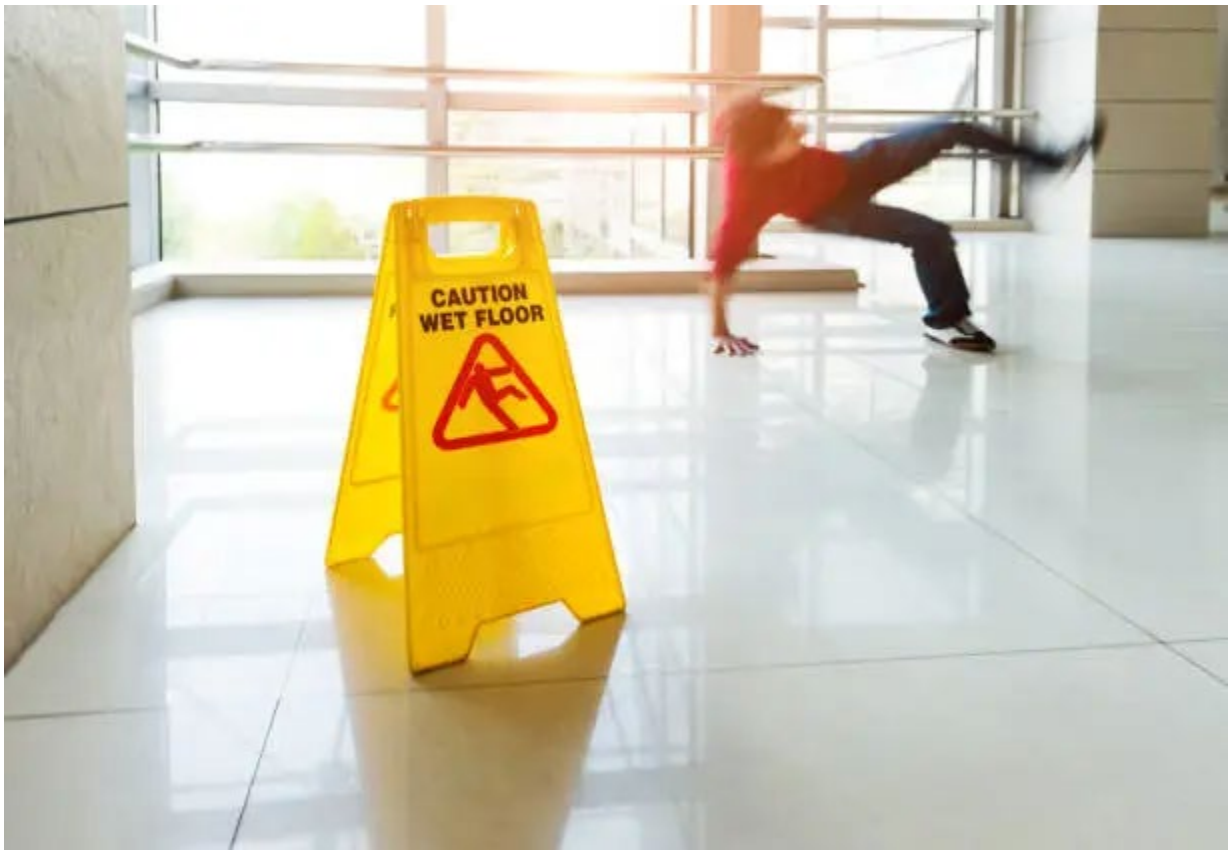
PREMISES LIABILITY IN KENTUCKY



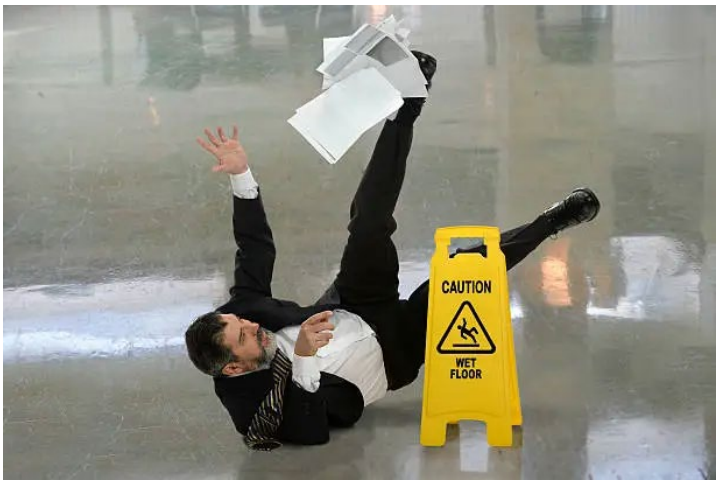
A DESK REFERENCE FOR ADJUSTERS

SEWELL & NEAL, PLLC

Premises Liability

Premises liability is not strict liability in Kentucky. While no one would ever say otherwise out loud, in practice, many treat a premises liability case as if all that must be proven is that an injury occurred. Premises liability is a type of negligence—meaning that the Plaintiff bears the burden of proving duty, breach, causation, and injury.

