

**PREMISES LIABILITY
IN MINNESOTA**

By

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1. General Duty

In Minnesota, a premises owner is under a legal obligation to keep and maintain their premises in a reasonably safe condition for use as to all who enter the premises. See *Messner v. Red Owl Stores, Inc.*, 238 Minn. 411, 413, 57 N.W.2d 659, 661 (1953); *Norman v. Tradehome Shoe Stores, Inc.*, 270 Minn. 101, 104, 132 N.W.2d 745, 748 (1965); *Ober v. The Golden Rule*, 146 Minn. 347, 348, 178 N.W. 586, 586 (1920); *Saari v. S.S. Kresge Co.*, 257 Minn. 290, 292-93, 101 N.W.2d 427, 429 (1960). However, this does not mean that the premises owner is an insurer of the safety of the premises. *Norman*, 270 Minn. at 104, 132 N.W.2d at 748; *Saari*, 257 Minn. at 293, 101 N.W.2d at 429; *Messner*, 238 Minn. at 413, 57 N.W.2d at 661. Rather, a premises owner will only be liable for his or her own negligence.

All property owners must use reasonable care to prevent a person from being injured by conditions on the property, so long as those conditions present a foreseeable risk of injury. *Hanson v. Christensen*, 275 Minn. 204, 212, 145 N.W.2d 868, 873-74 (Minn. 1966). An owner of a commercial premises is not an insurer of safety of a customer who is lawfully on the premises and the entrant must use reasonable care for their own safety. *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 203 N.W.2d 841, 845 (Minn. 1973). “Reasonable care” includes the duty to inspect and repair the premises and, at a minimum, to warn persons using the premises of unreasonable risks of harm.” *Sullivan v. Farmers & Merchants State Bank of New Ulm*, 398 N.W.2d. 592, 594-95 (Minn. App. 1986), *rev. denied* (Minn. Mar. 13, 1987). A commercial premises owner has a duty, however, to use reasonable care to protect its customers from obvious hazards on its property, if the owner should anticipate that the hazard might cause injury. *Gearin v. Wal-Mart Stores, Inc.*, 53 F.3d 216, 217 (8th Cir. 1995). Foreseeability is determined based upon “whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.” *Foss v. Kincade*, 766 N.W.2d 317, 322-23 (Minn. 2009) (internal citations omitted). If the danger was not foreseeable, then no duty will be imposed. *Lundgren v. Fultz*, 354 N.W.2d 25, 28 (Minn. 1984). Negligence cannot be shown by the mere fact that an unfortunate incident occurred. *Sperr v. Ramsey County*, 429 N.W.2d 315, 318 (Minn. Ct. App. 1988).

This duty to use reasonable care for the safety of persons on commercial premises includes a duty to use reasonable care in providing for and maintaining a suitable access in and out or to and from buildings on the premises. *McIlrath v. College of St. Catherine*,

399 N.W.2d 173, 174 (Minn. Ct. App. 1987). However, this duty may not extend to public walks or city sidewalks that are solely the responsibility of the municipality. *See Sternitzke v. Donahue's Jewelers*, 249 Minn. 514, 83 N.W.2d 96 (1957) (even if there is an ordinance requiring the property owner to shovel or clean the public sidewalk, there is no obligation to do so and the property owner cannot be held liable if it is not shoveled or maintained). But if the property owner uses the walkway for their own purpose, they may be held liable. *Graalam v. Radisson Ramp*, 71, N.W.2d 904 (Minn. 1955).

A “landowner’s duty of reasonable care includes an ongoing duty to inspect and maintain property to ensure entrants on the landowner’s land are not exposed to unreasonable risks of harm.” *Olmanson v. LeSueur Co.*, 693 N.W.2d 876, 881 (Minn. 2005). If dangerous conditions *are discovered*, the landowner must either repair the condition or provide entrants with adequate warnings. *Id.* However, this duty is not absolute. *Louis*, 636 N.W.2d at 319.

2. Exceptions to the Duty of Care

a. Trespasser

A trespasser is “a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor’s consent or otherwise.” Restatement (Second) of Torts § 329 (1965). The Minnesota Jury Instruction Guide defines trespasser as “a person who enters or stays on property in possession of another without permission, or enters with permission, but goes beyond the scope of permission.” *See* 4a Minnesota Practice, CIVJIG 85.10, Minnesota Jury Instruction Guides (6th Edition 2016). Generally, a landowner owes no duty to a trespasser and will not be liable for any injuries sustained by a trespasser. Restatement (Second) of Torts § 333 (1965); Dan B. Dobbs et al., *The Law of Torts* 2d § 273 (2011). There are instances when a landowner may be liable to a trespasser.

i. Artificial Condition

A landowner may be liable when the landowner knows or has reason to know that trespassers constantly intrude upon his land and are injured by an artificial condition on the property so long as the condition is (1) created by the landowner, (2) is known to likely cause at least serious bodily harm, (3) a trespasser would

not discover the artificial condition, and (4) there is not a reasonable warning about the artificially created condition on the property. Essentially, the landowner will only be liable to a trespasser when she fails to exercise reasonable care to warn a trespasser about a known danger artificially created or maintained by the landowner.

