LEGAL INSIGHTS
OF LITIGATION

OTTOSEN BRITZ KELLY COOPER GILBERT & DiNOLFO, LTD.

Volume 6, No. 1 -- Spring 2018

Watch Out! It's obviously an open danger

by W. Anthony Andrews and Touline Elshafei

A customer entering a home improvement store to purchase products is expected to reasonably understand and avoid open and obvious risks present within the store, even if the store creates the hazard, according to a recent ruling by the Seventh Circuit Court of Appeals.

In *Dunn v. Menard, Inc.*, 880 F.3d 899 (7th Cir. 2018) a plaintiff accused a local Menards store of negligence for keeping a stack of insulation too high in one of the store's warehouses, causing it to be unstable and leaning. Larry Dunn and his son Erik visited the Menards store to purchase rolled insulation. Dunn paid inside the main store for twenty-one rolls of insulation and was directed to pick up his merchandise in one of the self-service warehouses.

The store posted many signs warning of the dangers associated with handling certain products and encouraged guests to seek assistance if necessary.

On arrival, a security guard led the Dunns to the warehouse containing the insulation. Plaintiff witnessed employees assisting customers and understood he could ask for assistance if needed. Dunn parked his van next to the stacks of rolled insulation and noticed that one roll was obviously stacked too high, showing instability. Dunn asked his son to keep an eye on it. He then observed the stack for about five minutes to determine whether it was safe to proceed and still did not seek assistance from any employees.

Plaintiff and his son loaded the van for about fifteen minutes, facing the van as they loaded, with the leaning stack about eight to ten feet behind. As the final bales of insulation were loaded, the leaning stack fell. The parties agree that neither plaintiff nor his son directly or indirectly touched the stack. The falling stack struck Dunn, forcing him to the ground and allegedly injuring his right shoulder.

Menards filed a motion for summary judgment, seeking a ruling that it owed no legal duty to Dunn under these circumstances. The federal trial court granted summary judgment to Menards finding that Menards did not owe a legal duty to the plaintiff because the leaning stack of insulation that fell constituted an open and obvious condition. Plaintiff filed a motion to reconsider, which was denied, and this appeal followed.

The Seventh Circuit Court of Appeals affirmed that "persons who own, occupy, maintain or control land are not required to place burdensome safeguards on their property or on their employees when an open and obvious condition presents caution in and of itself." Instead, customers are expected to understand and avoid the hazardous and obvious condition under the reasonable person standard.

This standard is not based on plaintiff's subjective knowledge of a hazard but rather the objective knowledge of a reasonable person faced with the same condition. If a reasonable person with the plaintiff's knowledge of the situation should have understood and avoided the hazard, then from the defendant's perspective, the resulting injuries were neither foreseeable nor likely. Thus, the landowner bears no legal responsibility to prevent or warn against such obvious hazards.

Continued on page 4

Muddy dangers at a music festival

by Stephen DiNolfo

An outdoor concert attendee is not owed a duty of care by the landowner when presented with an open and obvious danger such as mud on park grounds.

In *Rozowicz v. C3 Presents, LLC*, 2017 IL App (1st) 161177, a plaintiff accused defendants of negligence arising out of a slip and fall injury she suffered at the 2011 Lollapalooza Music Festival at Grant Park in Chicago.

Magdalena Rozowicz and her two friends arrived at the Lollapalooza festival around 12 p.m. They attended the festival for about seven to eight hours, and at around 9 p.m., they began to walk southwest of Butler Field toward an exit. Rozowicz walked shoulder to shoulder with the crowd, following closely because although she could not see an exit, she "knew" one was in that direction. Rozowicz was aware that it had rained for many hours during the concert and there was mud everywhere. The condition of the ground was causing people to fall around her. Wearing flip-flops, she began walking uphill toward the exit, when her right foot slipped, and she fell. As a result of the fall, Rozowicz broke her ankle, necessitating surgery to repair the damage.

Her friend testified that she observed 20 people slip and fall throughout the day because of the mud and rain. She further testified that she and Rozowicz decided not to take an alternative exit route because turning against the crowd seemed "unnatural" and dangerous.