The general rule of premises liability is that only a person obligated to take care of property can be liable for the condition of the property. Many Plaintiff's attorneys attempt to make anyone with any type of relationship at all liable for the condition of property even if the Defendant has no ability to change or maintain the premises. Only those that have some element of control over the property or a condition on it can be liable, and then the analysis turns to what duty they owe to the Plaintiff. That is largely dependent on the Plaintiff's status. Finally, it must be determined that the duty was breached, which is not always as easy for the Plaintiff to prove as one might think.



Who Can Be Liable

Only a person who is deemed to be a "possessor" of property can have liability. That includes the following:

- The title owner of the property
- One who has agreed through contract to maintain the property
- One who has created a hazard on the property

One could imagine numerous examples that involve one of more of these "possessors," but in each case, the individual or entity has some ability to limit the danger posed by the condition:

Owners	Managers	Creators
Owners	Property Managers	Contractors
Tenants	Maintenance Companies	Guests

In recent years, Plaintiff's attorneys have tried to argue that an adjacent landowner can be liable for the condition of nearby property. This is only accurate if the neighboring landowner agreed to maintain the premises or caused/aggravated the defect itself. Often, this will occur if a local government has enacted an ordinance which makes a sidewalk the responsibility of the adjacent landowner or makes an owner maintain their property a certain way. Kentucky case law is clear that local ordinances cannot be used to support a negligence action because the local ordinance cannot inform a statewide standard of care if it only applies to a locality. For example, Louisville, Lexington, and some of the Northern Kentucky cities have ordinances making sidewalk scraping the responsibility of the adjoining landowner. Those cities may fine the adjacent landowner, but the ordinance does not change the tort duty owed by the adjacent landowner to a member of the general public. A failure to comply with that ordinance does not equate to a breach of a duty in negligence.

Status of Plaintiff

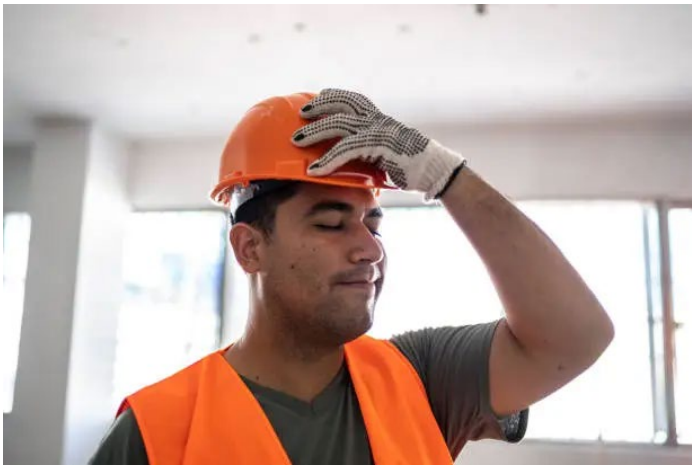
While many believe that Kentucky will move to a universal duty of care, Kentucky has had multiple opportunities to do so and has refused. Kentucky still follows the regime where the duty owed to the Plaintiff is contingent on their status on the property:

- ***Trespassers*** = duty to avoid intentional harm.
    - Not allowed or invited onto the property.
    - Does not have to be explicitly forbidden.

- ***Licensees*** = duty to warn of a known and latent unreasonably dangerous condition.
    - Licensee is allowed but not invited to be on the property, usually only for their benefit.
    - Includes a social guest at a home.

- ***Invitees*** = duty to use reasonable care inspect and then use reasonable care to either warn or eliminate an unreasonably dangerous condition.
    - Invitee is invited for a mutually beneficial purpose.

- ***Independent contractor*** = only to warn of latent dangers known to the landowner.
    - The reason for this is the person is there presumably to work on a defect and is professional enough to look out for their own safety.
    - The test for independent contractor in this scenario is the same as the test for the employee vs. contractor analysis



