Praise for *Premises Liability*

"Michael Neff's book is full of important information for those of us who desire to achieve excellence in premises liability cases. As we say in Alabama, Michael 'puts the hay down where the goats can get to it!' Read this book and enjoy learning from one of the best!"

—Gregory Cusimano, recipient of AAJ's Lifetime Achievement Award and the Leonard M. Ring Champion of Justice Award

"This book is the road map to all premises liability cases. Michael identifies the case critical documents, operational policies, and rules that lay out the core of any premises case. Using Michael's technique, you can use the defendant to prove your case in a single 30(b)(6) deposition."

—Mark Kosieradzki, author of *30(b)(6): Deposing Corporations, Organizations, and the Government*

"If you represent people with personal injury claims, you're probably going to talk to people who have premises liability cases. Over my career, I've talked to hundreds of people with premises liability claims without great results. After reading Mike's book, I know the problem was me. Mike covers every aspect of making a successful premises liability claim, from the initial screening of a claim to selecting experts, conducting discovery, case evaluation, and trial. You'll never approach a premises case the same again—Mike's insights will make a difference."

—Phillip Miller, coauthor of *Advanced Depositions Strategy and Practice*

"This book is laid out in a way that makes it easy to read and reference. As busy practitioners, it seems as though the days of reading an entire book are behind us. This publication makes it simple to determine what information you need and where to find it. I learned quite a lot from this, and I actually thought I already understood premises liability. Turned out I was wrong!"

—Dorothy Clay Sims, author of *Deposing Deceptive Defense Doctors*, Sims has spoken and published internationally on cross-examinations and is the only lawyer in the nation who limits her practice to cross-examining doctors for other attorneys

"Expert witnesses are essential to success in the courtroom. Yet few resources are available to teach advocates how to work with scientific experts. In this excellent book, Michael Neff shows attorneys how to effectively work with experts from start to finish. Attorney Neff has achieved tremendous success through his effective and creative use of expert witnesses—readers of this book will learn to do the same."

—Francis X. Shen, associate professor and McKnight Presidential Fellow at the University of Minnesota Law School

"As the current chair of AAJ's Police Misconduct Litigation Group and past chair of the Traumatic Litigation Group, I am very familiar with the requirement of having a basis in knowledge of a broad spectrum of practice areas, as there exists crossover in almost everything we do on a daily basis to serve justice to our clients. Mike's book perfectly fills that requirement as it effortlessly guides the practitioner through the essentials of proving liability in what are inherently difficult cases to prove. Without knowing what Mike Neff outlines in his book on premises liability a practicing attorney never even gets to present the damages that will restore the hole in a victim's life."

—Anthony Romanucci, chair of the AAJ's Police Misconduct Litigation Group and past chair of the AAJ's Traumatic Litigation Group

"Mike Neff's *Premises Liability* is a master-work for successfully navigating this challenging area of the law. It is destined to become the go-to manual for real trial lawyers in search of fresh ideas and a brilliant perspective on old ones. You would be wise to read it—and read it again!"

—Adam Malone, past president of the Southern Trial Lawyers Association and past president of the Melvin M. Belli Society

Premises Liability

A Guide to Success

Michael Neff

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Every book dedication that I've ever read or skimmed over has struck me as schmaltzy or overly emotional.

Then I wrote a book. Writing a book is probably as close to childbirth as a man could understand (or survive). Open the emotional floodgates! I hope I don't get post publication depression.

Trying large cases successfully requires a good team. Writing a book is similarly a team process. There are many behind-the-scenes decisions and issues to confront. I had no idea it was this intricate. A huge thank you to the Trial Guides team for shepherding the process.

Yes, I also need to say thank you to family and friends. In the book, I touch on the importance of finding someone to love, finding someone who has your back, and finding someone's back that you can protect. If you have that, it adds a big sense of purpose to life.

This book is especially dedicated to lawyers who want to get better. Once upon a time, I was a new lawyer desperately hoping to figure out what I was doing. Even as an experienced lawyer, I want to be better. Having an experienced lawyer share their thoughts allows other lawyers to extrapolate those thoughts into what they would do in those situations. I found that helped me get better. I hope it helps you make sense of where you are and where you want to go.

—Michael Neff

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Publisher's Note

This book is intended for practicing attorneys. It does not offer legal advice or take the place of consultation with an attorney who has appropriate expertise and experience.

