

## Mississippi Premises Liability: What is Required and What is Recommended?

- I. Introduction
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  - B. Law Practice
    - 1. Shareholder in Copeland Cook Taylor & Bush, P.A.
    - 2. Practicing for 13 years
  - C. Primary Practice Area: Insurance Defense Litigation
    - 1. 80% of practice: defending personal injury lawsuits
    - 2. About two-thirds of that defending stores in slip/trip-and-fall lawsuits
- II. Negligence 101
  - A. Negligence is a “tort”
    - 1. Tort = violation of legal duty (other than breach of contract that causes damages)
    - 2. Tortfeasor = person/entity that commits a tort
  - B. To be liable for Negligence, plaintiff must prove:
    - 1. Duty
    - 2. Breach
    - 3. Causation
    - 4. Damages
  - C. Duty = Act as Reasonably Prudent Person under same or similar circumstances
  - D. Breach = violation of legal Duty
    - 1. Doing something RPP would not do under SSC
    - 2. Failing to do something RPP would do under SSC
  - E. Causation
    - 1. Cause in fact = “but for” act/omission, damages would not have occurred
    - 2. Proximate cause = foreseeable that act/omission would cause damages
  - F. Damages
    - 1. Physical injury, impairment, disfigurement, pain/suffering
    - 2. Mental anguish and emotional distress
    - 3. Medical bills and medication expenses
    - 4. Lost wages and loss of wage-earning capacity
- III. Premises Liability 101
  - A. Type of Negligence Case that Defines:
    - 1. Plaintiff by one of three Statuses
    - 2. Owner’s Duty by Plaintiff’s Status
  - B. Statuses
    - 1. Invitee = person who enters premises at owner’s **invitation** for mutual **advantage**
    - 2. Licensee = person who enters premises at owner’s license or implied **permission** for person’s own convenience, pleasure, or benefit

3. Trespasser = person who enters premises without any invitation or permission
  - C. Benefit to Owner/Operator must be **Economic**
    1. Intangible benefit to landowner is insufficient to make visitor invitee.
    2. Landowner must receive tangible economic advantage.
    3. Customer = Invitee.
    4. Social Guest = Licensee\*
  - F. Status may change
    1. Invitee becomes Licensee or Trespasser if:
      - a. Invitee goes beyond scope or purpose of invitation (i.e., goes into area not included in invitation); or
      - b. Owner lawfully revokes invitation (i.e., asks person to leave)
    2. Social Guest becomes Invitee if guest gives sufficient benefit to owner
      - a. Going to owner's home to give owner ride; or
      - b. Going to owner's home to help owner move, un/pack, cook, clean
  - G. Legal Duty Owed
    1. Duty to Invitee = Exercise Reasonable Care to:
      - a. Keep Premises Reasonably Safe; and
      - b. Warn of dangerous conditions that are not readily apparent, of which owner knows or should know; and
    2. Duty to Licensee and Trespasser = Refrain from willfully or wantonly injuring plaintiff
- IV. Most Premises Liability Claims/Lawsuits:
- A. Involve Invitees
    1. Business invitee
    2. Public invitee
  - B. Are decided based on alleged constructive knowledge
    1. Store employees usually don't cause spills/hazards
    2. Store employees usually don't know about spill/hazard
- V. Invitee Plaintiff's Burden of Proof
- A. Plaintiff must prove:
    1. Dangerous condition existed on premises, AND
    2. Either:
      - a. Premises owner/operator caused/created hazard; or
      - b. Premises owner/operator had actual knowledge that hazard existed before incident and failed to remedy it or warn plaintiff; or
      - c. Hazard existed for sufficient length of time that premises owner is imputed with constructive knowledge of it.
  - B. Who caused dangerous condition?
    1. When dangerous condition caused by owner/operator, no knowledge of its existence need be shown.

