Subject: Re: Dulberg vs. Law Offices of Thomas J. Popovich, P.C., et a.
Date: Wednesday, September 19, 2018 at 2:05:44 PM Central Daylight Time
From: Paul Dulberg
To: Thomas W. Gooch III

Thanks Tom,

I'm willing to pay for the transcript.
It details which parts of the order were struck down for redundancy and which were considered conclusions.
it should help you in writing the amended complaint.

Thank You again,
Paul

On 9/19/2018 11:58 AM, Thomas W. Gooch III wrote:

> Court order is not as problem, get it to you today. The transcript is expensive and needs to be ordered from the court which we can do but I believe is a waste of money pls advise if you wish me to order it. We are preparing the amended complaint. You need to realize it is not at all unusual to have a complaint struck and dismissed without prejudice 2 or 3 times even in a case, its based on the law and the need to say more.
>
> In any event I am working on an amended complaint now and intend to file early. In the meantime we are going to proceed with discovery to keep things moving.
>
> **From:** Paul Dulberg <pdulberg@comcast.net>
> **Sent:** Wednesday, September 19, 2018 9:07 AM
> **To:** Office Office <office@goochfirm.com>
> **Cc:** Thomas W. Gooch III <gooch@goochfirm.com>; Sabina Walczyk <swalczyk@goochfirm.com>; Nikki <nikki@goochfirm.com>
> **Subject:** Re: Dulberg vs. Law Offices of Thomas J. Popovich, P.C., et a.
>
> Hi Tom, Sabina,
>
> May I get the digital copy of the court order and transcript from 9/12/2018?
>
> Thanks,
> Paul
> 847-497-4250
>
> On 9/12/2018 12:33 PM, Paul Dulberg wrote:
>
> > Hi Sabina, Tom,
> > I missed either of you in court this morning. I did not bring my phone into the courthouse so I couldn't call you.
> > Hope nothing bad happened to delay you and that everyone is okay.
> >
> > From what I understood, Judge Meyer moved forward without you and struck down the vast majority of our amended pleading as conclusions or redundant.
> > I have a pink copy of the courts order that I can drop off at your office this afternoon.
> > Judge Meyer suggested that we get a copy of the hearing transcript that would better explain his order.

Do I need to go get the transcript at the county administrative office or is this something you can do digitally?

Thanks,
Paul

On 8/31/2018 9:00 AM, Office Office wrote:

> Dear Mr. Dulberg:
>
> Attached please find the Defendants Reply in Support of their Motion to Dismiss along with their letter to the Judge.
>
> Please note there is a hearing on their Motion to Dismiss set for September 12, 2018 at 10:00 a.m. We will keep you advised of what transpires that day in Court.
>
> If you have any questions, please let me know.
>
> Melissa J. Podgorski
> Paralegal
> The Gooch Firm
> 209 South Main Street
> Wauconda, Illinois 60084
> (847) 526-0110 (phone)
> (847) 526-0603 (fax)
>
>

Subject: Fwd: Re: Dulberg v. Popovich 17 LA 377
Date: Monday, June 4, 2018 at 8:13:34 AM Central Daylight Time
From: me
To: Thomas W. Gooch III
Attachments: amended_complaint_comments2.txt

Hi Tom,
Forgot to include you in the cc. so I'm forwarding it to you.
Thank you,
Paul

-------- Forwarded Message --------
Subject: Re: Dulberg v. Popovich 17 LA 377
Date: Mon, 4 Jun 2018 08:07:12 -0500
From:me <pdulberg@comcast.net>
To: Sabina Walczyk <swalczyk@goochfirm.com>, Nikki <nikki@goochfirm.com>
CC: Office Office <office@goochfirm.com>

Hi Sabina and Tom,
Below are the changes, questions and comments.
They are also attached as a text file called, amended_complaint_comments2.txt

Comments on FIRST AMENDED COMPLAINT

Very well stated arguments. Some possible corrections and changes...

page 2, section 7: "lost control ..." could be changed to "inadvertently cut the arm of DULBERG"

Question: How were the amounts $260,000 and $250,000 arrived at?

page 3, section 11: "property" should read "properly".

page 3, section 13: Incorrect. MAST incorrectly informed DULBERG that the insurance policy limit for Gagnon was only $100,000, when in reality the policy limit was $300,000. (Proof: see file 2-104.pdf in email folder).

At no time was DULBERG ever informed of the McGuires' policy limits.

