

RAWLE'S REPORTS

THE NATION'S OLDEST LAW OFFICE

RAWLE &
HENDERSON LLP



The Nation's Oldest Law Office
~Established in 1783~

www.rawle.com

Philadelphia, PA
215. 575. 4200
Fax 215. 563. 2583

New York City, NY
212. 323. 7070
Fax 212. 323. 7099

Long Island, NY
516. 294. 2001
Fax 516. 294. 2006

Marlton, NJ
856. 596. 4800
Fax 856. 596. 6164

Pittsburgh, PA
412. 261. 5700
Fax 412. 261. 5710

Harrisburg, PA
717. 234. 7700
Fax 717. 234. 7710

Wilmington, DE
302. 778. 1200
Fax 302. 778. 1400

Wheeling, WV
304. 232. 1203
Fax 304. 232. 1205

 @1783Rawle

NEW YORK

PERSONAL INJURY

Summary Judgment in Snow & Ice Cases



Sylvia E. Lee

The Orange County New York Supreme Court recently granted summary judgment on two separate matters dismissing the plaintiffs' personal injury claims in favor of Rawle & Henderson LLP's client, the snow removal contractor.



Robert A. Fitch

In the first case, plaintiff claimed he was injured when he slipped and fell on ice on the walkway in front of his unit in a condominium complex on December 19, 2013. Plaintiff brought this action against the snow removal contractor, the property management company, and the condominium association. In addition, the property manager and the condominium association cross claimed against the snow removal contractor for contribution.

We moved for summary judgment dismissing the complaint as well as the cross claims. To meet our burden and demonstrate *prima facie* entitlement to summary judgment, we argued that our client did not create the hazardous condition and did not have actual or constructive notice of its existence. Further, we argued that plaintiff's claim must be dismissed because our client's limited contractual obligations to provide snow removal services did not create a duty of care to plaintiff—a nonparty to the snow removal contract.

In rendering its decision, the Court applied the New York Court of Appeals applicable standard established in *Espinal v. Melville Snow Contrs.*, N.Y.2d 136 (2002). In *Espinal*, the Court of Appeals affirmed the general rule that a snow removal contract does not render the contractor liable in tort for injuries sustained by third parties. However, the Court of Appeals also identified three exceptions to this general rule: 1) where the defendant launches a force or instrument of harm, 2) where the plaintiff detrimentally relies on the performance of the contracting party's duties and 3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.

In granting summary judgment in favor of our client, the defendant snow removal contractor, the Court found that plaintiff failed to allege facts in his complaint or his bill of particulars

that would require us to affirmatively negate the *Espinal* exceptions. As a result, we demonstrated our *prima facie* entitlement to judgment as a matter of law by showing that plaintiff was not a party to the snow removal contract. In granting summary judgment as to the cross claims, the Court found no basis for any independent duty running from our client to the property manager or condominium association above the limited contractual obligations set forth in the snow removal contract. The Court found our client had satisfactorily performed these duties and that the ice that caused plaintiff's fall was the result of snow melting from the roof of the condominium and refreezing on the ground due faulty drainage gutters.

In the second case, plaintiff alleged she slipped and fell on outdoor stairs located within her apartment complex on November 26, 2013. Plaintiff brought a lawsuit against the owner/operator of the apartment complex, as well as the snow removal contractor, alleging that the defendants were negligent in allowing a hazardous condition to exist on the premises and that they had actual and/or constructive notice of the same. The owner/operator cross claimed for indemnification, but did not submit any opposition to our motion for summary judgment.

We moved for summary judgment arguing that our client had a limited contractual obligation to perform snow clearing services. Further, plaintiff was not a party to the contract and thus the agreement did not give rise to a duty of care running from our client to plaintiff. Plaintiff countered by pointing to defendant voluntarily spreading sand on the date of the accident. In reply, we reasserted our position that defendant owed no duty to plaintiff. In addition, we asserted that our client's spreading of sand on November 26 was voluntary and that contractual obligation for remediation of snow and ice did not start until December 1.