2. When dangerous condition is caused by third party, plaintiff must prove owner/operator had actual or constructive knowledge of it

VI. Actual Evidence is Required

- A. No liability just because of incident or injury
  1. Owner/operators are not insurers against all injuries of invitees.
  2. Merely proving that accident occurred is not sufficient to prove liability.
  3. Instead, plaintiff must show that owner/operator was negligent.
- B. No liability if no dangerous condition existed
  1. Owner/operator cannot be found liable if no dangerous condition exists.
  2. The existence of dangerous condition cannot be shown merely because accident occurred.
- C. "Normally encountered dangers" are not hazardous conditions.
  1. Often pathways contain cracks and changes in elevation;
  2. They do not become hazardous conditions simply because they contain these minor imperfections or defects.
  3. Existence of slight variations in walkways does not constitute dangerous condition.
  4. Examples: See Bibliography
- D. Evidence Required to Prove Constructive Knowledge
  1. Show that hazardous condition existed for such length of time prior to fall that owner, through reasonable care, should have discovered it.
  2. Requires admissible evidence of length of time hazard existed.
    - a. Court will not indulge presumptions as to length of time.
    - b. Plaintiff must present specific proof as to actual length of time.
  3. Circumstantial evidence may be used, but it must create legitimate inference that places it beyond conjecture.
- E. Time lapse between last inspection and incident
  1. This does not establish length of time hazard existed.
  2. It is just as likely that hazard formed 1 minute before incident as it is that hazard formed 1 minute after last inspection.

VII. What is owner/operator legally required to do?

- A. Use reasonable care to:
  1. Keep premises reasonably safe, and
  2. Warn of hidden dangers, and
- B. Keeping premises safe includes duty to conduct reasonable inspections to discover dangers
- C. "Reasonable care" does not make owner "absolute insurer"
- D. "Reasonably safe" does not mean "absolutely safe"
  1. Impossible to keep premises "absolutely safe" all the time
  2. Customers and other people can and do cause hazards
- E. Use Common Sense to make premises safe
  1. Place non-slip mats/rugs inside and outside doors at all times

2. Place "Wet Floor" signs just inside doors on rainy days
3. Perform periodic inspections, cleaning, maintenance/repairs of premises
4. Clean/remedy spills/hazards immediately after discovery
5. Place warnings on/around spills/hazards about which owner knows

VIII. What is owner/operator recommended to do?

- A. Adopt policy/procedure/SOPs
  1. Preferably written (handbook/manual)
  2. Tailored to business
- B. But every business should have SOPs for:
  1. Periodic inspections of store
    - a. Areas to be inspected:
      - i. Floors, coolers, HVAC vents,
      - ii. Shelves, fixtures, counters,
      - iii. Doorways, thresholds, entrances, and exits,
      - iv. Sidewalks, curbs, and parking lot
    - b. Look for:
      - i. Spills, leaks
      - ii. Trash, debris
      - iii. Slip/trip hazards
  2. Periodic cleaning of all the above
    - a. Sweep and mop (or vacuum) of floors
    - b. Check cooler temps, dust/clean vents, empty reservoirs
    - c. Remove garbage/debris from floors, curbs, sidewalks, parking lot
  3. Routine and scheduled maintenance/repairs of all the above
    - a. Fix broken tiles, doors, thresholds, railings, curbs, potholes
    - b. Service/repair coolers and HVAC units, ducts, vents
  4. Frequency of inspections, cleaning, maintenance/repairs:
    - a. Once a day, or
    - b. Several times per day, or
    - c. Every hour, or
    - d. Continually = Include language in SOPs about:
      - i. Stocking, fronting, and recovery throughout day
      - ii. Stay on lookout for spills/hazards while working throughout day
    - e. Maintenance/repairs as needed
    - f. Depends on premises
      - i. Type of business/store
      - ii. Volume of invitees
  5. Spill / Hazard Remediation
    - a. If/when discovered/reported:
      - i. Clean spill or remove hazard immediately, or
      - ii. Place warning sign by hazard until can be remedied
    - d. Place bucket under and "Wet Floor" sign by dripping HVAC vent