In addition, when MAST later gave DULBERG all documents related to his case, DULBERG noticed that the Gagnon policy information and the McGuires' policy information was not included among the files. The medical depositions were also missing from the files. (Much email proof of this.)

page 3, section 15: correct. direct quotes from file 2-207.pdf and 2-205.pdf email exchanges from file 2-208.pdf to file 2-182.pdf show clearly that DULBERG does not agree or understand why McGuires are not liable for injury.

page 3, section 16: correct. Direct quote from 2-201.pdf. Extracted from the sentence: "We don't have to accept the $5,000, but if we do not, the McGuires will get out for FREE on a motion."

page 4, section 17: Why the quotations? It cannot be proven that this is a direct quote, though the emails quoted above can be proven. Not sure about the quote. Not sure that the meeting was the day before a court appearance yet, that is what DULBERG was told by MAST but Tom Kost who is DULBERGS' brother and was in the meeting does

not exactly recall this but says he remembers it was time sensitive.
There were actually 2 meetings in Hans Mast office on the McGuires. The first Dulberg attended with his Mother Barbara Dulberg and the second was with Thomas Kost, Dulbergs' brother.
However, I, DULBERG, am currently putting together a timeline of all documented court events along with the emails and this should narrow down the dates of these meetings.
I, DULBERG, believe that we should not include anything in the complaint that is not backed up by verifiable documented proof. Witness testimony can come out during the discovery phase, not the complaint. I dont want anything the defense can pounce on.

Why the statement "DULBERG would not see a dime from either case"? McGuires' and Gagnon's? No proof of this. Not sure of the claim. Again this is not backed up by the emails but is close to DULBERGS' recollection of the conversation with MAST and should come out in testimony, not in the complaint.

He claimed the McGuires would be dismissed for nothing if DULBERG did not accept the offer promptly. This can be proven through DULBERG as a witness and by his brother, THOMAS KOST, who was also present at the meeting. The claim can also be proven through emails.

page 4, section 18: It is written "having no choice in the matter". This can be replaced by "feeling he had no choice in the matter". (This is proven through the email record from file 2-208.pdf to 2-182.pdf.) In the email exchanges he is clearly in disagreement with McGuires' liability and clearly reluctant to accept the offer.

page 4, section 20: correct. Proof of direct quote in file 2-180.pdf.

page 4, section 22: correct. Proof of direct quote is in file 2-104.pdf

page 6, section 29: "reasonable" should read "reasonably". "forcing" could be changed to "pressuring" or "coercing".

page 7, section 31 j): correct. Direct quote from file 2-201.pdf.

I am available anytime to discuss any of this.
Thank you,
Paul
847-497-4250

On 6/1/2018 10:32 AM, Sabina Walczyk wrote:

> Yes it does thank you.
>
> Get Outlook for iOS
>
> ---
>
> **From:** me <pdulberg@comcast.net>
> **Sent:** Friday, June 1, 2018 10:31:04 AM
> **To:** Nikki
> **Cc:** Sabina Walczyk; Office Office
> **Subject:** Re: Dulberg v. Popovich 17 LA 377
>
> Hi Sabrina,
> Thank you for providing this for my review.
> I opened it and by the 3rd page already noticed some simple but fundamental errors we need to correct.
> I'm going to read it in detail and hope to have all corrections to you by Monday the 4th of June.
> Does that give you enough time to review my concerns and still meet the deadline of the 6th?
> Thanks again,
> Paul

Paul

On 6/1/2018 9:33 AM, Nikki wrote:

> Hi Paul,
>
> I have attached a draft of the First Amended Complaint for your case. Please review and advise. Thank you.
>
> Regards,
>
> Nikki Justiniani
> *Office Assistant*
>
> The Gooch Firm
> 209 S. Main Street
> Wauconda, IL 60084
> P: 847-526-0110
> F: 847-526-0603
> E: nikki@goochfirm.com
>

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page 7, section 31 j): correct. Direct quote from file 2-201.pdf.

Subject: Re: from tom
Date: Wednesday, October 3, 2018 at 11:02:09 AM Central Daylight Time
From: Paul Dulberg
To: Thomas W. Gooch III, Sabina Walczyk, Office Office, Nikki
Attachments: second_amended_complaint.txt

Hello Tom and Sabina,

I didn't understand the last email I received so I need some clarification. I was never rude or not courteous to your staff and your staff was always courteous to me. Yesterday I talked with Nikki briefly just to confirm that the office received the email and find out when I should expect to recieve the second amended brief for review. She was friendly and courteous. I said nothing rude or offensive.

I never ordered you or anyone to call me yesterday. I honestly don't know why you believe I did. I was not aware there was anything offensive in the attachment I sent. As I read it again I still can't see anything offensive in it.

As you know I have a permanent disability. You may not know I am on medication to control pain and spasms and this medication does not allow me to focus on complex subjects for a prolonged time. Since I do not understand your last email and I don't have much time before appearing in court I need to know where I stand.

Are you thinking of not continuing to represent me in this case?

Are you going to submit a second amended complaint on October 10 and appear in court?

Will I be given enough time to review the complaint before it is submitted?

May I comment on it or request changes to it or ask questions about it?

I do not want to offend anyone, so I need to know what I can comment on or ask questions about.

I have no memory of any inappropriate behavior when talking to Nikki yesterday. Please let me know how I can communicate with your staff or what I can include in an email in the future so you are not offended again.

Sorry if I did anything wrong.

Sincerely,

Paul Dulberg

On 10/2/2018 1:06 PM, Thomas W. Gooch III wrote:

> Mr. Duhlberg;
>
> I have your attachment and am deeply offended by it.