The Minnesota Jury Instruction Guide provides: “[a] possessor of property has a duty to use reasonable care to warn a trespasser of an artificial condition on the property if:

1. The possessor knows, or should know from facts already known, that trespassers regularly go on specific parts of the property where the injury happened, and
2. The possessor created or kept an artificial condition that the possessor knows is likely to cause death or serious injury, and
3. The possessor has reason to believe the trespasser will not discover the danger.”

See 4a Minnesota Practice, CIVJIG 85.13, Minnesota Jury Instruction Guides (6th Edition 2016). Similarly, a possessor of land has a duty to warn a trespasser of its activities on the premises if it knows of the trespasser. *Id.* at CIVJIG 85.16.

ii. Children – “Attractive Nuisance”

A landowner may be liable when the trespasser is a child, also known as the “attractive nuisance” doctrine. This requires a situation where the landowner knows, or has reason to know, that a child is likely to trespass and that the landowner knows the condition involves an unreasonable risk of injury which the child is too young to appreciate. The landowner will also be judged by the reasonableness of care he took to eradicate the condition or to protect the children.

The Minnesota Jury Instruction Guide provides: “[a] possessor of property who keeps a structure or other artificial condition on property that injures a trespassing child is negligent if:

1. The possessor knows, or has reason to know, children are likely to trespass on the property at the place where the condition exists, and
2. The possessor knows, or has reason to know, that this condition exists, and
3. The possessor realizes or should realize that this condition involves an unreasonable risk of death or serious injury to children, and
4. The children are too young at the time of the accident to understand the risk of playing with, or being near, the hazard or do not discover the condition, and
5. The benefits to the possessor of keeping the structure or artificial condition as it is and the burden of eliminating it are slight compared with the risk to the children, and
6. The possessor does not use reasonable care to get rid of the danger or protect the children.

See 4a Minnesota Practice, CIVJIG 85.19, Minnesota Jury Instruction Guides (6th Edition 2016).

iii. Recreational Use

Minnesota, like other states, has made it a policy to promote and encourage the use of privately owned lands and water to be used for the benefits of the public. As such, Minnesota enacted a Recreational Use Statute that provides the landowner of these types of recreational properties relatively broad immunity from liability for injury to someone who has permission to use the land for recreational purposes provided the landowner does not charge a fee for the use of the land. Generally, the landowner does not have to maintain the land for safe entry or use by other people, and generally does not have to warn of any dangerous conditions. When a landowner permits a person to use her land for recreational purposes without charge, then the landowner does not owe a duty to that person to maintain the land safe for entry or use to other persons, to warn of a dangerous condition, to care for the person except to refrain from willfully causing that person injury, and to curtail use of the land. Minn. Stat. § 604A.22.

However, an exception to this general rule comes when the person injured is a trespasser. The landowner may be liable to a trespasser because “a landowner retains the duty that a landowner has at common law to a trespasser” unless “the permitted use is for a recreational trail, [then] the owner’s only duty is to refrain from willfully causing injury.” *Razink v. Krutzig*, 746 N.W.2d 644, 649 (Minn. Ct. App. 2008). A landowner cannot act willfully to cause injury. If the landowner engages in conduct that would entitle a trespasser at common law to recover damages, the landowner may still be liable. Minn. Stat. § 604A.25; *see also Green-Glo Turf Farms v. State*, 347 N.W.2d 491, 494 (Minn. 1984).

Another exception to the general rule is when the landowner charges the person who enters the land (note however there are exceptions if it is leased to the statute or a political subdivision). Minn. Stat. § 604A.25(2). In cases of recreational use, both the recreational use statute and common law principals must be consulted.

b. Landlord and Tenant Duty

A landlord may be liable to his tenant when the landlord knew or should have known of a danger on the premises at the time of leasing, the dangerous condition was not obvious, and the tenant exercising due care would not discover it. *Broughton v. Maes*, 378 N.W.2d 134, 136 (Minn. App. 1985). When such a condition exists, the landlord needs to at least disclose the condition to the tenant. This rule extends to the tenant, and the tenant’s employees, family, and to others who enter the premises under the tenant’s right.

Generally, the landlord must also use reasonable care to maintain common areas in a reasonably safe condition for the use of his tenants and other visitors. This requires the landlord to make reasonable inspections from time to time. And this also encompasses that the landlord must make reasonable repairs on the property in a reasonably safe manner. What is considered a common area on the premises may be a question of fact. *See generally, Lillemoen v. Gregorich*, 256 N.W.2d 628, 631 (Minn. 1977).