- i. Until HVAC system can be serviced
    - ii. Periodically empty bucket
  - 6. Accident/Injury Response
    - a. Let MOD handle it
    - b. Do NOT admit fault
    - c. Fill out Incident Report
      - i. Customer's name, address, phone number
      - ii. Date/time of incident
      - iii. Nature of incident (i.e., trip, slip, other)
      - iv. Cause of incident (i.e., liquid or item/debris on floor)
      - v. Type of customer's injuries
      - vi. Whether ambulance was called, refused, came
      - vii. Names and phone numbers of MOD and employees
      - viii. Names and phone numbers of witnesses
    - d. Take photos of spill/hazard
    - e. Save CCTV footage of customer and incident
    - f. Send Incident Report, photos, video to insurance carrier
- D. Train employees on policies/procedures/SOPs
  - 1. Read/acknowledge SOPs
  - 2. Training videos
  - 3. On-the-job training
- E. Ensure employees use/follow/comply with SOPs
  - 1. Require SOP acknowledgement to leave probationary period
  - 2. Include compliance with SOPs in employee evaluations
- F. Use and keep written logs of:
  - 1. Inspections
  - 2. Cleanings
  - 3. Maintenance and repairs
- G. SOPs better be followed
  - 1. SOPs do NOT define owner's legal duty
    - a. SOPs show owner is conscientious about customer safety
    - b. Lack of SOPs is "bad optics"
  - 2. But plaintiff will argue to jury that:
    - a. SOPs have same duty as law, or
    - b. Violation of SOPs is evidence of legal liability
- H. Logs better be completed
  - 1. Keeping log is NOT legally required
    - a. Incomplete log only proves log was not completed
    - b. It does not prove that inspections/cleanings were not done
  - 2. But plaintiff will argue to jury that:
    - a. Incomplete logs prove inspections/cleanings were not done
    - b. Incomplete logs are evidence of legal liability
- I. Logs/Videos better be preserved
  - 1. Law is unclear on intentional/negligent spoliation

- a. Long line of cases required intentional spoliation
- b. But recent cases may allow inference with negligent spoliation
- 2. But plaintiff will argue to jury that:
  - a. Store had affirmative legal duty to have/keep logs/videos
  - b. Lack/loss of logs/video proves defendant's liability
- 3. Spoliation will not win/lose case
  - a. Spoliation alone does not prevent summary judgment
  - b. Spoliation cannot be decided before end of trial

IX. Building Codes

- A. Do they even apply to this store/business/premises?
  - 1. Has City/County adopted Code?
  - 2. Was Code adopted after building was built?
  - 3. Has Premises passed City/County annual inspections?
  - 4. OSHA only applies to employees
- B. Building codes do not define Owner's legal duty
  - 1. Duty = "reasonable care," reasonably safe, and warnings
- C. At best, building code may be analyzed under negligence per se:
  - 1. But at best, violation of building code may be "evidence" of:
    - a. Existence of dangerous condition
    - b. Alleged breach
  - 2. Plaintiff still must prove:
    - a. Violation of building code made premises unsafe, and
    - b. Violation of building code proximately caused incident

X. Summary and Conclusion

- A. Owner must use "Reasonable Care to:
  - 1. Make premises Reasonably Safe, including reasonable inspections
  - 2. Warn of hidden dangers, if owner has knowledge of dangers
- B. Reasonable Care does not mean "absolute insurer"
- C. "Reasonably Safe" does not mean "absolutely safe"
  - 1. Absolute safety is impossible
  - 2. Especially in retail stores
- D. Scope and frequency of inspections are Owner's choice
  - 1. They must be reasonable in scope and frequency
  - 2. Both depend on amount of customers/foot traffic
- E. Adopting SOPs, using Logs, and having Videos are good ideas
  - 1. Only if employees are trained to follow SOPs, use Logs, and preserve videos
  - 2. And only if employees actually follow SOPs, use Logs, and preserve videos
- F. Lack of SOPs, Logs, and Videos is bad
- G. But unfollowed SOPs, incomplete logs, and unpreserved Videos is worse

END.