Continued on page 2

Muddy dangers

Continued from page 1

C3 filed a motion for summary judgment, asking the trial court to determine that they owed no duty to Rozowicz, because the danger posed by the mud was open and obvious. The trial court granted summary judgment in C3's favor, finding there was no duty owed because C3 could reasonably expect a patron to discover such a normal risk on a rainy day. The court further found that C3 provided safe exit routes, by way of concrete paths, as marked on the Lollapalooza map.

Rozowicz appealed the trial court's finding. On appeal, plaintiff argued C3 owed her a duty of care to provide a safe egress from the concert grounds. Instead, they created an unreasonable risk of harm by forcing her to exit over a crowded incline that was poorly lit and covered in trees, the dangerous condition of which was exacerbated by the mud. She also argued both the deliberate encounter and distraction exceptions to the open and obvious doctrine applied, thus leading to a duty of care.

The appellate court reiterated that "[a] possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." Therefore, when a condition is open and obvious, generally the possessor of land does not owe a duty of care to invitees "because the landowner 'could not reasonably be expected to anticipate that people will fail to protect themselves from any danger posed by the condition.' "

It is impracticable to require C3 to prevent rainwater from reaching the ground and mixing with dirt in an entire outdoor park.

Here, the appellate court found "not only that the mud was the sole cause of her fall but that, given the people falling around her and her careful progress, she recognized the risk created by the muddy condition. Accordingly, the mud was an open and obvious condition, evident to any reasonable concert attendee present that evening."

As to the two exceptions to the open and obvious defense, the court found that the plaintiff was "not actually distracted to the extent that she would not discover or forget she had discovered the obvious slippery, muddy condition." Nor was the plaintiff required to take that particular "exit" route, as she testified other exits would not have exposed her to the mud.

Finally, the court found the magnitude of the burden and consequences of that burden on C3 to prevent concertgoers from slipping on mud at an outdoor park were significant. It would be impracticable to require C3 to prevent rainwater from reaching the ground and mixing with dirt in an entire outdoor park

Thus, the reviewing court affirmed the trial court's decision to grant judgment to the defendant because the muddy conditions were "open and obvious", and the defendant could not be expected to anticipate that Rozowicz would decide to not protect herself from any dangers the muddy conditions posed.

This case presents another example of why patrons of outdoor events, as well as visitors to any public or private land, must take responsibility for their own actions and take heed of obvious hazards. As this Illinois court points out, as well as the Seventh Circuit in *Dunn v Menard* case, an individual cannot simply ignore a known hazard and then, if injured, expect to recover from the landowner in court later. ■

Recent Verdicts of Interest

- **$33 Million Verdict to the Estate of an Attorney Shot by His Client**

Attorney's estate sued the office building security company who failed to protect him. Even though two security officers ordered the would-be gunman to leave the building, he came back and forced one security guard to take him upstairs where he shot three people.

- **$0 Dollars after a Three-Day Trial**

A shopper claimed a shelving divider brace fell on her causing a rotator cuff tear. Home improvement center, defended by this office, denied the event could have even taken place (because the store had no extra braces that could have been lying around at the time) and denied a 4 lb. brace could have caused such an injury.

- **$148 Million Verdict to a Woman who Took Shelter During a Rain Storm at O'Hare**

The shelter dislodged from strong winds and fell on top of her, leaving her paralyzed below the waist. Plaintiff was a dance student and member of a dance troop. Defendant had offered $30 Million before trial. The jury deliberated only five hours before coming to this record-breaking verdict. The City's insurer later reached an agreement to pay $115 Million in lieu of an appeal of the verdict.

Above are sample verdicts taken from the Cook County Verdict Reporter. Valuation of injuries and exposure to a defendant vary greatly based on the specific factors of a case. To assess the value or cost of a specific injury, contact one of our litigators.