It is not uncommon for tenants who are harmed to seek recompense from a landlord, particularly in cases involving harm caused by third parties where the tenant argues the landlord has a duty to prevent the harm. Under common law, a person owes no duty to control the conduct of a third person to prevent injury to another. *Delgado v. Lohmar*, 289 N.W.2d 479, 483 (Minn. 1983). There is an exception to this general rule that is

applicable where a defendant stands in some special relationship to either the person whose conduct needs to be controlled or to the foreseeable victim of that conduct. *Cairl v. State*, 323 N.W.2d 20, 25 n. 7 (Minn. 1982). A duty to warn and protect exists if two elements are met: 1) a special relationship exists; and 2) the harm is foreseeable. *Gilbertson v. Leininger*, 599 N.W.2d 127, 130-31 (Minn. Ct. App. 1999), *reh'g. denied* (Sept. 13, 1999). A person generally has no duty to act for the protection of another person. *See Delgado*, 289 N.W.2d at 483.

“Traditionally, a special relationship giving rise to a duty to [protect] is only found on the part of common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection.” *Gilbertson*, 599 N.W.2d at 131, *quoting Harper v. Herman*, 499 N.W.2d 472, 474 (Minn. 1993) (citing Restatement (Second) of Torts § 314A (1965)). Unless the commercial premises owner takes physical control or custody of patrons, there is no special relationship. *See Gilbertson*, 599 N.W.2d at 131. Custody and control of the person to be protected is a requirement to establish a duty. *See Donaldson v. Young Women’s Christian Ass’n of Duluth*, 539 N.W.2d 789, 792-93 (Minn. 1995) (the existence of a duty has most often been found where an institution such as a hospital or jail has physical custody and control of the person to be protected); *see also Harper*, 499 N.W.2d at 475 (finding no special relationship when the defendant did not hold “considerable power over [plaintiff’s] welfare”); and *Erickson, et al. v. Curtis Investment Co., et al.*, 447 N.W.2d 165, 168 (Minn. Ct. App. 1989) (explaining that a special relationship arises when the plaintiff has “entrusted his or her safety” to the defendant and the defendant has “accepted that entrustment”).

A duty to prevent a wrongful act by a third party will only be imposed only where those wrongful acts can be reasonably anticipated. *K.L. v. Riverside Medical Center*, 524 N.W.2d 300, 302 (Minn. Ct. App. 1994), *review denied* (Feb. 3, 1995). Acts such as sexual assault will rarely be deemed foreseeable in the absence of prior similar incidents. *Id.* The foreseeability of criminal, sociopathic, and unpredictable conduct to determine the existence of a legal duty to warn and protect is inherently difficult to ascertain. *N.W. by J.W. v. Anderson*, 478 N.W.2d 542, 544 (Minn. Ct. App. 1991), *review denied* (Feb. 10, 1992). Thus, the Minnesota Supreme Court has developed a rigid analytical standard:

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“a duty to protect against the devious, sociopathic, and unpredictable conduct of criminals does not lend itself easily to an ascertainable standard of care uncorrupted by hindsight nor to a determination of causation that avoids speculation. *Erickson v. Curtis Inc. Co.*, 447 N.W.2d 165, 169 (Minn. 1989); *Spitzak*, 500 N.W.2d at 156 (holding harm was not foreseeable where plaintiff failed to show that “series of similar incidents occurred at or around” apartment complex).

But even where a “special relationship” exists, the duty only extends to foreseeable criminal acts. *K.L. v. Riverside Medical Center*, 524 N.W.2d 300 (1994).

c. Abnormally Dangerous Conditions

Strict liability applies when there exists an abnormally dangerous condition on a property. When a person maintains a condition or engages in an abnormal activity in the community and inappropriate to its surroundings that involves a high degree of risk of harm to others, then that person will be strictly liable for injuries caused to others as a result of that activity. See Dan B. Dobbs et al., *The Law of Torts* 2d §§ 441- 444 (2011).

3. Defenses

a. Actual or Constructive Knowledge

Unless the dangerous condition actually resulted from the direct actions of a landowner or his or her employees, a negligence theory of recovery is appropriate only where the landowner had actual or constructive knowledge of the dangerous condition and failed to act. *Rinn v. Minn. State Agric. Soc’y*, 611 N.W.2d. 361, 365 (Minn. App. 2000). A landowner may be liable if a dangerous condition on the property was present for such a period of time so as to constitute constructive notice of the hazard. *Anderson v. St. Thomas More Newman Ctr.*, 178 N.W.2d. 242, 243-44 (Minn. 1970). A negligence claim based upon constructive notice cannot be sustained if there is merely speculation or insufficient evidence regarding the cause or duration of a dangerous condition. *Rinn*, 611 N.W.2d at 365.

Generally, a store is not liable for a slip and fall resulting from a foreign substance or slippery condition on the floor, unless the plaintiff can prove that store employees either caused the substance or slippery condition on the floor, or store employees knew or

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should have known of the presence of the substance or slippery condition and failed to take corrective action. See eg. *Messner v. Red Owl Stores*, 57 N.W.2d 659 (Minn. 1953) (grocery store was not negligent for Plaintiff's slip and fall on a banana peel); *Bragg v. Dayton Co.*, 4 N.W.2d 320 (Minn. 1942) (store was not negligent for allowing a depression in the floor to collect debris and cause trip and fall); but cf. *Sears Roebuck & Co. v. Peterson*, 76 F.2d 243 (8th Cir. 1935) (store was negligent for trip and fall on twine left in aisle by store employee).

