was entered into). *See also Scott v. Archon Group, L.P., 2008 OK 45, P25 (Okla. 2008).*

Although the Oklahoma Landlord Tenant Act, specifically Okla. Stat. tit. 41 § 118(A)(2) (2001), imposes a duty upon the landlord to make all repairs and do whatever is necessary to put and keep the tenant's dwelling unit and premises in a fit and habitable condition, it does not create a tort remedy for personal injuries sustained as a result of a landlord's breach of those duties. It merely regulates the contractual rights and obligations of the residential parties and does not enlarge the landlord's duty under common law. Okla.Stat. tit. 41, §§ 103(A) & 121. *Miller v. David Grace, Inc., 2009 OK 49 (Okla. 2009).*

The Oklahoma Supreme Court supplanted the caveat emptor doctrine of landlord tort immunity by imposing a general duty of care upon landlords to maintain the leased premises, including areas under the tenant's exclusive control or use, in a reasonably safe condition. This duty requires a landlord to act reasonably when the landlord knew or reasonably should have known of the defective condition and had a reasonable opportunity to make repairs. *Miller v. David Grace, Inc., 2009 OK 49 (Okla. 2009).*

Safety features such as doors and window locks, alarm devices, and balcony railings directly relate to security. Leasing a premise that is inadequately secured due to ineffective or

defective materials creates a duty on the part of the landlord to provide repairs or modifications upon notification of the defect by the tenant. This duty arises from the landlord-tenant contract and from the implication that the landlord is to provide services under the contract in a diligent manner. *Miller v. David Grace, Inc., 2009 OK 49 (Okla. 2009). See also Lay v. Dworman,* 732 P.2d 455 (reversing dismissal of Plaintiff's claims against apartment complex for rape by unknown assailant due to apartment complex's failure to repair a defective lock on sliding glass door and knowledge of criminal activities, including other rapes, in the area).

2) Hidden Danger

A hidden danger is a dangerous condition that the invitee [licensee] does not actually know about and would not be expected to observe in the exercise of ordinary care. A hidden danger may be totally or partially obscured from sight but it need not be if the circumstances are such that the invitee [licensee] would not be expected to observe the dangerous condition in the exercise of ordinary care. OUJI 11.11

3) Open and Obvious Defense

The owner/occupant has no duty to protect invitees or licensees from or warn them of any dangerous condition that is open and obvious, as such a danger is ordinarily readily observable by invitees or licensees. Oklahoma Uniform Jury Instruction 11.12

Examples:

- Wet floor was open and obvious as a matter of law since plaintiff knew or should have known of it. *Williams*, 958 P.2d at 1284
- Ice on defendant's premises was "equally obvious to both plaintiff and defendant," necessitating summary judgment for defendant. *Dover,* 111 P.3d at 246-47
- Judgment in favor of defendant where plaintiff walked into a low-hanging awning, despite plaintiff not seeing the awning. *C.R. Anthony Co.* 435 P.2d at 118-19
- Finding puddle in bathroom to be open and obvious, and noting that defense is not assumption of risk/comparative negligence issue, but goes to the *lack of duty in invitor-invitee premises liability law as to open and obvious conditions. Kastning v. Melvin Simon & Associates, Inc.,* 876 P.2d 239, 240

- Cardboard box lids scattered on floor at retail store open and obvious as a matter of law, necessitating summary judgment. *Kindkaid v. Wal-Mart Stores E., L.P.*, 387 F. App'x 876, at 877-878 ((10th Cir. 2010)
- Retaining wall off of which plaintiff fell while sleeping on defendant's property found open and obvious through examination of evidentiary materials. *Pickens v. Tulsa Metropolitan Ministry*, 951 P.2d 1079, 1086
- Curb in front of grocery store open and obvious despite plaintiff not seeing the curb while carrying groceries. *Safeway Stores v. McCoy*, 376 P.2d 285, 287-88
- Vehicle "clearance beam" in parking garage open and obvious, affirming summary judgment. *Scott v. Archon Group*, 191 P.3d 1207, 1219
- Foul balls at professional baseball game open and obvious condition as a matter of law, despite plaintiff allegations that protective screen was too low. *Tucker v. ADG, Inc.*, 102 P.3d 660, 666
- Orange electrical cord stretched across floor open and obvious as a matter of law, mandating summary judgment despite plaintiff's allegation that she did not see the cord because of the lighting. *Southerland v. Wal-Mart Stores*, 848 P.2d 68, 69
- Club not found liable for injuries and death of man who slipped and fell in water on step when leaving the club, as water from an air conditioner was an open and obvious danger and club owner had no duty to warn. *Esther v. Wiemer*, 859 P.2d 1140

4) Comparative Negligence

Under Oklahoma law comparative negligence is an affirmative defense and the Defendant must show by the greater weight of the evidence that the Plaintiff was negligent and his or her negligence was a direct cause of his or her injury. If the Plaintiff's liability is found to be 51% or greater, the Plaintiff is barred from recovery.