I more upset over being ordered to call you today. I am preparing for trial and frankly don't have time to read or comment on your attempts to educate me on what legal malpractice is all about, I particularly don't have time top read outdated cases on the elements of a legal malpractice case, nor do I have any intention of quoting the law you sent to me.

You understand full well I'm sure that I have been doing this for a very long time, if I need help on understanding the law I will get from someone who knows how to do legal research, you and your brother don't.

If I have anymore of this authoritative comments or instructions I will have to give particular thought to withdrawing my appearance and letting you represent your self or find someone else, understand this is not an empty threat, I will tolerate any more of this. If I need a factual question answered and I'm sure I will in the course of this litigation then I will ask you but kindly stop with rudimentary research. The Google searches of you and your brother are not replacements for my law license.

I generally don't have a proble3m with relatives helping out and being involved just so long as the client understands that the relatives involvement may waive the attorney client privilege. However at this point your brother has become more the problem then helpful. While I can not prevent him from injecting himself into your case through you, I am no longer willing to have him present at conferences or communicate directly with me.

At this point with everything I have going and the attitude you are displaying I have serious doubts as continuing to represent you. Kindly do not communicate with my staff on the telephone in the manner you chose today

Sincerely

Thomas W Gooch
The Gooch Firm
209 S. Main Street
Wauconda, Illinois 60084
847.526.0110
Gooch@goochfirm.com
WWW.Goochfirm.com

From: Paul Dulberg <pdulberg@comcast.net>
Sent: Tuesday, October 02, 2018 9:11 AM
To: Thomas W. Gooch III <gooch@goochfirm.com>; Sabina Walczyk <swalczyk@goochfirm.com>; Office Office <office@goochfirm.com>; Nikki <nikki@goochfirm.com>
Subject: Fwd: from tom

Hi Tom and Sabina,
Please see the attached file.
contact me with any questions.
Thank you,
Paul

-------- Forwarded Message --------
Subject:from tom
Date: Tue, 2 Oct 2018 07:32:00 -0500
From:T Kost <tkost999@gmail.com>
To:me <pdulberg@comcast.net>

see attached

Comments to the Gooch firm concerning the first amended complaint:

It is my opinion that the first amended complaint failed to adequately address the underlying case that DULBERG had against the MCGUIRES. Please note the case of Ignarski v Norbut which serves as an example of the same problem. I quote the relevent sections from Ignarski v Norbut below...

"The elements of a legal malpractice claim are: (1) the existence of an attorney client relationship which establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that "but for" the attorneys negligence, the plaintiff would have prevailed in the underlying action; and (4) damages. (Pelham v. Griesheimer (1982), 92 Ill. 2d 13, 64 Ill. Dec. 544, 440 N.E.2d 96; Sheppard v. Krol (1991), 218 Ill.App.3d 254, 161 Ill. Dec. 85, 578 N.E.2d 212; Claire Associates v. Pontikes (1986), 151 Ill.App.3d 116, 104 Ill. Dec. 526, 502 N.E.2d 1186.) Because legal malpractice claims must be predicated upon an unfavorable result in the underlying suit, no malpractice exists unless counsel's negligence has resulted in the loss of the underlying action. (Claire Associates, 151 Ill.App.3d at 122, 104 Ill. Dec. 526, 502 N.E.2d 1186.) Plaintiff is required to establish that but for the negligence of counsel, he would have successfully prosecuted or defended against the claim in the underlying suit. (Sheppard, 218 Ill.App.3d at 257, 161 Ill. Dec. 85, 578 N.E.2d 212; Claire Associates, 151 Ill.App.3d at 122, 104 Ill. Dec. 526, 502 N.E. 2d 1186.) Damages will not be presumed, and the client bears the burden of proving he suffered a loss as a result of the attorney's alleged negligence. Sheppard 218 Ill.App.3d at 257, 161 Ill.Dec. *289 85, 578 N.E.2d 212; Claire Associates, 151 Ill.App.3d at 122,104 Ill. Dec. 526, 502 N.E.2d 1186.

As a result of the foregoing, the plaintiff at bar was required to plead a case within a case. In particular, he was required to plead ultimate facts establishing why KFC had a duty to protect him from the criminal acts of third parties."

Likewise in the case of DULBERG, the first amended complaint does not plead ultimate facts establishing why the MCGUIRES had a duty duty of reasonable care to DULBERG and how the MCGUIRES breeched that duty.

The complaint must plead: 1) the existence of a duty owed to DULBERG by the MCGUIRES 2) a breach of that duty; 3) an injury proximately caused by the breach; and 4) damages.

More from Ignarski v Norbut...