b. Open and Obvious Condition on Premises

A landowner's duty to protect persons from foreseeably dangerous conditions on the property does not extend to risks that are open and obvious, unless the landowner should anticipate the harm despite such knowledge or obviousness. *Rinn*, 611 N.W.2d. at 364; see also Restatement (second) of Torts § 343A, subsection 1. If a court decides that a danger was either known or obvious as a matter of law, it must then decide whether the premises owner should nevertheless have anticipated the harm despite its known or obvious danger. *Louis*, 636, N.W.2d at 322. The risk of harm is obvious if the dangerous condition is visible, and the condition and risk are apparent and recognizable to a reasonable person exercising ordinary perception, intelligence, and judgment. *Louis v. Louis*, 636 N.W.2d 314, 321 (Minn. 2001); *Munoz v. Applebaum's Food Market Inc.*, 293 Minn. 433, 434, 196 N.W.2d 921, 922 (Minn. 1974) (test is whether condition was "in fact visible"). Essentially, a landowner's duty of reasonable care does not extend to warn or protect against risks which, from the facts, should be known. *Doe v. Brainerd Int'l Raceway, Inc.*, 533 N.W.2d. 617, 621 (Minn. 1995). Generally, this defense will be fact-dependent but a condition may be open and obvious as a matter of law in certain circumstances. And landowners owe persons a duty to keep and maintain their premises in a reasonably safe condition but they are not insurers of safety. *Wolvart v. Gustafson*, 146 N.W.2d. 172, 173 (Minn. 1966). An entrant on the land has a duty to exercise reasonable care for his or her own safety. *Louis*, 636 N.W.2d. 314, 318 (Minn. 2001).

c. Assumption of the Risk

There are two forms of assumption of the risk, primary and secondary.

i. Primary Assumption of the Risk

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Primary assumption of the risk applies when a party voluntarily enters a relationship in which the party assumes well-known and incidental risks. *Olson v. Hansen*, 299 Minn. 39, 44, 216 N.W.2d 124, 127 (1974). Where the defendant has no duty to protect against these risks, and if injury arises from such risk, a plaintiff's claim of negligence is barred. *Daly v. McFarland*, 812 N.W.2d 113, 119 (Minn. 2012). The elements of primary assumption of the risk are whether a person had (1) knowledge of the risk; (2) an appreciation of the risk; and (3) a choice to avoid the risk that the person voluntarily chose to take. *Snilsberg v. Lake Wash. Club*, 614 N.W.2d 738, 746 (Minn. 2000). Primary assumption of risk is a complete bar to a plaintiff's recovery. *Schneider ex rel. Schneider v. Erickson*, 654 N.W.2d 144, 148-49 (Minn. Ct. App. 2002); *Bjerke v. Johnson*, 742 N.W.2d 660, 669 (Minn. 2007) ("Primary assumption of the risk completely negates a defendant's negligence").

The primary assumption of risk doctrine is typically limited to circumstances involving inherently dangerous activities. See, for example, *Grim v. TapeMark Charity Pro-Am Golf Tournament*, 415 N.W.2d 874, 876 (Minn. 1987) (relieving amateur golfers of duty of care towards spectators); *Riger v. Zackoski*, 321 N.W.2d 16, 23-24 (Minn. 1982) (relieving duty of care towards patrons at the track during a sanctioned auto race); *Moe v. Steenberg*, 275 Minn. 448, 450, 147 N.W.2d 587, 589 (1966) (relieving defendant of duty of care in ice skating collisions); *Boyer v. VandeKamp*, No. C3-96-475 1996 LEXIS 878 (Minn. Ct. App. July 30, 1996) (unpublished) (where Plaintiff was held to have assumed the risk of injury of riding a horse given his knowledge that riding horses can be dangerous).

When applying the "primary assumption of risk" test, the result of the analysis is a determination of whether or not the Defendant was negligent, that is whether the defendant had any duty to protect the plaintiff from a risk of harm. *Rieger v. Zackoski*, 321 N.W.2d. 16, 23 (Minn. 1982). This analysis of a legal duty is an issue for the court to determine as a matter of law. *Larson v. Larson*, 373 N.W.2d. 287, 289 (Minn. 1985).

ii. Secondary Assumption of the Risk

While primary assumption of risk operates to bar a plaintiff's claim, secondary assumption of the risk is an issue of comparative negligence. As a result, secondary assumption of risk has been codified into Minnesota Statutes relative to comparative

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fault. Comparative negligence will reduce the amount of plaintiff's relief. See generally, Minn. Stat. § 604.01.

d. Snow and Ice Immunity

An owner or possessor of land is under an affirmative duty to exercise reasonable care in maintaining his/her property in a reasonably safe condition for visitors on the premises. However, absent extraordinary circumstances a landowner or possessor may await the end of a storm and a reasonable time thereafter before removing snow and ice from the sidewalks and steps. *Niemann v. Northwestern College*, 389 N.W.2d 260 (Minn. App. 1986). An example of an extraordinary circumstance would be a pre-existing dangerous condition such as built up ice or snow. Generally, Minnesota courts have not imposed unreasonable standards on property owners in slip and fall cases, as Minnesota Courts recognize the perils of Minnesota's snowy, icy winters. It is the burden of the plaintiff in a slip and fall case on a commercial premises due to ice or snow to prove that the owner of the commercial premises knew there was ice or snow there, and that the ice or snow had been there long enough that the owner should have discovered it had they reasonably inspected the premises. *Gearin v. Wal-Mart Stores, Inc.*, 53 F.3d 216 (8th Cir. 1995).