5) Several Liability

In Oklahoma, all liability is several in any civil action based on fault and not arising out of contract. 23 O.S. § 15. In other words, each party or non-party bears their own portion of liability. Although not specifically affirmed by case law or otherwise codified, several liability may extend to the criminal acts of other parties or non-parties. *See* Oklahoma Uniform Jury Instruction 9.21.

6) Rain

Storeowner was not held liable for injuries to woman who slipped and fell on entrance floor that had become damp and wet from rain earlier in the morning. No duty was breached to store

customer unless employee of store caused the dangerous condition or the dangerous condition existed long before the owner was able to discover and remove the dangerous condition. *Safeway Stores, Inc. v. Criner*, 380 P.2d 712, 716 (Okla. 1963).

7) Ice and Snow

Naturally occurring or natural accumulation of ice and snow creates no liability. Natural may not mean directed by gutters, eaves, downspouts, etc. *Buck. Del City Apartments, Inc.*, 431 P.2d 360 (Okla. 1967). Where there is no act on the part of the owner or occupant of the premises creating a greater hazard than that brought about by natural causes, such as the forming of ice and the falling of snow, all persons on the property are expected to assume the burden of protecting themselves from the naturally occurring hazards. *Dover v. Braum, Inc.* 111 P.3d 243 (Okla. 2005).

8) Black Ice

A business owner may be liable for a fall on "black ice" occurring on the premises. If the business owner has sufficient notice of the naturally occurring "black ice" and resulting hazard, a jury may decide that the property owner had a duty to warn the invitee of the hazardous condition since it was not open and obvious. *Brown v. Alliance Real Estate Group*, 1999 OK 7.

9) Lightning

Lightning is a universally known danger created by the elements. Golf Course has no duty to warn its invitees of the patent danger of lightning or to reconstruct or alter its premises to protect against lightning. Plaintiffs did not allege and offered no proof Golf Course created a greater hazard than that brought about by natural causes and Golf Course is thus entitled to judgment as a matter of law. *Grace v. City of Oklahoma City*, 1997 OK CIV APP 90, 3 (Okla. Civ. App. 1997).

10) Negligence Per Se

In addition to the duty to exercise ordinary care there are also duties imposed by statutes and ordinances. The violation of an ordinance is to be deemed negligence per se if the injury complained of (1) was caused by the ordinance's violation, (2) was of the type intended to be prevented by the ordinance, and (3) the injured party was one of the class meant to be protected by the ordinance. *Boyles v. Oklahoma Natural Gas Co.,* 619 P.2d 613 (Okla. 1980).If a violation of a statute or ordinance was the direct cause of the injury, then such a violation in and of itself would create negligence. Oklahoma Uniform Jury Instruction § 9.10. A hotel's failure to equip certain stairways with handrails constitutes negligence per se with respect to an injury sustained in fall on the stairway. *Eddy v. Oklahoma Hotel Bldg. Co.,* 228 F.2d 106 (10th Cir. *1955).*

11) Acts of Third Persons

An invitor has no duty to protect an invitee from the criminal acts of third persons, unless the invitor knows or has reason to know that the third party's acts are occurring or are about to occur; in which case, the invitor would have the duty to warn or protect the invitee from the third-party's criminal acts. *Taylor v. Hynson,* 856 P.2d 278 (Okla. 1993).

The open and obvious limitation of invitors' duty does not apply to acts of third persons. Premises liability cases involving criminal attacks focus on the invitor's knowledge of criminal activity; they do not incorporate the "open and obvious danger" analysis found in physical-defect cases. *Therrien v. Target Corp.,* 2007 WL 431516, C.A. 10 (Okla. 2007).