"As previously stated, the plaintiff failed to plead a case within a case. In particular, because the second amended complaint did not contain ultimate facts as to why KFC owed plaintiff a duty of protection, it did not satisfy the proximate cause requirement (i.e., but for the attorney's negligence, plaintiff would have prevailed in the underlying action). Plaintiff, however, essentially seeks to dispose of the proximate cause requirement. In attempting to do so, plaintiff ignores Illinois case law which has repeatedly rejected this position. In Sheppard 218 Ill.App.3d 254, 161 Ill. Dec. 85, 578 N.E.2d 212, the defendant was injured at work by an unidentified and allegedly defective forklift. The *291 defendant attorney was retained to investigate and file a product liability action against the manufacturer of the forklift. The complaint alleged that the attorney never investigated the facts, never identified the manufacturer, and failed to institute legal proceedings. Subsequently, plaintiff's employer disposed of the forklift making it impossible to prosecute the claim. The trial court dismissed plaintiff's complaint because it did not plead, and plaintiff could not prove, that he would have prevailed in the product liability suit "but for the defendant's negligence." In affirming the trial court's dismissal, this court rejected the plaintiff's argument that defendant's negligence should absolve the plaintiff of his responsibility to identify the forklift manufacturer. Sheppard, 218 Ill.App.3d at 258; 161 Ill. Dec. 85, 578 N.E.2d 212; see also Beastall v. Madson (1992), 235 Ill.App.3d 95, 175 Ill. Dec. 865, 600 N.E.2d 1323; Coofc v. Gould (1982), 109 Ill.App.3d 311, 64 Ill. Dec. 896. 440 N.E.2d 448."

In short, we have no case against MAST unless we can establish that "but for" the attorney's negligence, the plaintiff would have prevailed in the underlying action. In other words, we have to show that DULBERG would have prevailed against the MCGUIRES if it wasn't for the actions of MAST. The first amended complaint did not sufficiently address the "case within a case" or the "underlying case", which is against the MCGUIRES.

The judge needs more details on the legal basis by which DULBERG could have prevailed against the MCGUIRES if MAST didn't give such crappy counsel.

I believe that the following argument establishes the legal basis by which DULBERG would have prevailed against the MCGUIRES and this agument or something like it should be included in the second amended complaint...

HOW TO PRESENT THE LIABILITY OF THE MCGUIRES:

Premises liability is generally defined as ì[a] landownerís or landholderís tort liability for conditions or activities on the premises.î Blackís Law Dictionary (9th ed. 2009).

A premises-liability action is a negligence claim. See, Salazar v. Crown Enterprises, Inc., 328 Ill. App. 3d 735, 740, 767 N.E.2d 366, 262 Ill. Dec. 906 (1st Dist. 2002).

The essential elements of a cause of action based on common-law negligence are the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. Ward v. Kmart Corp., 136 Ill. 2d 132, 140, 554 N.E.2d 223, 143 Ill. Dec. 288 (1990).

Under the Premises Liability Act, ìthe owner or lessee of premises owes a duty of ëreasonable care under the circumstances' to those lawfully on the premises.î Simmons v. American Drug Stores, Inc., 329 Ill. App. 3d 38, 43, 768 N.E.2d 46, 51, 263 Ill. Dec. 286 (1st Dist. 2002), quoting 740 ILCS 130/2 (West 2000). In a situation where a plaintiff alleges that an injury was caused by a condition on the defendant's property, and the plaintiff was an invitee on the property, whether the injury is reasonably foreseeable is determined pursuant to section 343A of the Restatement (Second) of Torts. Section 343 of the Restatement provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts ß 343 (1965).

An exception to this general rule, known as the ìopen and obvious danger ruleî, is set forth in section 343A of the Restatement. It provides:

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.

Restatement (Second) of Torts ß 343A(1).

Facts:

a) MCGUIRES purchased and provided GAGNON with a chainsaw without following the directions and heeding the warnings clearly printed in the operator's manual that accompanied the chainsaw. Chainsaw was purchased on 5-22-2011 and was first used on 6-28-2011, the day DULBERG was injured.

b) The operator's manual clearly states in large, bold font: "WARNING - To ensure safe and correct operation of the chainsaw, ths operator's manual should always be kept with or near the machine. Do not lend or rent your chainsaw without the operator's instruction manual."

c) Just under this warning on the same page the operator's manual clearly states in large, bold font: "WARNING - Allow only persons who understand this manual to operate your chainsaw."

d) The manual has a list clearly labeled as "SAFETY RULES". The first listed rule is: "Read this manual carefully until you completely understand and can follow all safety rules, precautions, and operating instructions before attempting to use the unit."

e) The second listed safety rule is: "Restrict the use of your saw to adult users who understand and can follow safety rules, precautions, and operating instructions found in this manual."

f) The fourth listed safety rule is: "Keep children, bystanders, and animals a minimum of 35 feet (10 meters) away from the work area. Do not allow other people or animals to be near the chainsaw when starting or operating the chainsaw (Fig.2)." There is a large picture next to this rule of people standing at least 35 feet away from a person operating a chainsaw.

g) The MCGUIRES asked DULBERG to help GAGNON. DULBERG did not go to the MCGUIRES property to help cut down a tree. He went to see if he wanted the wood. Only after he was on the property for more than two hours was he asked by the MCGUIRES if he could help GAGNON.

h) The MCGUIRES were in possession of the owners manual and looked at it while DULBERG was present, however they asked DULBERG to help GAGNON anyway. They had the manual and DULBERG did not. They had access to knowledge about the warnings clearly stated in the manual that DULBERG did not have. "A duty to warn exists where there is unequal knowledge, actual or constructive, and the defendant, possessed of such knowledge, knows or should know that harm might or could occur if no warning is given." (Pitler, 92 Ill.App.3d at 745, 47 Ill.Dec. 942, 415 N.E.2d 1255, quoting Kirby v. General Paving Co. (1967), 86 Ill.App.2d 453, 457, 229 N.E.2d 777.)

i) Had the MCGUIRES read and followed the warnings and safety rules in the operators manual, the injury to DULBERG could not have occurred.