From a public policy standpoint, it is simply unreasonable to expect that a premises located in Minnesota during the dead of winter can be expected to be completely void of all snow or ice. The Minnesota Court of Appeals cited to earlier Minnesota precedent which found that, "it is a 'physical impossibility' in Minnesota's climate to keep sidewalks clear of ice, and that the expense of attempting to do so 'would bankrupt any city'" *Rodenwald v. State, Dept. of Natural Resources*, 777 N.W.2d 535 at 537 (Minn. Ct. App. 2010). The *Rodenwald* case addresses the "mere slipperiness doctrine" in the context of a municipality. However, the analysis in this line of cases is instructive, insightful and in many ways, applicable to a non-municipality. It is similarly unreasonable for individuals living in Minnesota (and especially those who have for some time) to disregard the potential presence of snow and ice.

A municipality owes a duty to the public to exercise reasonable care, in view of climatic and other conditions, in maintaining the sidewalks and other public ways in a safe condition for the passage of pedestrians. However, a municipality is not liable for injuries resulting from the mere slipperiness of a sidewalk due to ice and snow. Rather, it must act

within a reasonable time to correct snow and icy conditions in order to prevent formation of slippery and dangerous ridges, depressions and irregularities in the surface.

Keep in mind that it is the duty of the municipality, not the landowner, to keep the sidewalk in a reasonable safe condition. *Loewe v. City of Le Sueur*, 277 Minn. 94, 97-98, 151 N.W.2d 777, 780 (Minn. 1967); *Sternitzke v. Donahue's Jewelers*, 249 Minn. 514, 522-23, 83 N.W.2d 96, 101-02 (Minn. 1957). Thus, if a sidewalk that abuts a landowner becomes slippery due to natural conditions, then the landowner will not be liable. *Graalum v. Radisson Ramp, Inc.*, 245 Minn. 54, 59-60, 71 N.W.2d 904 (Minn. 1955). But if ice or slippery conditions form due an artificial cause by the manner in which a landowner maintains her property, then the owner may be liable for injuries. *Olson v. St. James*, 380 N.W.2d 555, 560 (Minn. App. 1986). Regardless, there must be some actual or constructive knowledge to the landowner. *Bergum v. Palmborg*, 240 Minn. 122, 126, 60 N.W.2d 71, 73 (Minn. 1953).

In *Davis v. Colonial Amoco Svc. Ctr., Inc.*, the plaintiff contended that the defendant violated its duty to clear the snow and ice from its property that had *accumulated prior to that day's storm*. 2002 WL 979591 at *1 (Minn. Ct. App. May 12, 2002). (Emphasis added). Plaintiff argued that the ice she slipped on was pre-existing because she discerned through touch that it was three to four inches thick and therefore, it could not have formed during the storm that afternoon. *Id.* The Court found that if there was a four- to five-inch mound of snow and ice, as Plaintiff alleged, *its height above the rest of the ground would make it visible, open, and obvious*. *Id.* (Emphasis added). Thus, the district court did not err in concluding that the defendant was under no duty to warn against an open and obvious hazard. *Id.* citing *Peterson v. W.T. Rawleigh Co.*, 144 N.W.2d 555, 557 (Minn. 1996).

Similarly, in *Doyle v. City of Roseville*, the plaintiff slipped on ice in an ice arena parking lot. 524 N.W.2d 461 (Minn. 1994). The plaintiff had been inside the arena to watch a high school hockey game and slipped when she was leaving the game. The Supreme Court noted that the temperature on that day had reached about 45 degrees, and when Ms. Doyle arrived at the arena around 7 p.m., water from melted snow was running across the parking lot. *Id.* at 462. Ms. Doyle did not see ice, she only saw water as she entered. *Id.* When Ms. Doyle left the ice arena three hours later at about 10 p.m., it was considerably colder than when she had entered and the ground had become slippery. *Id.* The Court noted that Ms. Doyle had lived in Minnesota for 30 years. As Ms. Doyle neared her car,

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she slipped on a “very thin layer of glare ice,” and fell which resulted in a broken leg. *Id.* In affirming the District Court’s grant of summary judgment to the City of Roseville, the Supreme Court held that, “there has been no showing from which it could be inferred that the City of Roseville has not met its common law duty with respect to the maintenance of its highways and sidewalks.” *Id.* In its discussion, the Court made a point to highlight that the ice was newly formed and that it would be physically impossible in such a climate for a sidewalk to be clear of ice at all times. *Id.* at 463. Just because an incident happens, does not mean someone was negligent. *Sperr v. Ramsey County*, 429 N.W.2d 315, 318 (Minn. Ct. App. 1988).