Examples:

Dance Club was held liable to woman hit by "flying beer bottle" while she was on the dance floor. It was reasonably foreseeable that selling beer in glass bottles to patrons who had a

known propensity for violence could result in such an accident. *McClure v. GroupK Enters., Inc., 977* P.2d 1148, 1151 (Okla. Civ. App. 1999).

After parking in defendant's parking garage, Plaintiff was kidnapped at knife point and raped. The trial court granted summary judgment to defendant, rejecting Plaintiff's argument that defendant could have reasonably anticipate criminal activity and afforded reasonable protection against it. The Court of Civil Appeals affirmed. On review, the Supreme Court of Oklahoma held that defendant's past experience with a high rate of crime gave rise to a duty to provide precautions against criminal activity in its parking garage. There was a question of fact as to whether the precautions defendant undertook were adequate to provide reasonable protection to its business invitees. Therefore, summary judgment was improper and the issue of a breach of duty was for the trier of fact. *Bray v. St. John Health Sys.,* 2008 OK 51 (Okla. 2008).

Fast-Food restaurant not held liable for assault on customer waiting in line to place an order. The short amount of time between verbal exchange and attack did not allow restaurant employee an opportunity to prevent an attack. *Shelkett By and Through Shelkett v. Hardee's Food Systems, Inc.,* 848 P.2d 63, 67 (Okla. App. 1993).

Plaintiff mother sued defendant retailer based on a premises liability theory of negligence after her 5 year old child was sexually assaulted inside the men's restroom at the store while his aunt waited outside the door. The District Court granted summary judgment to the retailer. On appeal, mother pointed out that the perpetrator was not an employee of the retailer, but he was apparently on the premises for the purpose of soliciting donations for a church and that the perpetrator's church was on a list of groups that were not permitted at the store because of behavior issues. The court concluded that summary judgment was improper. Whether the perpetrator's criminal act was an unforeseeable intervening cause that shielded the retailer from liability for any

negligence it might have committed was an issue that could not be resolved on summary judgment because foreseeability remained a controverted issue of fact. The mother was not required to show that the retailer was specifically aware of, or could have foreseen, the exact crime or the specific location on its premises where patrons might be injured by the tortious acts of third persons. Further, any contributory negligence on the part of the aunt was a question of fact for the jury. *Lewis v. Wal-Mart Stores E., L.P.,* 2009 OK CIV APP 81 (Okla. Ct. App. 2009).

To determine the foreseeability issue, the Oklahoma Supreme Court has adopted the approach of the Restatement (Second) of Torts § 344 (1965). *Bray* at ¶ 12, 187 P.3d at 724. Section 344 provides, at comment f:

> *Duty to police premises*. Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. *He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection*.

Restatement (Second) of Torts § 344 cmt. f (1965)(emphasis added).

4. Licensee

A licensee is one who is on the premises of another by tolerance/permission, express or implied of the owner/occupant thereof for purposes in which the owner/occupant has no business or commercial interest. Oklahoma Uniform Jury Instruction No. 11.8. A licensee is one who goes onto the property of another for his own benefit with the implied or express permission of the landowner. *Brown v. Nichols, 935* P.2d 319, 321 (Okla. 1997).

Examples:

A holder of a permissive easement, a hunter, or any other person who has been given express permission to come onto the owner's land is a licensee.

A. Duty

The owner/occupant of premises has a duty to a licensee, whose presence on the premises is known or reasonably should be known, not to injure him/her 1) by a willful or wanton act, or 2) by needlessly exposing him/her to danger by a failure to warn of any hidden danger on the premises that is known to the owner/occupant and that the licensee is not likely to discover by himself/herself. This duty is limited to any hidden danger that the owner/occupant actually knows about, and the owner/occupant has no duty to inspect the premises for hidden dangers. Oklahoma Uniform Jury Instruction No. 11.13.

The landowner has a duty to exercise reasonable care to disclose to the licensee the existence of dangerous conditions known to the owner that are unlikely to be discovered by the licensee; this duty extends to conditions and defects that are hidden dangers, traps, snares, and the like. *Thomas v. E-Z Mart Stores, Inc.*, 102 P.3d 133 (Okla. 2004); *Pickens v. Tulsa Metropolitan Ministry, 951* P.2d 1079, 1083 (Okla. *1997).* This duty is limited to any hidden dangers that the owner actually knows about, and the owner has no duty to inspect the premises for hidden dangers. *Sagona v. Sun Company, Inc., 57* P.3d 879 (Okla. Civ. App. 2002).