As stated in part (g), DULBERG came to the property in order to see if he wanted the wood from the tree and not to help with cutting. Only after being on the property for more than two hours in the MCGUIRES' presence did the MCGUIRES ask DULBERG to help GAGNON. Therefore

DULBERG was clearly an invitee and was owed a duty of 'reasonable care' by the MCGUIRES.

The MCGUIRE'S were in possession of the operator's manual of the chainsaw. They were also the owners of the chainsaw. Multiple warnings were clearly printed in bold font in the operator's manual, so the MCGUIRES should have realized that asking DULBERG to help GAGNON while not following any of the warnings described in parts (b), (c), (d), (e), and (f) involved an unreasonable risk of harm to DULBERG.

The MCGUIRES should have expected that since DULBERG did not have access to the operator's manual he was not aware of the explicit warnings described in parts (b), (c), (d), (e), and (f).

Therefore the MCGUIRES failed to exercise reasonable care toward DULBERG. They had access to knowledge about the warnings clearly stated in the manual that DULBERG did not have. "A duty to warn exists where there is unequal knowledge, actual or constructive, and the defendant, possessed of such knowledge, knows or should know that harm might or could occur if no warning is given." (Pitler, 92 Ill.App.3d at 745, 47 Ill.Dec. 942, 415 N.E.2d 1255, quoting Kirby v. General Paving Co. (1967), 86 Ill.App.2d 453, 457, 229 N.E.2d 777.)

The chainsaw accident was or should have been reasonably foreseeable to a person who read the warnings described in parts (b), (c), (d), (e), and (f) and failed to heed those warnings. Had the MCGUIRES read and followed the warnings and safety rules in the operators manual, the injury to DULBERG could not have occurred.

Also, MAST could have attempted to impose liability on a possessor of land by a negligence claim rather than through Premises Liability.

In this case, under the general negligence theory, all the plaintiff would need to prove is that the defendant negligently created the dangerous condition on its premises. Plaintiff would only need to prove the existence of a duty owed to DULBERG, breach of the duty, and that the breach proximately caused the injuries.

CONCERNING MAST'S LIABILITY

Arguments which support the liability of MAST have already been made in the first amended complaint. However, there were a few important points that were not mentioned yet in the previous complaints and could definitely be of use in the second amended complaint. They are as follows...

MAST told DULBERG at a meeting in which DULBERG was trying to decide whether to accept the MCGUIRE's offer of $5,000 that because the restatement of torts 318 is not applicable in Illinois, DULBERG had no case against the MCGUIRES and that the MCGUIRES did not have to offer any settlement at all. DULBERG asked MAST to cite case law that shows why the MCGUIRES were not at least partially liable for DULBERG'S injury, and MAST cited Tilscher v Spangler, a case which confirms that restatement of torts 318 is not applicable in Illinois. But note the claim of MCGUIRE'S liability given above relies on restatement of torts 343 or a general neglegence claim. It is completely independent of restatement of torts 318.

At the same meeting MAST also informed DULBERG that the MCGUIRES made an offer of $5,000 to be nice (they did not have to offer anything) and if DULBERG did not accept the offer it would be withdrawn and the MCGUIRES will ask for summary judgement. MAST informed DULBERG that the presiding judge would grant the MCGUIRES a summary judgement dismissing the case against them, leaving DULBERG with no settlement at all from the MCGUIRES.

According to Illinois law, summary judgment should be granted if there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. (Carruthers v. Christopher & Co. (1974), 57 Ill. 2d 376, 380, 313 N.E.2d 457.) It should never be granted unless the right of the movant is free from doubt. (Murphy v. Urso (1981), 88 Ill. 2d 444, 464, 58 Ill. Dec. 828, 430 N.E.2d 1079.) If the affidavits and other materials disclose a dispute as to any material issue of fact, summary judgment must be denied even if the court believes the movant will or should prevail at trial. Summary judgment procedure is not designed to try an issue of fact, but rather to determine if one exists. (Ray v. Chicago (1960), 19 Ill. 2d 593, 599,169 N.E.2d 73.) In considering a motion for summary judgment, the court must strictly construe all things filed in support of the motion

while liberally construing all things filed in opposition thereto. (Kolakowski v. Voris (1980), 83 Ill. 2d 388, 398, 47 Ill. Dec. 392, 415 N.E.2d 397.) If fair minded persons could draw different inferences from the evidence, the issues should be submitted to a jury to determine what conclusion seems most reasonable. (Silberstein v. Peoria Town and Country Bowl, Inc. (1970), 120 Ill.App.2d 290, 293-94, 257 N.E.2d 12.)