e. Superseding or Intervening Cause

A landowner will not be liable when there is an unforeseeable intervening event. *Bilotta v. Kelley Co.*, 346 N.W.2d. 616, 625 (Minn. 1984). Generally, a superseding or intervening cause is an act of the plaintiff, or a third person, in no way caused by the defendant’s negligence, or a force of nature, occurring after the defendant’s negligent act or omission and operating as an independent force to produce the injury. *Hafner v. Iverson*, 343 N.W.2d. 634, 637 (Minn. 1984). Broken down further, a cause is superseding if (1) its harmful effects occurred after the original negligence; (2) it was not brought about by the original negligence; (3) it actively worked to bring about a result that would not have otherwise followed the original negligence; (4) it was not reasonably foreseeable by the original actor. *Ponticas v. K.M.S. Invs.*, 331 N.W.2d. 907, 915 (Minn. 1983). Generally, the district court will determine whether the specific intervening act was foreseeable. *Hilligos v. Cross Cos.*, 228 N.W.2d. 585, 586 (Minn. 1975); *Vanderweyst v. Langford*, 228 N.W.2d. 271, 272 (Minn. 1975). A superseding or intervening cause breaks the chain of causation set in operation by the defendant’s negligence, thereby insulating his negligence as a direct cause of the injury. *Hafner*, 343 N.W.2d at 637. Thus, it is a limitation on the defendant’s liability for his negligent conduct. *Lennon v. Pieper*, 411 N.W.2d. 225, 228 (Minn. App. 1987).

f. Comparative Fault

Minnesota is a modified comparative fault state. The comparative fault statute permits a plaintiff to recover damages if the plaintiff is not more at fault than a defendant. This means that a plaintiff who has greater fault than the defendant cannot recover damages from that defendant. Plaintiff’s fault is compared to each individual defendant. The fault

of all parties is compared whether the case is based on negligence, strict liability, or breach of warranty.

The fault of non-parties may also be compared whether or not the non-party was involved in the lawsuit. *See Lines v. Ryan*, 272 N.W.2d 896 (Minn. 1978) (fault of no-parties may be compared), *but cf. Ripka v. Mehus*, 390 N.W.2d 878 (Minn. Ct. App. 1986) (court refused to allow unidentified party's fault to be compared.) If just one defendant, plaintiff can recover damages if the plaintiff is 50 percent or less at fault in causing the accident. If there is more than one defendant, and plaintiff's fault exceeds that of an individual defendant, plaintiff is barred from recovering from the defendant who has less fault than plaintiff, unless defendants are engaged in a joint venture. *See Tester v. Am. Standard, Inc.*, 590 N.W.2d 679 (Minn. Ct. App. 1999) *review denied* (Minn. June 16, 1999); *Erickson v. Whirlpool Corp.*, 731 F. Supp. 1426, 1428 (D. Minn. 1990) ("As a general rule, Minnesota law is perfectly clear: the fault of multiple defendants is not to be aggregated pursuant to the comparative fault statute"), *citing Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795, 798 (Minn. 1982); *Hansen v. St. Paul Metro Treatment Center, Inc.*, 609 N.W.2d 625 (Minn. Ct. App. 2000), *review denied* (Minn. July 25, 2000) (in plaintiff's suit against three defendants jury apportioned fault at 44% to plaintiff, 24% to one defendant, 18% to another defendant, and 14% to a third defendant, which barred plaintiff from recovering from any defendant when plaintiff's fault was compared to each individual defendant).

The jury will generally be instructed by the court on the effect of comparative fault on its answers to the liability questions, and as such, will be advised that a plaintiff will not recover if plaintiff's fault is greater than 50 percent. *See* 4a Minnesota Practice, CIVJIG 28.15, Minnesota Jury Instruction Guides (6th Edition 2016).

Note that the application of the comparative fault statute and execution of a *Pierringer*-type release requires the plaintiff to satisfy any judgment to the extent the party released had responsibility for a share of fault. But, the settling party's fault still can be submitted to the jury for consideration. *Schendel v. Hennepin County Medical Center*, 484 N.W.2d 803, 808 (Minn. App. 1992) (citing *Lines v. Ryan*, 272 N.W.2d 896, 902-03 (Minn. 1978)). The remaining defendant(s) get a credit for the settling defendants percentage of fault, rather than the amount paid by the settling defendant. *See Rambaum v. Swisher*, 435 N.W.2d 19 (Minn. 1989); *In re Individual 35W Bridge Litig.*, 806 N.W.2d 811 (Minn. 2011). If plaintiff has executed a *Pierringer*-type release with one or more tortfeasors

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prior to obtaining a jury verdict against a remaining tortfeasor, plaintiff is required to satisfy any judgment to the extent the party released had responsibility for a share of fault.

g. Joint and Several Liability

Joint and several liability applies when two or more defendants are severally liable. It relates to how and whether defendants will share liability obligations to plaintiff. Effective August 1, 2003, the legislature modified Minn. Stat. § 604.02 as it relates to joint and several liability and apportionment of damages as follows:

Subdivision 1. Joint liability. If two or more persons are severally liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that the following persons are jointly and severally liable for the whole award:

- (1) a person whose fault is greater than 50 percent;
- (2) two or more persons who act in a common scheme or plan that results in injury;
- (3) a person who commits an intentional tort; or
- (4) a person whose liability arises under chapters 18B - pesticide control, 115 - water pollution control, 115A - waste management, 115B - environmental response and liability, 115C - leaking underground storage tanks, and 299J - pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01.