Hotel maid held to be a licensee rather than a trespasser when she went to get some ice to cool her face, as was customary for the maids to do; therefore, hotel owner owed her a duty to exercise ordinary care to avoid injuring her. *Oklahoma Biltmore v. Williams, 79* P.2d 202 (Okla. 1938).

Plaintiff filed suit against Defendant or injuries sustained as a result of falling in a tunnel hallway which leads from Saint Anthony Hospital, where she worked, to the employee parking garage. At the time of Plaintiff's fall, Defendant's employee was working in the tunnel stripping and waxing the floor. Plaintiff claimed that she fell because of Defendant's failure to adequately warn her of the dangerous condition existing on the tunnel floor. Defendant filed a motion for summary judgment maintaining it took reasonable care in warning invitees, including Plaintiff, of the potentially dangerous condition on the floor. The trial court granted Defendant's motion. Plaintiff appealed and the Court of Civil Appeals, Division I, affirmed the summary judgment finding Defendant satisfied its duty to warn Martin of a potentially dangerous condition on the floor. The Oklahoma Supreme Court disagreed and found that the condition presented by the floor was in the nature of a hidden danger and not one that was open and obvious. As a result, the employer had a duty to warn the employee of the potentially dangerous condition. A genuine issue of material fact as to the adequacy of the warning provided by the employer existed as a rational fact finder could have concluded that the janitor obstructed the employee's passage and forced her to step around him. As she placed her foot on the floor between the rubber strips placed for passage, she fell. Thus, reasonable minds could have differed as to whether the warnings were adequate to apprise the employee of the potentially dangerous condition. In addition, the fact that three people fell within a span of 30 to 40 minutes that evening lended support to the notion that either the warnings were confusing or that the condition was so dangerous that the public could not avoid the harm even after receiving a warning. As such, the trial court erred by granting summary judgment in favor of the employer. Martin v. Aramark Servs., Inc., 2004 OK 38 (Okla. 2004).

B. Social Guests

Where child was at his friend's house playing and was injured when shot in the eye with BB gun, the court held that a social guest is more correctly labeled a licensee and is owed a duty of ordinary care. *Vance By and Through Vance v. Thomas*, 716 P.2d 710 (Okla. Civ. App. 1986). A social guest in the home of a host was found to be a licensee and there was owed the duty to exercise ordinary care to- avoid injuring him. *Simon v. Rizek, 296* F. Supp. 602 (W.D. Okla. 1962).

The companies managed the apartment complex where the visitor was injured. She was rendered a quadriplegic after diving into the apartment pool and striking her head. She sued for negligence. The trial court granted the companies summary judgment. The appellate court affirmed, finding undisputed proof of the open and obvious condition of the pool at the time of the incident. On review, the court reversed. The court found that a fact issue existed regarding whether the danger of diving head first into the pool was an open and obvious danger. Despite the visitor's admissions that she understood the dangers of diving into the waters at an unknown depth, she also indicated that the pool's lighting made her think it would be safe to do a shallow-water dive. The visitor's perception was linked to the pool's lighting, which created shadows. Her rescuer also indicated that he could not determine the depth of the water until he entered the pool. The characteristics of the pool as a hidden or open hazard presented an issue of fact, and thus summary judgment was inappropriate. *Sholer v. ERC Mgmt. Group, LLC,* 2011 OK 24 (Okla. 2011).

5. Trespasser

A trespasser is one who is on another's land without an implied invitation and against the owner's wishes. *Lohrenz v. Lane*, 787 P.2d 1274, 1277 (Okla. 1990).

A. Duty

To a trespasser, a landowner only owes the duty not to injure him willfully or wantonly. *Pickens v. Tulsa Metropolitan Ministry, 951* P.2d 1079, 1083 (Okla. *1997).* Gross negligence is synonymous with a wanton act; therefore, an act or omission involving reckless indifference to the safety of a reasonably anticipated "technical trespasser," such as a child of tender years, may be wanton. *Lohrenz v. Lane,* 787 P.2d 1274, 1278 (Okla. 1990).

Trespass defense applied to worker's personal injury action against owner based on accident that occurred while worker was taking down telegraph poles on property adjacent to his employer's; owner's mere knowledge of remodeling project on adjacent property was not implied invitation to enter its own property and remove poles. *Rowell v. El Reno Junior College Foundation, Inc.,* 910 P.2d 962 (Okla. 1993).