Therefore, when MAST told DULBERG that if he did not accept the offer of $5,000 the MCGUIRES would get out of the case on a motion for a summary judgement, MAST effectively informed DULBERG that:

a) the MCGUIRES' lack of liability for DULBERG's injury was free from doubt

b) there existed no genuine issue of material fact that the MCGUIRES are entitled to summary judgement as a matter of law

c) affidavits and other materials did not disclose any dispute as to any material issue of fact in this case

d) the court while strictly construing all things filed in support of the motion and while liberally construing all things filed in opposition thereto would have found the MCGUIRES liable for nothing with respect to DULBERG'S accident and would have granted a motion for summary judgement

e) fair minded persons could not draw different inferences from the evidence that the MCGUIRES were not in any way liable for DULBERG'S accident.

Within these notes I tried to explain 3 points:

1) That the first amended complaint failed to adequately address the underlying case that DULBERG had against the MCGUIRES. In other words, we have to show that DULBERG would have prevailed against the MCGUIRES if it wasn't for the actions of MAST. The first amended complaint did not sufficiently address the "case within a case" or the "underlying case", which is against the MCGUIRES.

2) The case against the McGuires could be made by using the restatement of torts 343 or by using general negligence or in any other way that a premises liability or negligence expert would recommend.

3) Arguments which support the liability of MAST have already been made in the first amended complaint. But there are a few additional arguments that that may prove helpful to include. They are the reasons Mast gave to Dulberg why he will get $5,000 or nothing. The only case Mast cited to Dulberg was Tilscher v Spangler, and because the case confirmed that restatement of torts 318 is not applicable in Illinios, Mast told Dulberg he has no case against the McGuires. Mast also told Dulberg the judge would grant a summary judgement if Dulberg refused the offer.

I hope the details within these comments prove helpful in writing a more robust second amended complaint.

Subject: Fwd: from tom
Date: Tuesday, October 2, 2018 at 9:11:13 AM Central Daylight Time
From: Paul Dulberg
To: Thomas W. Gooch III, Sabina Walczyk, Office Office, Nikki
Attachments: second_amended_complaint.txt

Hi Tom and Sabina,
Please see the attached file.
contact me with any questions.
Thank you,
Paul

-------- Forwarded Message --------
Subject:from tom
Date: Tue, 2 Oct 2018 07:32:00 -0500
From:T Kost <tkost999@gmail.com>
To:me <pdulberg@comcast.net>

see attached

Comments to the Gooch firm concerning the first amended complaint:

It is my opinion that the first amended complaint failed to adequately address the underlying case that DULBERG had against the MCGUIRES. Please note the case of Ignarski v Norbut which serves as an example of the same problem. I quote the relevent sections from Ignarski v Norbut below...

"The elements of a legal malpractice claim are: (1) the existence of an attorney client relationship which establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that "but for" the attorneys negligence, the plaintiff would have prevailed in the underlying action; and (4) damages. (Pelham v. Griesheimer (1982), 92 Ill. 2d 13, 64 Ill. Dec. 544, 440 N.E.2d 96; Sheppard v. Krol (1991), 218 Ill.App.3d 254, 161 Ill. Dec. 85, 578 N.E.2d 212; Claire Associates v. Pontikes (1986), 151 Ill.App.3d 116, 104 Ill. Dec. 526, 502 N.E.2d 1186.) Because legal malpractice claims must be predicated upon an unfavorable result in the underlying suit, no malpractice exists unless counsel's negligence has resulted in the loss of the underlying action. (Claire Associates, 151 Ill.App.3d at 122, 104 Ill. Dec. 526, 502 N.E.2d 1186.) Plaintiff is required to establish that but for the negligence of counsel, he would have successfully prosecuted or defended against the claim in the underlying suit. (Sheppard, 218 Ill.App.3d at 257, 161 Ill. Dec. 85, 578 N.E.2d 212; Claire Associates, 151 Ill.App.3d at 122, 104 Ill. Dec. 526, 502 N.E. 2d 1186.) Damages will not be presumed, and the client bears the burden of proving he suffered a loss as a result of the attorney's alleged negligence. Sheppard 218 Ill.App.3d at 257, 161 Ill.Dec. *289 85, 578 N.E.2d 212; Claire Associates, 151 Ill.App.3d at 122,104 Ill. Dec. 526, 502 N.E.2d 1186.

As a result of the foregoing, the plaintiff at bar was required to plead a case within a case. In particular, he was required to plead ultimate facts establishing why KFC had a duty to protect him from the criminal acts of third parties."

Likewise in the case of DULBERG, the first amended complaint does not plead ultimate facts establishing why the MCGUIRES had a duty duty of reasonable care to DULBERG and how the MCGUIRES breeched that duty.