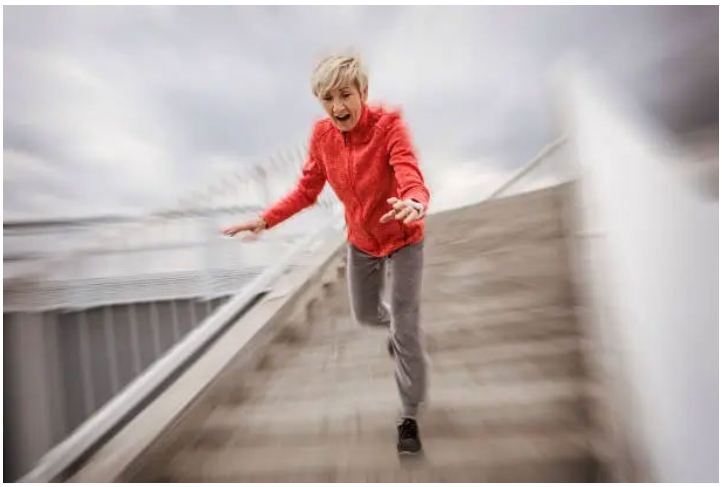
A Plaintiff's status can change as their circumstances change. If an invitee of a store wanders into the office or stock room, they have become a trespasser, and no duty of care is owed other than to not intentionally harm them. Whatever that status is, it is transferable. An invitee who invites friends has shared his/her invitee status with their friends.

Basis of Liability

The only basis for liability in negligence is when an unreasonably dangerous condition is present. This is determined using foresight as opposed to hindsight. In essence, it is not enough for the Plaintiff to establish that they were injured. They must show that the injury was the result of an unreasonably dangerous condition. That requires that they establish what the condition is. Once they have established that, they must establish that it is unreasonably dangerous. An unreasonably dangerous condition is one in which a reasonably prudent landowner in their position would not be allowed to stay on their property.

In the event that the Plaintiff cannot identify a condition that played a substantial factor in causing the injury, summary judgment is appropriate. If the Plaintiff can identify a condition, in most cases, it will be a jury question of whether the condition was unreasonably dangerous. However, there is dicta in the case law that would indicate that certain conditions are not unreasonably dangerous as a matter of law:

- A pothole
- An uneven step on an inclined sidewalk
- A curb near a street
- A condition that cannot be made safer



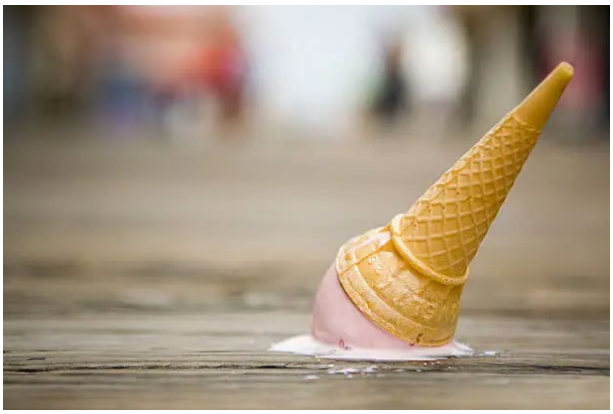
This is not the same as the now nearly defunct "open and obvious" defense. Under the old law, a trial judge could determine that an individual paying attention would have seen the condition and avoided it. Currently, an open and obvious condition can be the basis of a defense, but it would be so because it was deemed to not be unreasonably dangerous.

Another way "open and obvious" can be useful is when the Plaintiff admits to knowing the condition is present and appreciates the risk. The case law that neutralized the doctrine

provides that summary judgment is unavailable in most cases because the critical issue is whether the duty of care (to warn or eliminate) was breached is a factual one. In cases where a Plaintiff has admitted unequivocally that he/she knew the condition was present and that it might cause harm, they have technically judicially admitted that no breach has occurred. This is admittedly an experimental tactic.

A landowner has an affirmative duty to inspect its premises for hazardous conditions. The extent of that duty has not yet been fully fleshed out by Kentucky case law. Plaintiff's attorneys would argue that if a condition is present and identifiable, the duty to inspect is automatic and strict. This is because Kentucky follows a burden-shifting approach in some cases where an injury was caused by a fall on a foreign transitory substance:

> …[O]nce the plaintiff establishes that he or she fell as a result of a transitory foreign substance, a rebuttable presumption of negligence arises. At that point, the burden shifts to the defendant to show by the greater weight of evidence that it exercised reasonable care in the maintenance of the premises under the circumstances. The circumstances could include the nature of the specific hazard and the nature of the defendant's business.



That case law deals specifically with a fall caused by a foreign substance on the floor while Plaintiff shopped in a self-serve grocery setting. It is in response to the prior ability of a landowner to defend on the basis that the Plaintiff must prove that the landowner was on notice of the condition before the Plaintiff fell. While the notice requirement is gone, the Plaintiff must still prove every other aspect of his/her case. Only in cases of transitory substances that create a hazard does the burden-shifting approach even apply.