B. Attractive Nuisance

In some circumstances, an owner/occupant of premises may have a duty to exercise ordinary care to protect children who trespass on his/her/its premises from injury. If a jury finds that Plaintiff was injured while trespassing on Defendant's land, then in order for Plaintiff to recover the jury must find all of the following to have been established:

a) The injury was directly caused by [describe the artificial condition] maintained by Defendant on the premises;

b) The condition was unusually attractive to children;

c) Plaintiff was attracted onto the premises by the condition;

d) The condition created an unreasonable risk of injury to children, which Defendant knew, or, as a reasonably careful person, should have known;

e) Plaintiff lacked the ability to appreciate or realize the risk; and

f) Defendant, failed to exercise ordinary care to protect Plaintiff from injury.

OUIJI Instruction No. 11.5 - DUTY TO CHILDREN - ATTRACTIVE NUISANCE

A landowner is generally under no duty to trespassers other than to avoid willfully, wantonly or intentionally harming them. The attractive nuisance doctrine is an exception to this rule. It involves balancing the interests between that of society in protecting its children and the right of landowners and proprietors to make use of their property in a lawful business. *Knowles v. Tripledee Drilling Co., Inc.*, 771 P.2d 208 (Okla. 1989).

In making a determination as to whether the attractive nuisance doctrine applies to a specific fact situation the following factors must be considered:

a) how uncommon the instrumentality is;

b) how unusually dangerous the instrumentality is;

c) how attractive the instrumentality is;

d) the probability of children coming into contact with the instrumentality;

e) whether the probability is so localized that harm can be avoided, or whether the probability is such that there is no indication of when and where the contact will occur;

f) how feasible it is to avoid danger of harm;

g) how great is the burden of avoiding the harm;

h) the effect of placing such a duty on a party; and

i) whether the child has an apparent intelligence and consciousness of the circumstances such that she/he could reasonably appreciate the danger or the lack

of right to tamper with the instrumentality so that the duty to protect should not be imposed. *Knowles v. Tripledee Drilling Co*., 1989 OK 40 (Okla. 1989)

The question of whether the doctrine of attractive nuisance applies is a question of fact for the jury. *Keck v. Woodring,* 201 Okla. 665, 208 P.2d 1133 (Okla. 1948); *Empire Gas & Fuel Co. v. Powell,* 150 Okla. 39, 300 P. 788 (Okla. 1931). Questions of fact as to whether the instrumentality that caused the injury was attractive to children, accessible to children or adequately warned children of danger are also jury questions. *Stanolind Oil & Gas Co. v. Jamison,* 204 Okla. 93, 227 P.2d 404 (Okla. 1950). More specifically, children under the age of 7 years and, in the absence of evidence of capacity, those children between 7 and 14 years of age have been presumed to be incapable of contributory negligence resulting in a greater duty of care being owed to these children by a landowner. The greater duty of care to trespassing children is further supported by this Court's decision that these children are capable of no more than a technical trespass. The burden of proving the nature of the trespass or capacity of the child as it relates to the defense of contributory negligence falls on the defendant and is, ultimately, a question for the jury to consider. *Cheek,* 137 P. at 732.

In every Oklahoma decision we have found regarding the attractive nuisance doctrine, it has been clearly stated that it is for the protection of children of tender age. Distinctions are made between children under the age of 7 years and between the ages of 7 and 14 years. Whether a child over the age of 14 years has sufficient capacity to understand the danger and ability to take care of himself under the circumstances may properly be a jury question. We decline to extend the doctrine of attractive nuisance to adults, regardless of their mental capacity. We find no compelling societal interest to do so. *Wever v. State ex rel. Department of Human Services,* 1990 OK CIV APP 39 (Okla. Ct. App. 1990).

C. Swimming Pool, Ponds

Where a city ordinance required property owner to construct a fence to meet certain requirements to protect small children from gaining access to swimming pool, and a property owner failed to construct such a protective fence, the owner was held liable for the drowning death of a small child who gained access to the owner's pool through the fence. *Death of Lofton* V. *Green,* 905 P.2d 790 (Okla. *1995).*

County building codes that required the fencing of swimming pools held not to require property owner to fence livestock pond in rural area, and, as such, could not support an action for liability against landowner for two-year-old child's injuries sustained by falling into pond. *Lohrenz v. Lane,* 787 P.2d 1274, 1277 (Okla. 1990).