Attorneys are strongly cautioned to evaluate information, ideas, and opinions set forth in this book in light of their own research, experience, and judgment. Readers should also consult applicable rules, regulations, procedures, cases, and statutes (including those issued after the publication date of this book), and make independent decisions about whether and how to apply such information, ideas, and opinions for particular cases.

Quotations from cases, pleadings, discovery, and other sources are for illustrative purposes only and may not be suitable for use in litigation in any particular case.

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Introduction

Why Buy This Book?

"Big Verdicts!" "Huge Settlements!" Those statements sure look good, and are more exciting to pitch than "Be the best professional you can be!" or "Do your best work!" Most everyone has seen ads for lawyers who promise big things. I have been fortunate to be lead counsel in some thrilling and professionally rewarding premises liability verdicts. I'll introduce them here because they have influenced my methodology and it is nice to have positive reinforcement when assessing whether you are performing the best you can. Yet keep in mind that following a process—even a good one—doesn't ensure that the jury will bring you a verdict you'll treasure.

The first trial involved Monitronics,[1] a home security monitoring company. Horrifically, a woman was kidnapped and later raped by an intruder who had been in her home for eight hours before she came home. Yet the security company failed to advise her that the alarm had gone off eight times. On November 11, 2011, a DeKalb County, Georgia, jury returned a $9 million verdict against Monitronics.

Before leaving the courtroom, each juror stopped to hug her. It was the most poignant gesture I'd ever witnessed in my professional career. Two years later, the Georgia Supreme Court denied *certiorari*, and the judgment (plus interest) was paid in full. Our research reflects that the verdict was a record for a rape case in Georgia.

1 *Monitronics Intern., Inc. v. Veasley*, 323 Ga. App. 126, 746 S.E.2d 793 (2013).

The second trial involved Kroger,[2] a national supermarket chain. A young mother slipped and fell in a puddle inside the store and sprained her wrist. That injury evolved into complex regional pain syndrome (CRPS). Her medical bills at the time of trial were under $15,000. On August 10, 2012, a Gwinnett County, Georgia, jury returned a $2.79 million verdict against Kroger. The result, I think, was more impressive than the Monitronics verdict. The jury respectfully recognized that for the rest of her life our client would live in constant pain. The Georgia Supreme Court denied *certiorari*, and the judgment (plus interest) was paid in full. Our research reflects that this was the largest Georgia verdict for a fall in a supermarket.

The third case involved Six Flags[3]—which holds itself out as the largest regional theme park in the United States. On July 3, 2007, a nineteen-year-old customer was beaten into a coma by off-duty, seasonal Six Flags employees. On November 20, 2013, a Cobb County, Georgia, jury returned a verdict of $35 million—with Six Flags being held 92 percent responsible. Our research reflects that this was the largest premises liability verdict in Georgia history. The Georgia Supreme Court heard oral argument in February, 2017, and issued a decision June 5, 2017, that reinstated the verdict. After ten years, the case has now resolved.

The goal of this book is to share with you some of the approaches we used in developing those cases. Many of my tactics and philosophies were gleaned from or influenced by reading work from excellent lawyers and teachers like David Ball, Rick Friedman, Pat Malone, William Barton, and Carl Bettinger. I've

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2 *Kroger Co. v. Schoenhoff*, 324 Ga. App. 619, 620, 751 S.E.2d 438, 440 (2013), *cert. denied* 2014.

3 *Six Flags Over Georgia II, L.P. v. Martin,* 335 Ga. App. 350, 780 S.E.2d 796 (2015), *reconsideration denied* (Dec. 16, 2015), *cert. granted* (Sept. 6, 2016), *aff'd in part*, *rev'd in part*, 301 Ga. 323, 801 S.E.2d 24 (2017), and vacated sub nom. *Six Flags Over Georgia II, LP v. Martin*, No. A15A0828, 2017 WL 4545713 (Ga. Ct. App. Oct. 12, 2017)

been influenced by what I've read and heard. I've tried things that other great lawyers have suggested. Their work helped me do the work that I did on these cases, as well as the cases I work on today.

I am a better lawyer because these lawyers were willing to share their thoughts and ideas with me. I wouldn't have achieved the success that I have without the help of people along the way. I hope the techniques and insights I share in this book help you become a better lawyer too. I believe you will learn from some of our efforts to implement the ideas of other lawyers. If you get a chance to see a jury hug your client, you will cherish that moment for the rest of your life. You will have helped create that moment. Whenever you have a bad day professionally, you can retrieve that memory and remember you are doing something right.