## Bibliography

Black's Law Dictionary 1717 (10th ed. 2014)  
*Thompson v. Lucas*, 219 So.3d 583 (Miss. Ct. App. 2017)  
*Doe v. Jameson Inn*, 56 So.3d 549 (Miss. 2011).  
*Daulton v. Miller*, 815 So.2d 1237 (Miss. Ct. App. 2001)  
*McCullar v. Boyd Tunica, Inc.*, 50 So.3d 1009 (Miss. Ct. App. 2010)  
*Olier v. Bailey*, 164 So.3d 982 (Miss. 2015)  
*Jones v. Imperial Palace of Miss., LLC*, 147 So.3d 318 (Miss. 2014)  
*Cotton v. Fred's Stores of Tenn., Inc.*, 122 So.3d 140 (Miss. Ct. App. 2013)  
*Almond v. Flying J Gas Co.*, 957 So.2d 437 (Miss. Ct. App. 2007)  
*Rod v. Home Depot USA, Inc.*, 931 So.2d 692 (Miss. Ct. App. 2006)  
*Penton v. Boss Hoggs Catfish Cabin, LLC*, 42 So.3d 1208 (Miss. Ct. App. 2010)  
*Stanley v. Boyd Tunica, Inc.*, 29 So.3d 95 (Miss. Ct. App. 2010)  
*Jones v. Wal-Mart Stores E., LP*, 187 So.3d 1100 (Miss. Ct. App. 2016)  
*Trull v. Magnolia Hill LLC*, 171 So.3d 518 (Miss Ct. App. 2014)  
*Parson v. Go Knightrider LLC*, 282 So.3d 609 (Miss. Ct. App. 2019)  
*Aultman v. Delchamps*, 202 So.2d 922 (Miss.1967)  
*Waller v. Dixieland Food Stores, Inc.*, 492 So.2d 283 (Miss. 1986)  
*Munford, Inc. v. Fleming*, 597 So.2d 1282 (Miss. 1992)  
*Richardson v. Norfolk Southern Ry. Co.*, 923 So.2d 1002 (Miss. 2006)  
*Thomas v. Isle of Capri Casino*, 781 So.2d 125 (Miss. 2001)  
*DeLaughter v. Lawrence Co. Hosp.*, 601 So.2d 818 (Miss. 1992)  
*Grand Casino Biloxi v. Hallmark*, 823 So.2d 1185 (Miss. 2002)  
*Clinton Healthcare, LLC v. Atkinson*, 294 So.3d 66 (Miss. 2019)  
*Walker v. Cellular S. Inc.*, 309 So.3d 16 (Miss. Ct. App. 2020)  
*Burns v. Gray*, 270 So.3d 1084 (Miss. Ct. App. 2018)  
*Benson v. Rather*, 211 So. 3d 748, 754 (Miss. Ct. App. 2016)

## Examples of "Normally Encountered Dangers" that are Not Dangerous Conditions

*Jones v. Wal-Mart Stores E., LP*, 187 So.3d 1100 (Miss. Ct. App. 2016) (4-inch-wide, 4-inch-deep crack in sidewalk)  
*Knight v. Picayune Tire Servs. Inc.*, 78 So.3d 356 (Miss. Ct. App. 2011) ("seam" creating uneven surface in parking lot)  
*Penton v. Boss Hoggs Catfish Cabin, LLC*, 42 So.3d 1208 (Miss. Ct. App. 2010) (uneven concrete pad on walkway)  
*Bond v. City of Long Beach*, 908 So.2d 879 (Miss. Ct. App. 2005) (1-inch height variation on sidewalk)  
*Rowe v. City of Winona*, 159 So.2d 282 (Miss. 1964) (large crack in sidewalk)  
*Chance v. Wal-Mart East L.P.*, 2015 U.S. Dist. LEXIS 9626 (S.D. Miss. July 23, 2015) (1.75-inch-deep indentation in parking lot)  
*Quick v. Strategic Restaurants Acquisition Co.*, 2013 U.S. Dist. LEXIS 44516 (S.D. Miss. Mar. 28, 2013) (1.5-inch-deep, 10-inch diameter pothole in parking lot)  
*Parker v. Wal-Mart Stores Inc.*, 261 F. Appx. 724 (5th Cir. 2008) (3.5-inch-wide, 2-inch-deep crack in curb)

*McCain v. Lehman Bros. Inc.*, 2008 U.S. Dist. LEXIS 31414 (S.D. Miss. Mar. 27, 2008) (“large cracks” and “slight height differential” in sidewalk)

*Mack v. Waffle House Inc.*, 2007 U.S. Dist. LEXIS 29078 (S.D. Miss. Apr. 18, 2007) (2-inch-wide, 4.75-inch-long, 0.75-inch-deep crack in sidewalk)

*Trull v. Magnolia Hill LLC*, 171 So.3d 518 (Miss Ct. App. 2014) (0.25-inch-high and 1.5-inch-wide threshold)

*McGovern v. Scarborough*, 566 So.2d 1225 (Miss. 1990) (2-inch-high threshold)

*Benson v. Rather*, 211 So. 3d 748 (Miss. Ct. App. 2016) (2.5-inch-high threshold)

*Dickinson v. Vanderburg*, 141 So.3d 455 (Miss. Ct. App. 2014) (2-inch-high threshold)

*Kidd v. McRae’s Stores P’ship*, 951 So.2d 622 (Miss. Ct. App. 2007) (jury found 1/16-inch height difference between two tiles)

*Beasley v. Wal-Mart Stores, Inc.*, 2012 U.S. Dist. LEXIS 49291 (N.D. Miss. Apr. 9, 2012) (1-inch-wide crack in grout between two tiles)

END.