6. Dram Shop Liability

A. Dram Shop Act

The Oklahoma Supreme Court first recognized a common law "dram shop" action in *Brigance v. Velvet Dove Restaurant, Inc.*[1] Commercial vendors who provide on-premises consumption of alcohol are under a duty to exercise reasonable care in selling or furnishing liquor to persons who by previous intoxication may lack full capacity or self-control to operate a motor vehicle and who may subsequently injure a third party. The action was limited to one who sells alcoholic beverages for on-premises consumption to a *noticeably intoxicated person*.

B. Commercial Sale

The actual commercial sale of alcohol or the intent to make a profit from the sale of alcohol is necessary to establish liability. [2] If a "business that sponsors an event for employees or associates

[1] 725 P.2d 300 (Okla. 1986)
[2] *McGee v. Alexander*, 37 P.3d 800 (Okla. 2001).

as a social host . . . does not sell or intend to make a profit from the sale of alcohol," such furnishing of alcohol falls outside of the liability imposed on commercial alcohol vendors under *Brigance*.[3]

C. Visibly intoxicated

"Noticeable intoxication" is an essential element that must be established in dram shop liability cases. The *Brigance* standards for imposition of liability focus on the tavern-keeper/vendor's objective observations and perceptions of a patron's state of intoxication**..."**[4]

Noticeable intoxication can be established by circumstantial evidence, such as the driver's blood alcohol level, investigative officer's observations after an accident, and whether the policies, procedures, training or overall environment of the bar/restaurant did not give the employees the ability to recognize when a patron has become noticeably intoxicated.[5] A question of fact exists with regard to the issue of noticeable intoxication when these other factors are present.[6]

D. Voluntary Intoxication of Plaintiff

Oklahoma has refused to extend common law liability against providers of alcoholic beverages in favor of persons injured as a result of their own intoxication.[7] However, in the case of an intoxicated adult passenger of a vehicle pursuing a cause of action against the tavern that served alcohol to both the passenger and the intoxicated driver, later resulting in an accident, Oklahoma Courts have upheld such a claim, subject to liability defenses such as contributory negligence.[8]

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[3] *Id*. at 804
[4] *Frank v. Merciez,* 806 P.2d 1147, 1150 (Okla.App.1991).
[5] *Copeland v. Tela Corp.*, 996 P.2d 931 (Okla. 1999).
[6] *Id.*
[7] *Ohio Casualty Co. v. Todd*, 813 P.2d 508 (Okla. 1991)
[8] *Bennett v. Covergirls,* 973 P.2d 896

E. Sale to Underage Person

Title 37, Section 537(A) of the Oklahoma Statutes states that no person shall "1. Knowingly sell, deliver, or furnish alcoholic beverages to any person under twenty-one (21) years of age; 2. Sell, deliver or knowingly furnish alcoholic beverages to an intoxicated person or to any person who has been adjudged insane or mentally deficient . . ."

Title 38, Section 8.2(A) states no person shall "knowingly and willfully permit any individual under twenty-one (21) years of age who is an invitee to the person's residence, any building, structure, or room owned, occupied, leased or otherwise procured by the person or on any land owned, occupied, leased or otherwise procured by the person, to possess or consume any alcoholic beverage . . . "

A somewhat lower standard applies to the sale or delivery of low-point beer. The applicable statute for this type of alcohol makes it unlawful "for any person to sell, barter, or give to any person under twenty-one (21) years of age any low-point beer . . ." 37 O.S. § 241.

Dram shop liability in Oklahoma was only recognized for the sale of alcohol consumed on site and for sale of alcohol to minors regardless of on site or off premise consumption. *Boyle v. ASAP Energy, Inc.*, 2017 OK 82, 2017 WL 4782999 expands that liability to include liability for a convenience store operator when they sale alcohol to a visibly intoxicated customer who consumes the alcohol purchased off premises and then drives a vehicle which causes injury to a third person. In *Boyle*, the customer had started drinking alcohol in the morning, at a golf tournament and between 8:30 a.m. and 5:00 p.m. he consumed 18-21 beers, 3-4 shots of vodka and 2 sips of moonshine. After returning home from the golf tournament, he drove to a Fast Lane convenience store and purchased a 9-pack of Miller Lite beer. The Court found that because the customer appeared intoxicated at the time that he purchased the beer and that the clerk saw the

customer drive up in a car, it was foreseeable that the customer would drive while intoxicated and injure an innocent third party.

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