Where I Started

All good stories should have a beginning, middle, and end. My name is Michael Lawson Neff. My middle name is Lawson because I am the son of two lawyers. My parents practiced law together in a medium-sized town in New Jersey, until their divorce. So I grew up around the law. I heard about motions practice during dinner. I spent time in my parents' conference room doing homework after school.

The law, however, wasn't that exciting to me. As I grew up, I was sure I would do something more "exciting," like be a stockbroker. In college, I was a finance major because I wanted to be the next Bud Fox from the movie *Wall Street*. (In hindsight, I guess Oliver Stone's message went way over my head.) However, October 19, 1987, "Black Monday," changed my mind.

I was a sophomore in college, and the stock market dropped 22.6 percent in one day. I owned a few shares in two companies, and I called my stockbroker. He sounded ready to jump out a

window. I suggested that if the stock I bought two weeks ago was down 25 percent, it might be a good idea to buy more. He didn't think that was a good idea. He was emotionally overwhelmed by the situation. Two weeks later, the stock was back to my purchase price. I lost an opportunity, but I learned something: during high-pressure situations, it helps to take a big-picture view of a problem.

Within a few weeks, I soured on the idea of being a stockbroker. I didn't want to be held hostage in a career where my success would depend on whether other people panicked or made bad choices while under pressure. So I decided I'd be a lawyer. In hindsight, that was very naive. As trial lawyers, our careers frequently surf a tidal wave of emotions. We are expected to perform with grace under pressure. In the courtroom, poise can be far more important than intelligence or any legal skill.

The Journey Begins

My choice to pursue law was only the first of many steps in becoming a trial attorney. I started law school by focusing on real estate and property law. I had the idea that I'd be a real estate developer like Donald Trump (my views have evolved a bit since then).

Then I got bit by the torts bug. While it took me a while to recognize my passion, it took my torts professor only two weeks. By the second week of class, my professor began saying, "So let's hear from the plaintiff's side. Mr. Neff, what do you think?" Without being conscious of it, every time I took a position in class, it was for the plaintiff. But that's not surprising; my allegiance has always been with the underdog. Seeing the little guy overcome superior forces has always been exciting to me. Who loves rooting for Goliath? Maybe stockbrokers?

After law school I worked for law firms that did family law, real estate, and business litigation. During that time, I was given an opportunity to spearhead a Fair Labor Standards Act case on behalf of an employee. We filed suit against a publicly traded company for unpaid overtime. I remember my initial research to draft the complaint involved reading a government-published pamphlet about the Fair Labor Standard Act. We settled the case favorably after depositions. From there, I began working on a few personal injury cases.

Then, in 1996, I opened my own law practice. Over time, I developed a romantic vision of representing real people. I thought I could fight and slay evil dragons while representing important ideals. However, I went through some very tough times where I felt more like Don Quixote. I was fighting windmills rather than dragons. Even worse, the windmills were kicking my ass.

But that tough road early on was not without its benefits. I learned how to work hard and channel my creativity. And, with a lot of help, support, and encouragement, I developed resiliency and I improved.

Fast-forward seventeen years and I've been privileged, in the last three years alone, to be lead counsel in three record-setting plaintiff's verdicts. Each case involved issues of premises liability—cases that are known to be difficult for a host of different reasons, including juror preconceptions. As happens with any success, lots of folks have asked me for advice. I've heard questions like, "What was the tipping point, what was the thing that made you so dangerous in the courtroom?"

I've always thought about professional success in the same way I do personal success. It's organic, and it arises out of a collision of many different factors, including hard work and creativity.

Let's Talk about Magic

The questions from my colleagues about *the* single key to success are grounded in a misconception. We all suffer from it. It's the misconception that great results come from one hidden technique, a specific practice, or even a single turn of phrase. But that's typically not reality—particularly for a trial attorney.

There is no one magic bullet. In fact, I hate to break it to you, but magic doesn't exist at all. It's an illusion. However, magic bullets can be an easy way to talk about effective strategies. In that sense, there are a lot of magic bullets. If you add just one of them, you may stand out. If you add multiple magic bullets and you combine them with the right case and the right client, you have the potential to be a part of something very special—justice.

The views in this book are heavily influenced by my experiences—I've reflected on them in order to convey fundamental elements that can help make you successful. I understand your goal isn't, "I need to learn more about Mike Neff." Your goal is, "What can I learn *from* Mike Neff?" I've included topics that are battle proven for me.