The complaint must plead: 1) the existence of a duty owed to DULBERG by the MCGUIRES 2) a breach of that duty; 3) an injury proximately caused by the breach; and 4) damages.

More from Ignarski v Norbut...

"As previously stated, the plaintiff failed to plead a case within a case. In particular, because the second amended complaint did not contain ultimate facts as to why KFC owed plaintiff a duty of protection, it did not satisfy the proximate cause requirement (i.e., but for the attorney's negligence, plaintiff would have prevailed in the underlying action). Plaintiff, however, essentially seeks to dispose of the proximate cause requirement. In attempting to do so, plaintiff ignores Illinois case law which has repeatedly rejected this position. In Sheppard 218 Ill.App.3d 254, 161 Ill. Dec. 85, 578 N.E.2d 212, the defendant was injured at work by an unidentified and allegedly defective forklift. The *291 defendant attorney was retained to investigate and file a product liability action against the manufacturer of the forklift. The complaint alleged that the attorney never investigated the facts, never identified the manufacturer, and failed to institute legal proceedings. Subsequently, plaintiff's employer disposed of the forklift making it impossible to prosecute the claim. The trial court dismissed plaintiff's complaint because it did not plead, and plaintiff could not prove, that he would have prevailed in the product liability suit "but for the defendant's negligence." In affirming the trial court's dismissal, this court rejected the plaintiff's argument that defendant's negligence should absolve the plaintiff of his responsibility to identify the forklift manufacturer. Sheppard, 218 Ill.App.3d at 258; 161 Ill. Dec. 85, 578 N.E.2d 212; see also Beastall v. Madson (1992), 235 Ill.App.3d 95, 175 Ill. Dec. 865, 600 N.E.2d 1323; Coofc v. Gould (1982), 109 Ill.App.3d 311, 64 Ill. Dec. 896. 440 N.E.2d 448."

In short, we have no case against MAST unless we can establish that "but for" the attorney's negligence, the plaintiff would have prevailed in the underlying action. In other words, we have to show that DULBERG would have prevailed against the MCGUIRES if it wasn't for the actions of MAST. The first amended complaint did not sufficiently address the "case within a case" or the "underlying case", which is against the MCGUIRES.

The judge needs more details on the legal basis by which DULBERG could have prevailed against the MCGUIRES if MAST didn't give such crappy counsel.

I believe that the following argument establishes the legal basis by which DULBERG would have prevailed against the MCGUIRES and this agument or something like it should be included in the second amended complaint...

HOW TO PRESENT THE LIABILITY OF THE MCGUIRES:

Premises liability is generally defined as ì[a] landownerís or landholderís tort liability for conditions or activities on the premises.î Blackís Law Dictionary (9th ed. 2009).

A premises-liability action is a negligence claim. See, Salazar v. Crown Enterprises, Inc., 328 Ill. App. 3d 735, 740, 767 N.E.2d 366, 262 Ill. Dec. 906 (1st Dist. 2002).

The essential elements of a cause of action based on common-law negligence are the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by that breach. Ward v. Kmart Corp., 136 Ill. 2d 132, 140, 554 N.E.2d 223, 143 Ill. Dec. 288 (1990).

Under the Premises Liability Act, ìthe owner or lessee of premises owes a duty of ëreasonable care under the circumstances' to those lawfully on the premises.î Simmons v. American Drug Stores, Inc., 329 Ill. App. 3d 38, 43, 768 N.E.2d 46, 51, 263 Ill. Dec. 286 (1st Dist. 2002), quoting 740 ILCS 130/2 (West 2000). In a situation where a plaintiff alleges that an injury was caused by a condition on the defendant's property, and the plaintiff was an invitee on the property, whether the injury is reasonably foreseeable is determined pursuant to section 343A of the Restatement (Second) of Torts. Section 343 of the Restatement provides:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts ß 343 (1965).

An exception to this general rule, known as the ìopen and obvious danger ruleî, is set forth in section 343A of the Restatement. It provides:

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.

Restatement (Second) of Torts ß 343A(1).

Facts:

a) MCGUIRES purchased and provided GAGNON with a chainsaw without following the directions and heeding the warnings clearly printed in the operator's manual that accompanied the chainsaw. Chainsaw was purchased on 5-22-2011 and was first used on 6-28-2011, the day DULBERG was injured.

b) The operator's manual clearly states in large, bold font: "WARNING - To ensure safe and correct operation of the chainsaw, ths operator's manual should always be kept with or near the machine. Do not lend or rent your chainsaw without the operator's instruction manual."

c) Just under this warning on the same page the operator's manual clearly states in large, bold font: "WARNING - Allow only persons who understand this manual to operate your chainsaw."

d) The manual has a list clearly labeled as "SAFETY RULES". The first listed rule is: "Read this manual carefully until you completely understand and can follow all safety rules, precautions, and operating instructions before attempting to use the unit."

e) The second listed safety rule is: "Restrict the use of your saw to adult users who understand and can follow safety rules, precautions, and operating instructions found in this manual."