In granting summary judgment in favor of our client the snow removal contractor, the Court found we satisfied our burden and demonstrated a *prima facie* entitlement to judgment by proving that plaintiff was not a party to the snow removal contract. Moreover, the Court found that we negated the possible applicability of all three *Espinal* exceptions, though we were not required to do so due to plaintiff's failure to allege facts in her complaint and bill of particulars that would trigger these exceptions. The burden shifted to plaintiff to present evidence sufficient to raise a triable issue of fact, but she failed to show *Espinal's* applicability. The Court dismissed the owner/operator's cross claim for indemnification on the theory that defendant did not completely displace the owner/operator's duty of care to main the premises in a safe condition.

Robert A. Fitch, the resident partner in our New York City office, and **Sylvia E. Lee**, an associate, handled these cases. **Robert F. Fanning**, a law clerk, assisted in the preparation of this article.

Robert A. Fitch concentrates his practice on the defense of architects and engineers, construction, medical and oral surgery malpractice claims, and commercial motor vehicle litigation. He received his undergraduate degree from Syracuse University and his J.D. from Syracuse University College of Law. He is admitted to practice in New York since 1974, as well as in Federal Courts in Southern, Eastern and Northern Districts of New York and the Second Circuit Court of Appeals. Bob has tried over 100 cases to verdict and is a member of the Defense Research Institute, Federal Bar Council, PIAA and Trucking Industry Defense Association. Bob was named a **New York Metro Super Lawyer** in 2013, 2014, 2015, 2016 and 2017 by the publishers of *Law & Politics*. He has a peer review rating by Martindale-Hubbell of AV (the highest).

Bob can be reached directly at: (212) 323-7060 • rfitch@rawle.com

Sylvia E. Lee is an associate in the New York City office of Rawle & Henderson LLP. She concentrates her practice in the defense of medical and dental professionals, hospitals, nursing homes, product liability, premises liability, toxic tort including asbestos litigation, auto liability, and commercial litigation. In addition, Sylvia has an extensive appellate law practice. Sylvia graduated with a B.S. degree from the State University of New York at Stony Brook. She then attended New York Law School and earned her Juris Doctorate degree. She is admitted to practice in New York and New Jersey, as well as the U.S. District Courts for the Eastern District of New York and the U.S. District of New Jersey.

Sylvia can be reached directly at: (212) 323-7081 • slee@rawle.com

PITTSBURGH PARTNER

Rawle & Henderson LLP is pleased to announce that **William T. “Will” Polaski** has joined our Pittsburgh office. He concentrates his law practice in the areas of product liability, commercial litigation, insurance coverage, and environmental, mass and toxic torts.

Will earned his J.D. from the University of Southern California Law School in 1999 and his B.A. in Journalism and Mass Communication, *cum laude*, from Washington and Lee University in 1996.

Will has practiced law for 18 years and has a strong litigation practice. He served as First Chair trial leader in a multi-million dollar commercial defense litigation case and as head negotiator in an oil and gas drilling mediation and contract dispute. He is skilled in complex, multi-state case management for Fortune 500 companies, including analysis of document retention policies and corporate practices and procedures.

Will has represented national and international manufacturers and suppliers in complex product liability and toxic tort litigation involving pharmaceutical and chemical products. He has represented a major public authority with respect to federal compliance issues.

Will is admitted to practice in Pennsylvania and Ohio, as well as the U.S. District Court for the Western District of Pennsylvania and the U.S. Supreme Court. He volunteers pro bono services for the Allegheny County Custody Conciliation Project, which provides legal assistance to low-income individuals and families.