What Is Your Case's Theme?

Think of a case you're working on now or maybe one that's recently come across your desk. Can you tell me your theme in one sentence? As a younger lawyer, I used to hate when more experienced lawyers would ask me that question, because I really didn't understand what they meant.

To find the theme, keep asking yourself, "Why should a juror care about this case?" The theme is not "my client broke her leg and needs money." What is universal about the case? Let's say a client broke her leg stepping in a pothole at a shopping center.

Assume the shopping center knew the hole was there for months and admits it should have been fixed because it is a hazard. It is one thing to defer building maintenance to stretch the budget. It is quite another thing to defer maintenance when the problem is a safety risk.

"Property manager rolls the dice with a known hazard" might encapsulate the issue. The theme in this case is the property manager's choice to save money in exchange for exposing people to the risk of harm. It addresses something universal about this client's story. It transcends this case to connect the jurors to the client. It moves you and, with hope, moves your audience.

When people ask me to talk about how I construct my cases, I tell them that I always look for universal themes. I drive my cases with them, and I do my best never to lose sight of the big picture.

Jurors frequently resist when you try to force their focus to what you want them to think. Instead, look for and show the jurors things you expect they'll want to see. Let the jury form their own conclusions. Themes are mile markers in your case's GPS. They can help you track where you need to go.

When I was younger, I might have gone looking for a theme during discovery. Now, I visualize a theme before discovery and use it as a guide for conducting discovery. Look for things about the case that would cause your nonlawyer friends to say, "No way! That really happened?"

If you find that "No way!" moment, you've found an event that leads to a theme. You can connect with that theme (and the jury) by being a real, accessible person rather than lawyer-man or lawyer-woman. I wish I had known that as a younger lawyer. Bring your real-world experience into the courtroom. Use it to shape the way you take a deposition and create your trial presentation.

Keep Learning along the Way

The practice of law (and life) is a continuous journey. In the movie *The Matrix*, Neo is able to learn by downloading information from a computer to his brain. After a short download time, he is expert in martial arts without practicing. That is a sexy concept. Unfortunately, it is science fiction. In the real world, mastery of most any skill requires many years and much practice before a person is considered an expert. Even "expert" trial lawyers need to keep practicing and keep learning. The law is voluminous, and the skills in persuasion are sometimes subtle.

You could disagree with everything I suggest, but if reading my experiences gives you an opportunity to build a better mousetrap, then you are better for having made the trip. (P.S. Please send me your better mousetrap ideas. I'd like to be a better lawyer too.) If you modify just one thing I do and it makes you a better lawyer, this book will be worth ten or even one hundred times the price.

I hope my number one goal is the same as your number one goal—we want to persuade jurors that our clients are entitled to a just verdict. Sometimes our audience is an insurance adjuster rather than a jury. Sometimes we need to persuade her that this case needs to be settled.

In pursuing the goal of persuasion, I consider this: What skills do I need? What traits are important? What are the things in this case that real people will care about? How can I help these jurors see the case from my perspective? If you can answer these questions, you'll be a better lawyer. This book explains how I've found answers to these questions and how I've applied those answers in the courtroom to the benefit of my clients.

My journey from sitting in my parents' conference room as a kid, through law school, and into private practice has been a long one. I've learned a lot. But acquiring knowledge is not cheap. It takes sizeable investments in time, money, and emotion. When I

sometimes complain about how much it costs to get a case ready for trial, my very practical and very intelligent industrial engineer wife will remind me of this: "You have a way of preparation that works for you. When you follow it, you are generally successful. When you didn't follow it [before my approach evolved to where it is], you weren't as successful. Why would you change your approach?" To paraphrase James Carville to Bill Clinton, "It's the process, stupid."[4] It's tough to argue with that logic.

With that, we are going to start the process at the beginning—with the decision to accept the case. From there, we will go about building a case from the ground up through interviewing witnesses, finding Rules of the Road™-type industry standards,[5] selecting expert witnesses, deposing the defense witnesses, surviving dispositive motions, and resolving the case. We will end by addressing settlement and trial. It is my hope that you'll find things to add to your plan and expand on these ideas as you learn more.

4 Jerry Jasinowski, "It's the Economy, Stupid" *The Huffington Post* November 05, 2016.

5 *See* Rick Friedman and Patrick Malone, *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability*, 2nd ed. (Portland, OR: Trial Guides, 2012).