Five lessons from the Grubhub "Gig" economy decision
by Michael Castaldo, Jr. and John E. Motylinski

On February 8, 2018, a federal magistrate judge ruled that Grubhub, a food delivery service provider, properly classified their drivers as independent contractors under California law. This ruling marks a significant win for the "gig" economy, which typically uses a labor force of independent contractors (rather than employees). While *Grubhub* does not necessarily have national or precedential implications, it is a bellwether case that will provide some useful guidance for businesses using contracted labor and litigators handling classification lawsuits alike.

The *Grubhub* Decision

In *Lawson v. Grubhub, Inc.*, No. 15-CV-05128-JSC, 2018 WL 776354, at *1 (N.D. Cal. Feb. 8, 2018), the plaintiff was an aspiring actor who worked with Grubhub as a delivery service provider for four months. During his tenure with Grubhub, the plaintiff would make deliveries to customers who ordered food through Grubhub's online platform. He began working with Grubhub after completing an online application that required him to submit a driver's license, proof of vehicle registration, and proof of auto insurance. The plaintiff also entered into a "service provider agreement" that stressed the parties' relationship was as that of "principal and independent contractor, not employer and employee." He later wanted "employee" benefits.

The ultimate issue examined by the court was whether the plaintiff was an employee or independent contractor under California's common law test, which is a fact-intensive inquiry that takes into account a number of separate factors. While no single factor is dispositive, the most weight is placed on whether the putative employer has the "right to control the manner and means of accomplishing the desired result." Other factors include: (1) whether the service provider is engaged in a distinct business or occupation; (2) whether the work is performed under the direction or supervision of the principal; (3) the skill required for the work; (4) whether the principal or the worker supplies the tools, equipment, instrumentalities needed to perform the work and the place where the work is performed; (5) the length of time for the performance of services; (6) whether payment is made by time or by the job; (7) whether the work is part of the regular business of the principal; and (8) whether the parties intended to create an employment or independent contractor relationship. Weighing those factors, the court determined the plaintiff was an independent contractor.

Lessons from the *Grubhub* Case

While the *Grubhub* case is of limited precedential value given its unique set of facts and because it was decided under California law, it contains useful lessons on how to survive independent contractor misclassification lawsuits. It also demonstrates the pitfalls some companies may fall into in utilizing an independently contracted labor force.

Lesson #1: Mode of Services: The weightiest factor in the court's calculus concerned whether Grubhub had the right to control its delivery drivers. The less control a putative employer has over its labor force, the more likely it will be that the workers are properly classified as independent contractors.

In *Grubhub*, for instance, the court ultimately found that Grubhub did not control how the plaintiff made deliveries. The plaintiff could have made his deliveries "by car, motorcycle, scooter or bicycle", and Grubhub never inspected his vehicles. Grubhub did, however, require that the plaintiff be licensed to drive and that his vehicle be registered and insured. But, reasoned the court, requiring compliance with such legal requirements did not itself weigh in favor of finding an employer/employee relationship. Under these facts, the court concluded that Grubhub did not overly control the plaintiff's performance of his work, which weighed in favor of a principal/independent contractor relationship.

Lesson #2: Controlling Contractors' Appearance: The *Grubhub* case also teaches that companies using independent contractors should seek to avoid excessively controlling the appearance of their work force. Where firms impose too much of a dress code or require their contractors wear uniforms, a court will be more likely to find an employer/employee relationship. But, businesses do have some leeway on the matter.

Grubhub provided the plaintiff with a shirt and hat, which the plaintiff agreed to wear in exchange for Grubhub's provision of insulated bags to carry food deliveries. Therefore, the plaintiff argued that Grubhub was overly controlling his appearance and that he was consequently an employee. The court disagreed and reasoned that, notwithstanding the plaintiff's agreement to wear the shirt and hat, Grubhub never actually monitored or supervised whether the plaintiff actually wore his Grubhub clothing.

Lesson #3: Contractors' Scheduling: In misclassification cases, whether the contractor has the ability to work when they want to is a paramount consideration. In fact, where a contractor is required to work at certain times, a court may be more apt to classify their relationship as that of employee/employer.

In *Grubhub*, the plaintiff had complete control over his schedule and reserved the right to decide whether and when he worked, as well as the length of time he worked. Nevertheless, the plaintiff tried to assert that, because Grubhub retained the right to cancel its agreement with him if he signed up to work a shift and subsequently did not make himself available, the court noted that "even an independent contractor must perform the work he contracted to perform."