Will can be reached directly at: (412) 261-5703 • wpolaski@rawle.com



Will Polaski

PRODUCT LIABILITY ADVISORY COUNCIL

David Ira Rosenbaum, a partner in our Philadelphia office, served as the co-chair and co-emcee at the **Spring 2017 Conference of the Product Liability Advisory Council** with Kelli J. Stallard, a partner with the Australian law firm of DibbsBarker in April in Las Vegas, Nevada. David is a member of the Product Liability Advisory Council (“PLAC”), a non-profit association of American and international product manufacturers who analyze and improve product liability law. The Council is composed of more than 90 leading product manufacturers and several hundred of the most elite product liability defense counsel both in the U.S. and abroad.

David has an active product liability defense practice. Throughout his career, he has defended product liability lawsuits for manufacturers of a wide variety of industrial and consumer products. David also regularly works with in-house attorneys, engineers and warranty personnel to formulate product recall notices and services bulletins and to conduct post-sale campaigns to minimize the risk of product-related injuries. In addition, David has extensive experience in commercial litigation and transactional matters. He graduated *cum laude* from Temple University School of Law and earned an A.B. in Political Economy from Vassar College. He is admitted to practice in Pennsylvania and New Jersey, as well as the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania, the District of New Jersey, the Third Circuit Court of Appeals and the U.S. Supreme Court. He has been rated AV Preeminent by Martindale-Hubbell in 2017 for the 17th consecutive year.



David can be reached directly at (215) 575-4378 • drosenbaum@rawle.com

SUPPORT CENTER FOR CHILD ADVOCATES

John T. Donovan was honored as a **Distinguished Advocate for the Philadelphia Support Center for Child Advocates** in April 2017 at the Support Center's Annual Benefit Reception & Auction. The event was held at the Crystal Tea Room in the Wanamaker Building in Philadelphia.



John T. Donovan

John is the chair of **Rawle & Henderson's Child Advocacy Practice Group**, which was formed in 2013 to improve the firm's service to the Support Center. Rawle & Henderson has assisted the Support Center since the program's inception in 1977 as an advocate for victims of child abuse and neglect in the city. John also captains Rawle & Henderson's team in the annual Philadelphia Bar Association 5K to benefit the Support Center.

John is a partner in our Philadelphia office. He concentrates his practice on premises liability, product liability, catastrophic injury, toxic tort and construction law matters. He graduated, *cum laude*, in 1989 from Lafayette College and received a law degree in 1992 from the University of Pittsburgh, where he was elected class vice president. He is admitted to practice in the federal and state courts of Pennsylvania and New Jersey and the Third Circuit Court of Appeals. He has tried dozens of cases to verdict in both Pennsylvania and New Jersey. He has been designated Liability Catastrophic Injury Counsel (LCIC) for a major international insurance carrier for both Pennsylvania and New Jersey.

John has written about the spoliation of evidence defense for the *Product Law and Liability Journal* and spoken on various topics for the Pennsylvania Bar Institute. He is a member of the Pennsylvania Defense Institute and in 1998 he was appointed by then Governor Thomas Ridge to serve as an ambassador on behalf of Team Pennsylvania to encourage growth and development of business in the Commonwealth. In 2002 he was voted by his peers as one of the top forty attorneys in the Commonwealth under the age of forty. He has been selected as a **Pennsylvania Super Lawyer** from 2010 through 2017. He was the Recipient of the Philadelphia Court of Common Pleas First Judicial District's Roll of Honor award from the First Judicial District's Pro Bono Committee for his pro bono service in Philadelphia's legal community during 2006, 2007, 2013 and 2014.

In the past he taught at Villanova University School of Law and Rutgers School of Law as an adjunct faculty member on trial and pretrial issues. He initiated the program at Temple University School of Law, where he continues as an adjunct faculty member.

John can be reached directly at: (215) 575-4254 • jdonovan@rawle.com

RAWLE'S REPORTS is a monthly publication of Rawle & Henderson LLP. Previous issues are available on our website. If you would like **hard copies** of past issues, please email your request to info@rawle.com.