1

Starting Off Right

Case Intake, Selection, and Early Preparation

Your premises liability experience cannot start until you accept a client's case. To me, taking a case is like getting married. The rubber meets the road when you say, "I do." As much as you can talk or read about getting married, taking the vows means that you're serious and you're committed. And, as in so many other experiences, you learn as you go forward.

This chapter addresses what to look for in making a commitment to a premises liability case. There are universal issues—both from a damages perspective and in terms of liability hurdles—that trial lawyers should consider. First, in taking a premises case, the damages should meet a well-considered threshold, which will adequately compensate the lawyers for their time, the expenses they invested, and the risks associated with taking a premises liability case.

As is the case when choosing an investment portfolio, a person's risk tolerance will vary. Premises liability cases are not like

car wrecks. They involve more risks. So some self-assessment is needed before taking the plunge. You need to consider and address liability risks before you start.

Our Firm's Case Selection Evaluation

Gerry Spence advocates a voir dire approach that mirrors "I'll show you mine if you show me yours." That means he will reveal something about himself before he asks the panel to reveal something about themselves. He'll lead the way. He'll show the jury that he understands that it is not easy to reveal things about themselves in a strange forum. He'll say, "But that is what we need to do. I'm no better than you are, so I'll go first."

When my law firm takes a case, we are committed to trying it. I realize that lawyers with new firms have to budget in settlements in order to keep the lights on. However, if you adopt my approach that every case you take needs to be tried, it crystallizes your view of the world.

You likely already know that a commitment to trial is a significant investment of time and money. That commitment, however, is even more important in a premises case, where you have to minimize the risks associated with these sometimes long and expensive cases.

Our firm obtains the majority of its cases from referring lawyers. Thus, we have to focus on the total case value, the value of the attorneys' fees pot, and the value of our firm's share of the attorneys' fees. In addition, our firm typically fronts all of the litigation expenses. As a rule of thumb, we project the expenses in a premises liability case as 10 percent of the case value.

For our firm to consider a premises liability case, we feel the attorneys' fees have to be worth six figures. For me, due to the

amount of time I need to devote to premises liability cases, I typically want the case value to approach seven figures. Some may consider those to be ridiculously high standards. However, unlike car wreck cases, significant premises liability cases rarely settle prelitigation or early in litigation. Corporation and insurance company biases are inherent in evaluating liability cases. The blame-the-victim mindset is established and powerfully entrenched.

A $500,000 litigated case can easily cost $50,000 to thoroughly litigate (experts for both parties, video depositions, and so on). A $1 million case can easily cost $100,000 to try (experts and doctors appearing live at trial, focus groups, and so on).

Some Words of Caution

When I was a young lawyer, I was eager to represent clients and get courtroom experience. So, I took every car wreck case I could. Some of them had dreadful damages. Some of them had questionable liability. Some of them had both.

Of course, as a rookie, I had no frame of reference for screening my cases. As a result, I learned a lot of lessons the hard way. For beginning lawyers, this may not matter. You need to try cases to get experience, and as long as you are abiding by ethical rules and diligently representing your clients, you shouldn't be afraid of gaining that experience in car wreck cases.

But, as you'll see below, this is *not* the model I suggest for premises cases. If you need trial experience, get that by trying car wreck cases. Car wreck cases are an easier road for a new lawyer to travel because almost everyone understands what it means for drivers to follow the rules of the road. After all, we needed to learn those rules to get our drivers' licenses. Also, almost everyone understands the clear and present danger if a driver does not

follow the rules. People can get hurt and killed. We've all seen, read, or heard about deadly car wrecks.

I do not recommend that you acquire your early trial experience by trying premises liability cases, unless you have an experienced mentor to guide you through the process. From a liability perspective, trying a premises liability case is almost the inverse of trying a car wreck case. Almost no one understands the rules of the road for a premises liability case (this is why everyone should read Pat Malone and Rick Friedman's *Rules of the Road*,[1] which I discuss in more detail in chapter 4). People don't understand that slips and trips have been studied for decades and that simple-to-follow rules exist to prevent them. We will get into some of those rules later in this book.

A beginning lawyer has a lot on her plate. She's nervous. She has to remember many rules that require precision, like laying a foundation for the admissibility of evidence. Some require quick decisions on whether to object. It takes time to master those rules. It takes time to develop poise standing in front of a jury. Much of trial work is based in psychology. Much of the psychology comes down to taming your own fears and emotions.