f) The fourth listed safety rule is: "Keep children, bystanders, and animals a minimum of 35 feet (10 meters) away from the work area. Do not allow other people or animals to be near the chainsaw when starting or operating the chainsaw (Fig.2)." There is a large picture next to this rule of people standing at least 35 feet away from a person operating a chainsaw.

g) The MCGUIRES asked DULBERG to help GAGNON. DULBERG did not go to the MCGUIRES property to help cut down a tree. He went to see if he wanted the wood. Only after he was on the property for more than two hours was he asked by the MCGUIRES if he could help GAGNON.

h) The MCGUIRES were in possession of the owners manual and looked at it while DULBERG was present, however they asked DULBERG to help GAGNON anyway. They had the manual and DULBERG did not. They had access to knowledge about the warnings clearly stated in the manual that DULBERG did not have. "A duty to warn exists where there is unequal knowledge, actual or constructive, and the defendant, possessed of such knowledge, knows or should know that harm might or could occur if no warning is given." (Pitler, 92 Ill.App.3d at 745, 47 Ill.Dec. 942, 415 N.E.2d 1255, quoting Kirby v. General Paving Co. (1967), 86 Ill.App.2d 453, 457, 229 N.E.2d 777.)

i) Had the MCGUIRES read and followed the warnings and safety rules in the operators manual, the injury to DULBERG could not have occurred.

As stated in part (g), DULBERG came to the property in order to see if he wanted the wood from the tree and not to help with cutting. Only after being on the property for more than two hours in the MCGUIRES' presence did the MCGUIRES ask DULBERG to help GAGNON. Therefore

DULBERG was clearly an invitee and was owed a duty of 'reasonable care' by the MCGUIRES.

The MCGUIRE'S were in possession of the operator's manual of the chainsaw. They were also the owners of the chainsaw. Multiple warnings were clearly printed in bold font in the operator's manual, so the MCGUIRES should have realized that asking DULBERG to help GAGNON while not following any of the warnings described in parts (b), (c), (d), (e), and (f) involved an unreasonable risk of harm to DULBERG.

The MCGUIRES should have expected that since DULBERG did not have access to the operator's manual he was not aware of the explicit warnings described in parts (b), (c), (d), (e), and (f).

Therefore the MCGUIRES failed to exercise reasonable care toward DULBERG. They had access to knowledge about the warnings clearly stated in the manual that DULBERG did not have. "A duty to warn exists where there is unequal knowledge, actual or constructive, and the defendant, possessed of such knowledge, knows or should know that harm might or could occur if no warning is given." (Pitler, 92 Ill.App.3d at 745, 47 Ill.Dec. 942, 415 N.E.2d 1255, quoting Kirby v. General Paving Co. (1967), 86 Ill.App.2d 453, 457, 229 N.E.2d 777.)

The chainsaw accident was or should have been reasonably foreseeable to a person who read the warnings described in parts (b), (c), (d), (e), and (f) and failed to heed those warnings. Had the MCGUIRES read and followed the warnings and safety rules in the operators manual, the injury to DULBERG could not have occurred.

Also, MAST could have attempted to impose liability on a possessor of land by a negligence claim rather than through Premises Liability.

In this case, under the general negligence theory, all the plaintiff would need to prove is that the defendant negligently created the dangerous condition on its premises. Plaintiff would only need to prove the existence of a duty owed to DULBERG, breach of the duty, and that the breach proximately caused the injuries.

CONCERNING MAST'S LIABILITY

Arguments which support the liability of MAST have already been made in the first amended complaint. However, there were a few important points that were not mentioned yet in the previous complaints and could definitely be of use in the second amended complaint. They are as follows...

MAST told DULBERG at a meeting in which DULBERG was trying to decide whether to accept the MCGUIRE's offer of $5,000 that because the restatement of torts 318 is not applicable in Illinois, DULBERG had no case against the MCGUIRES and that the MCGUIRES did not have to offer any settlement at all. DULBERG asked MAST to cite case law that shows why the MCGUIRES were not at least partially liable for DULBERG'S injury, and MAST cited Tilscher v Spangler, a case which confirms that restatement of torts 318 is not applicable in Illinois. But note the claim of MCGUIRE'S liability given above relies on restatement of torts 343 or a general neglegence claim. It is completely independent of restatement of torts 318.

At the same meeting MAST also informed DULBERG that the MCGUIRES made an offer of $5,000 to be nice (they did not have to offer anything) and if DULBERG did not accept the offer it would be withdrawn and the MCGUIRES will ask for summary judgement. MAST informed DULBERG that the presiding judge would grant the MCGUIRES a summary judgement dismissing the case against them, leaving DULBERG with no settlement at all from the MCGUIRES.

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c) affidavits and other materials did not disclose any dispute as to any material issue of fact in this case

d) the court while strictly construing all things filed in support of the motion and while liberally construing all things filed in opposition thereto would have found the MCGUIRES liable for nothing with respect to DULBERG'S accident and would have granted a motion for summary judgement

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