Lesson #4: Negotiated Fees: Businesses using contracted labor forces should be cautious of setting "one size fits all" fee arrangements. As the *Grubhub* case makes clear, where the fees of an

Continued on page 4

Grubhub "Gig"

Continued from page 3

independent contractor agreement are - or could be - negotiated by the parties, it will generally be more conducive to a finding of an independent contractor relationship. Conversely, if a worker has no input as to the fees they receive, they are more likely to be classified as an employee.

For example, the plaintiff argued that Grubhub unilaterally determined the plaintiff's rates and that the plaintiff had no meaningful opportunity to negotiate on his fees, meaning that he was more of an employee than an independent contractor. Grubhub countered by arguing that the service provider agreement gave the plaintiff the ability to negotiate. However, the court found that "this right is hypothetical rather than real" because there was no evidence that the plaintiff had any actual input into his fees. This gave rise to an inference that the plaintiff was an employee rather than an independent contractor.

Lesson #5: Don't Rely on Labels: Businesses using contracted labor often rely on agreements that repeatedly refer to the parties' relationship as that of principal/ independent contractor. However, as the *Grubhub* decision demonstrates, such labels may not be given much weight in the eyes of a court.

In the *Grubhub* case, the service provider agreement clearly indicated that the relationship was that of principal and independent contractor and not employer-employee. Further, the agreement expressly provided that, if the plaintiff changed his mind about being an independent contractor, he would notify Grubhub. But, the court refused to place too much weight on labels and stated "[i]n the circumstances here—where the hirer unilaterally determines the contract's terms for a low wage, low-skilled job—the parties' label warrants little weight." Accordingly, although what the parties call themselves can be important, it is not dispositive.

Conclusion

Employers would be well advised to examine the *Grubhub* case when analyzing misclassification issues. Unfortunately, *Grubhub* is of limited precedential value because it was decided under California law and contained unique facts. However, by heeding the lessons illustrated in *Grubhub*, businesses will improve their chances of surviving a misclassification suit. ■

Watch out!

Continued from page 1

Here, the reviewing court found that a reasonable person would not have stood underneath a tall stack of obviously unstable insulation, even if that person avoided physical contact. Thus, the leaning stack of insulation was an open and obvious condition.

However, the Seventh Circuit went further, acknowledging that Illinois law does recognize two exceptions to the open and obvious rule where the owner of the land can and should anticipate the dangerous condition may cause physical harm in spite of its known or obvious danger. These two are: (1) the "distraction exception," where the owner of land has reason to expect that the invitee's attention may be distracted, so that he would not discover what is obvious and would fail to protect himself from it; and (2) the "deliberate encounter" exception, where the owner of land has reason to expect that the invitee will proceed to encounter the danger because the advantages of doing so outweigh the danger to a reasonable person.

The court found that neither exception applied here. The plaintiff was not distracted nor expected to become distracted nor was the plaintiff required to load and handle the insulation alone; the plaintiff could have asked for help but did not. Thus, the court held that Menards did not owe a duty to this guest, because the insulation stack was an open and obvious danger and imposing a duty on Menards, to constantly watch the stacks would be excessive and unreasonable.

The Seventh Circuit Court's ruling validated a conservative application of the open and obvious condition doctrine with regard to premises liability actions in Illinois, acknowledging that landowners are not the absolute insurers against all injuries on their premises. ■

Ottosen Britz Kelly Cooper Gilbert & DiNolfo, Ltd.'s newsletter, ***Legal Insights of Litigation,*** is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.

1804 North Naper Boulevard, Suite 350
Naperville, Illinois 60563
(630) 682-0085
www.ottosenbritz.com

W. Anthony Andrews, Editor wandrews@ottosenbritz.com

Copyright 2018 by
OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.

All rights reserved.
Pursuant to Rules 7.2-7.4 of the Illinois Rules of Professional Conduct, this publication may constitute advertising material.

Printed on recycled paper.