Subdivision 2. Reallocation of uncollectible amounts generally. Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

Subdivision 3. Product liability; reallocation of uncollectible amounts. In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.

In situations where there is more than one defendant who is found to be liable to the plaintiff, one of the defendants may end up being responsible for a portion of the judgment that is uncollectible from another defendant, if each of the defendant's actions contributed to causing plaintiff's injury. The imposition of joint and several liability requires the negligence of two or more defendants acting together to cause an injury. See *Hosley v. Armstrong Cork Co.*, 383 N.W.2d 289, 292 (Minn. 1986); *Staab v. Diocese of St. Cloud*, 813 N.W.2d 68 (Minn. 2012) (*Staab I*), *aff'g, rem'd'g* 780 N.W.2d 392 (Minn. Ct. App. 2010). In *Staab I*, the court held that even the fault of non-parties who may be culpable can be compared, so even though Mr. Staab was not a named party, he was found 50% at fault for his wife's injury, and the Diocese was found 50% at fault, so the Diocese would be liable for only its share. Two years later, the Supreme Court decided *Staab v. Diocese of St. Cloud (Staab II)*, 853 N.W.2d 713 (Minn. 2014), which dealt with loss reallocation under subdivision 2 of Minn. Stat. § 604.02, and whether Mr. Staab's uncollectible 50% fault portion of the verdict could be reallocated to the Diocese. The Supreme Court said no, the fault of an uncollectible non-party cannot be applied to increase the liability of a severally liable defendant.

4. Dog Attacks

Under Minnesota law, dog owners are liable for damages when their dog attacks or injures a person "without provocation." Minn. Stat. § 347.22. This statute imposes absolute liability on the dog owner. *Seim v. Garavalia*, 306 N.W.2d 806 (Minn. 1981). The only defenses available to the dog owner are that the injured person provoked the dog, was not behaving peaceably or was in a place where (s)he could not lawfully be (i.e., was trespassing). See *Matson v. Kivimaki*, 294 Minn. 140, 200 N.W.2d 164 (1972).

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a. Statutory Strict Liability

Injuries from dog bites or attacks generally arise under a homeowner's policy. An owner of a dog who injures a person will be strictly liable. Liability is controlled by statute. If a dog, without provocation, attacks or injures any person who is acting peaceably in any place where the person may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. Minn. Stat. § 347.22. By the terms of the strict liability dog-bite statute, the dog's owner is always primarily liable for damage caused by the animal, and a party liable based upon harboring or keeping is secondarily liable. If the dog's owner has insurance, the Plaintiff should seek compensation from that individual before making a claim against the landlord. *Tschida v. Berdusco*, 462 N.W.2d. 410, 411 (Minn. Ct. App. 1990).

When asserting liability for a dog bite under a common-law negligence theory, a Plaintiff need not establish a dog's viciousness or scienter. *Ryman v. Alt*, 266 N.W.2d. 504, 508 (Minn. 1978). However, a plaintiff establishes an animal's vicious propensity with proof that the particular animal was "abnormal and dangerous." *Clark v. Brings*, 169 N.W.2d. 407, 409 (Minn. 1969). An animal's propensity is vicious if it tends to harm, whether manifested in play or in anger, or in some outbreak of untrained nature which, from want of better understanding, must remain unclassified. *Id.* at 413. The duty of care and restraint attaches when the owner has knowledge that the animal is "evilly inclined." *Cuney*, 78 N.W. at 879. See also *Matson v. Kivimaki*, 200 N.W.2d. 164, 172 (Minn. 1972) (holding that actions of a dog were more in nature of a reflex action than part of a continued course of vicious conduct known to the defendant.)

b. Defenses

Based upon a reading of the statute, defenses generally including whether the injured person provoked the dog, whether the person was not acting peaceably, and whether the person was trespassing. Provocation and acting peaceable are generally combined into one defense. *Lewellin ex rel. Lewellin v. Huber*, 465 N.W.2d 62, 64 (Minn. 1991). This is partly due to the fact that the Minnesota Supreme Court has not defined "peaceable" behavior. There is no defense of comparative negligence.

i. Provocation

If the injured person provoked the dog, then this is an absolute defense to strict