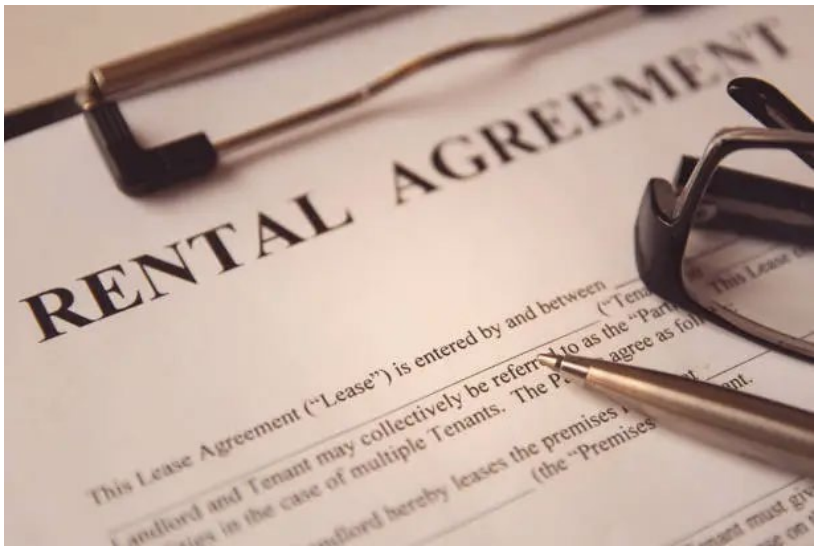
Only if an unreasonably dangerous condition is present is any duty even owed. The possessor then owes a duty to use reasonable care to either eliminate or warn of the condition. This presents a second bite at the apple of "reasonableness." First, one can argue that the condition is not unreasonably dangerous, and in the alternative, reasonable care was used to mitigate the harm it could cause. This could take the form of warning signs, cleanup efforts, snow removal, etc. The argument is that to require anything other than reasonable care turns premises liability into strict liability once an unreasonably dangerous condition is found to be present.

The Building Code does not provide a duty of care to a landowner. The KBC is a set of regulations adopted by statute to handle proper construction. Construction is defined by the statute as the creation or substantial alteration of a building, and it does not include regular maintenance and repair. Plaintiff's attempt to argue that such codes apply because an action for violation of such a code might entitle the Plaintiff to attorney fees. However, the statute is not more applicable to a landowner than the DOT regulations are to the driver of a passenger vehicle.

Issues with Tenants

Generally, a landlord is not liable for injuries to the tenant or his property because of defects in the leased premises in the absence of a contract or warranty as to the condition itself. This is known as the "wholly leased" doctrine, and it stems from the idea that a landowner who vests control over a specific area to another should have no responsibility for the conditions within that area.

A tenant takes the premises as she finds them and a landlord will not be liable for injuries caused by defects in the leased premises unless the condition is unknown to the tenant and not discoverable through reasonable inspection. Where tenant is put in complete and unrestricted possession and control of premises with no statutory or contractual obligation on landlord to repair, landlord is liable only for failure to disclose known latent defects at time tenant leased premises.



Common areas are a different story as the control of that area is not vesting in a different individual. A landlord must exercise ordinary care to keep in a reasonably safe condition the premises reserved for the common use of his tenants. The determination of a landlord's liability for injuries attributable to natural accumulations of ice and snow in common areas is encompassed by the general duty of a landlord to exercise reasonable care to keep common areas reasonably safe. The landlord's actual or constructive notice of the hazardous conditions is a significant factor. Other factors include, for example, the length of time the snow or ice had remained on the walkway and the landlord's opportunity

to take steps to remedy the condition. The tenant's actions also need to be evaluated for their reasonableness. Considerations include, for example, the necessity of traveling at that particular time, and the availability of other means of ingress and egress.

Many Plaintiff's attorneys try to use the Uniform Residential Landlord Tenant Act as a basis for a tort claim for personal injury, but that is specifically not allowed in Kentucky. URLTA obligations include the following:

> (1) comply with building and housing codes; The practitioner should be aware that some communities have enacted ordinances requiring smoke detectors to be hard wired or contain extended-life batteries.
>
> (2) make repairs necessary to put property in fit and habitable condition;
>
> (3) keep common areas in clean and safe condition;
>
> (4) maintain in good and safe working order all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances;
>
> (5) supply running water and hot water at all times and reasonable heat between October 1 and May 1 unless the heat and hot water is within the exclusive control of the tenant and supplied by direct public utility connection

If no local government within which the apartment in question is located has adopted the URLTA, the common law governs. The URLTA does not extend landlord liability beyond what is permitted at common law, and the requirements of the URLTA can only be used to support an action by the tenant to have the repair performed. If a tenant of his/her guest is injured because of a condition which was not repaired, they may not use that lack of repair as a basis for a personal injury claim.