

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

03-30-15

Michigan Legislature Codifies Property Owners' Duties With Respect to Trespassers

By Drew W. Broaddus

In a premises liability suit, the duty of care owed by the property owner or possessor depends upon the plaintiff's status on the land. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596 (2000). "Historically, Michigan has recognized three common-law categories for persons who enter upon the land or premises of another: (1) trespasser, (2) licensee, or (3) invitee." *Id.* Each of these categories corresponds to a different standard of care that is owed to those injured on the owner's premises. *Id.*

A "trespasser" is a person who enters upon another's land, without the landowner's consent. Under the common law, the landowner owes no duty to the trespasser except to refrain from injuring him by "willful and wanton" misconduct. *Id.*¹ A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent. *Id.* A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. Typically, this includes social guests. An "invitee" is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make it safe for the invitee's reception." *Id.* at 596-597. The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. *Id.* at 597.

Effective June 26, 2014, the Michigan Legislature codified property owners' tort duties with respect to trespassers at MCL 554.581 *et seq.* The statute states, in relevant part, that a property owner or possessor "owes no duty of care to a trespasser and is not liable to a trespasser for physical harm caused by the possessor's failure to exercise reasonable care to put the land in a condition reasonably safe for the trespasser or to carry on activities on the land so as not to endanger trespassers." MCL 554.583(1). The statute goes on to establish various exceptions to this general rule of non-liability; "a possessor of land may be subject to liability for physical injury or death to a trespasser" under the following circumstances:

- the property owner engages in willful or wanton misconduct, § 583(2)(a);
- the property owner is both aware of the trespasser's presence and is actively negligent, § 583(2)(b);

SECRET WARDLE NOTES:

Under the common law, "[t]respassers are lowest on the legal scale in terms of the level of care required of owners or occupiers of land. As a general rule, a landowner is liable to a trespasser only if the landowner is grossly negligent or commits a willful and wanton act that results in injury to the trespasser." *Torts: Michigan Law and Practice* § 9.11 (ICLE 2015). The statute does not alter this rule in any significant way.

The concept of "trespass" has a different meaning in premises liability than it does in the context of a criminal or tort claim against a trespasser. A trespasser in the premises liability context need not *intend* to be a trespasser. M Civ JI 19.01.

¹ See *Boundaries*, December 17, 2010, "The 'Accidental' Trespasser: Still A 'Trespasser' For The Purposes Of Premises Liability; Owed Minimal Duty," by Drew Broaddus.

CONTINUED...

- the property owner knew or should have known “that trespassers constantly intrude on a limited area of the land and the trespasser was harmed as a result of the possessor's failure to carry on an activity in that limited area involving a risk of death or serious bodily harm with reasonable care for the trespasser's safety,” § 583(2)(c); or
- in certain situations where a child is injured by “an artificial condition on the land.” § 583(2)(d).

Under § 583(2)(d), the property owner can have liability for “a child injured by an artificial condition on the land” if *all of the following* apply:

- (i) The possessor knew or had reason to know that a child would be likely to trespass on the place where the condition existed.
- (ii) The possessor knew or had reason to know of the condition and realized or should have realized that the condition would involve an unreasonable risk....
- (iii) The injured child, because of his or her youth, did not discover the condition or realize the risk involved in intermeddling with it or in coming within the area...
- (iv) The utility to the possessor of maintaining the condition and the burden of eliminating the danger were slight as compared with the risk to the child.
- (v) The possessor failed to exercise reasonable care to eliminate the danger or otherwise to protect the child. *Id.*

The statute “does not increase the liability of a possessor of land and does not affect any immunity from or defenses to civil liability established by or available under the statutes or common law ... to which a possessor of land is entitled.” MCL 554.583(3). The statute does not define “trespass” or “trespasser” and will presumably rely upon common law definitions.

Although there is no case law interpreting this provision yet, it is probably applicable only to accidents occurring on or after June 26, 2014. “Statutes are presumed to apply prospectively unless the Legislature clearly manifests the intent for retroactive application.” *Johnson v Pastoriza*, 491 Mich 417, 429 (2012). “[P]roviding a specific, future effective date and omitting any reference to retroactivity supports” prospective application only. *Id.* at 432.

CONTACT US

Troy
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
Tel: 248-851-9500 Fax: 248-538-1223

Lansing
6639 Centurion Drive, Ste. 100
Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids
2025 East Beltline SE, Ste. 600
Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

CONTRIBUTORS

Premises Liability Practice Group Chair
Mark F. Masters

Editor
Linda Willemsen

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for Boundaries, or for newsletters pertaining to any of our other practice groups, please contact Secret Wardle Marketing at swwsubscriptions@secrestwardle.com or 248-539-2850.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice
Blueprints – Mapping legal solutions for the construction industry
Community Watch – Breaking developments in governmental litigation
Contingencies – A guide for dealing with catastrophic property loss
Fair Use – Protecting ideas in a competitive world
In the Margin – Charting legal trends affecting businesses
Industry Line – Managing the hazards of environmental toxic tort litigation
Landowner's Alert – Defense strategies for property owners and managers
No-Fault Newsline – A road map for motor vehicle insurers and owners
On the Beat – Responding to litigation affecting law enforcement
On the Job – Tracking developments in employment law
Safeguards – Helping insurers protect their clients
Standards – A guide to avoiding risks for professionals
State of the Art – Exploring the changing face of product liability
Structures – A framework for defending architects and engineers
Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability

SECRET
SW
WARDLE

Copyright 2015 Secret, Wardle, Lynch, Hampton, Truex and Morley, P.C.

This newsletter is published for the purpose of providing information and does not constitute legal advice and should not be considered as such. This newsletter or any portion of this newsletter is not to be distributed or copied without the express written consent of Secret Wardle.