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liability. *Engquist v. Loyas*, 803 N.W.2d 400 (Minn. 2011). If the Plaintiff voluntarily and unnecessarily provokes a dog in a manner that invites a dog attack, then is not entitled to recover. Plaintiff does not need to intend to provoke to dog. Provocation involves (1) voluntary conduct that, (2) exposes the person to a risk of harm from the dog, (3) where the person had knowledge of the risk (4) at the time of the accident. “The question of whether a dog was provoked within the meaning of the statute in a given case is primarily a question of fact for the jury.” *Engquist*, 803 N.W.2d 400. See also, *Bailey v. Morris*, 323 N.W.2d 785 (Minn. 1982); *Seim v. Garavalia*, 306 N.W.2d 806 (Minn. 1981); *Lavella v. Kaupp*, 240 Minn. 360, 61 N.W.2d 228 (Minn. 1953); *Fake v. Addicks*, 45 Minn. 37, 47 N.W. 450 (Minn. 1890); *Grams v. Howard’s O.K. Hardware Co.*, 446 N.W.2d 687 (Minn. App. 1989).

ii. Trespass

Issues of trespass as generally discussed above will likely apply to dog attacks. If a person is not lawfully where they are supposed to be, then they will not be allowed recovery. Unlike the defense of provocation, whether a person was lawfully where they were supposed to be is generally an issue for a court, thus making this defense appropriate for summary judgment.

c. Landlord Liability

As a general rule, a person does not have a legal duty to protect another from the harm caused by a third party’s conduct. *H.B. by Clark v. Whittemore*, 522 N.W.2d. 705, 707 (Minn. 1996). An exception to this general rule arises when the parties have a special relationship such that a party owes a duty to protect another and there are foreseeable risks involved. *Funchess v. Cecil Newman Corp.*, 632 N.W.2d. 666, 673 (Minn. 2001). Historically, the landlord-tenant relationship was not a special relationship giving rise to a duty to protect. *Id.* This general rule of landlord non-liability has not been replaced with a general standard of reasonable care in Minnesota. *Johnson v. Miller*, 388 N.W.2d. 26, 28 (Minn. App. 1986). It is a well-established rule in Minnesota that if a landlord retains no control over the land after the tenant takes possession, then the landowner should not be liable for the tenant’s negligence in maintaining the premises if they have been turned over in good condition. *Id.* at 27. The Minnesota Supreme Court has

expressed reluctance to extend the legal duty to protect others. *Funchess*, 632 N.W.2d. at 674.

In dog bite cases, Minnesota Courts have held that the possession of land on which the animal is kept, even when coupled with permission given to a third person to keep the dog, is not enough to make the possessor of the land liable as a harborer of the animal. *Gilbert v. Christiansen*, 259 N.W.2d. 896 (Minn. 1977); *Harer v. Wojciechowski*, 496 N.W.2d. 844 (Minn. App. 1993). See also *Burger v. Bigelow's Ponderose Mobile Home Park, LLC*, 2006 WL 163430 (Minn. Ct. App. 2006) (despite having rules regarding dogs in its mobile home park, the park was not negligent when young girl who was bitten when attempting to feed a neighbor's dog with alleged vicious propensities leashed but unsupervised in the neighbor's yard); *McLeod v. Hodgeman*, 2007 WL 4110068 (Minn. App. Nov. 20, 2007) (plaintiff could not establish that the landlord was negligent or had control over the rented bedroom of its tenant who owned a pitbull where the injury occurred); *H.P. by Peshon v. Carney*, 1999 WL 690196 (Minn. App. 1999) (landlord was not liable for a dogbite when landlord's adult daughter who owned a dog moved into a unit of a duplex as the court held the landlord was not a harbinger or keeper of a tenant's dog).

The Minnesota Supreme Court has interpreted "harboring or keeping" a dog under Minn. Stat. ' 347.22 to mean more than the presence of a dog on the premises. *Verrett v. Silver*, 244 N.W.2d. 147, 149 (Minn. 1976). Harboring means to afford lodging, to shelter or to give refuge to a dog. Keeping a dog implies more than the mere harboring of the dog for a limited purpose or time. *Id.* One becomes a keeper of a dog only when he either with or without the owner's permission undertakes to manage, control or care for it as dog owners in general are accustomed to do. *Id.* Whether or not a person "harbors" or "keeps" a dog is a question of fact for the jury. *Verrett v. Silver*, 244 N.W.2d. 147, 149 (Minn. 1976).

Absent any indicia of control over a dog within the tenant's apartment, a landlord is not a harbinger or keeper of a tenant's dog. *Gilbert v. Christiansen*, 259 N.W.2d. 89, 897 (Minn. 1977)(the Court held that an apartment manager did not harbor or keep the offending dog and was not liable for injuries sustained in tenant's apartment). The right of landlords to exclude pets does not give them control over the pet such that they are harborers or keepers of the animal for purposes of section 347.22. *Id.* at 897. A landlord's limited right to enter the tenant's property is insufficient to show that the landlord exercised control over a tenant's dog, and therefore the landlord cannot be . The

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Court followed the *Gilbert* decision and held that a mobile home park landlord cannot be held liable for damages if the dog attacks someone within the confines of the tenant's lot as the landlord is not an "owner" under the strict liability statute and is under no duty to control a tenant's dog within the confines of a tenant's lot. *Harer v. Wojciechowski*, 496 N.W.2d. 844, 845 (Minn. App. 1993).

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