While I'm not one to shrink from a challenge, young lawyers have enough on their plates in their first five to ten civil trials. A criminal lawyer should handle misdemeanors before handling felonies—no one believes a lawyer's first trial should be a murder defense.

I believe no one's first civil trial should be a premises liability trial. The risk is enormous for your clients, who may have a serious, permanent injury. And the risk is serious for you professionally and financially. You can expect to spend five to six figures on a premises case that goes to trial.

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1 Friedman and Malone, *Rules of the Road: A Plaintiff Lawyer's Guide to Proving Liability*, 2nd ed. (Portland, OR: Trial Guides, 2012).

Help Wanted: Experienced Trial Counsel

Sometimes the volume-practice guy gets together with the max-value guy, and they work to get the best possible result for the client. When to associate counsel can be a sensitive topic. As a young solo-practitioner lawyer, I often heard speakers at CLE seminars address the issue of associating counsel. I'd sit in the audience and think, "Oh look at this guy trolling for cases. The reason I am here is so that I can learn how to handle cases myself. I'm smart. I can figure this out. I don't need to give away most of the fee to someone else."

After a few years of learning things the (very) hard way, I reassessed my thinking and started associating more experienced counsel on my significant cases. I then accompanied them to depositions and trial. I watched and asked questions. I realized that more experienced lawyers were getting higher settlements because they knew how to play the game (and had a track record of success). I then applied all the lessons I learned from these larger cases to smaller and medium-sized cases I could appropriately handle myself. A series of win-win outcomes followed. The clients obtained better results. I learned things I couldn't learn from a book or a CLE, and I got to ask questions that deepened my understanding. I don't think I lost any money, and I became a better lawyer. Associating more experienced counsel expedited my learning curve. In hindsight, I wish I had just started out associating experienced counsel. If you are working solo, consider it your internship or associate position—most young lawyers are paid to do grunt legal work while they learn how to handle more responsibility or significant and profitable work.

You might have had success in auto cases. You may have been retained on a significant case and think you are a smart guy or gal. A brain injury is a brain injury, right? CRPS is still CRPS. A three-level fusion is a three-level fusion. Right?

You don't want to practice on a high six- or seven-figure case. There are too many pitfalls. Learn your state's premises liability law, learn how to play the liability game, and apply these lessons on low six-figure cases until you get solid feet beneath you. There's no better way to learn than by watching someone who has done it before and later asking them, "Why did you ask this question? What prompted that line of questioning? What were your considerations when you planned that order of evidence?" Plus, you may be able to network with your co-counsel, who might send you cases that don't meet her damages or liability threshold.

Here are some questions you might consider when evaluating retaining trial counsel (frequently this information is available on websites or by local reputation):

- What are some of your successful verdicts?
  - » What were the issues?
  - » What was the damages level?
- What premises cases have you tried or are you looking to try?
- What damages level do you want to see before you will come in as lead counsel?
- What do you think this case could be worth?
- How would you work it up?
- How much would you estimate the litigation expenses to be?

Not Everyone Loves a Premises Case (Or the Lawyer Who Prosecutes It)

Slip and fall cases can be the scariest cases to accept because they can conjure the banana-peel, insurance-fraud, ambulance-chasing prejudice that many people have about them. How deep rooted is this prejudice? In 1966 (fifty-one years ago!), a romantic comedy called *The Fortune Cookie* was released. The movie starred Walter Matthau as a personal injury lawyer. IMDb describes the movie like this: "A crooked lawyer persuades his brother-in-law to feign a serious injury." In the movie, actor Jack Lemmon plays a cameraman injured after a collision with a star football player who ran out-of-bounds. The lawyer wants his brother-in-law to pretend he is paralyzed to scam the insurance company. You might feel better to know that the movie skewers insurance *defense* lawyers as well:

Willie Gingrich: What about *Mrs. Cunningham v. Baltimore and Ohio Railroad*, U.S. District Court, Eastern District of Ohio, number eighty-nine twenty-seven? Mrs. Cunningham, en route to Cincinnati to visit dying uncle, gets trapped in the toilet on account of a faulty lock. The car is hitched to another train. Mrs. Cunningham winds up in San Bernardino, California. By this time, the uncle is dead and she's cut out of the will, so she sues the railroad for damages. Does this ring a bell?

O'Brien: Never heard of it!

Willie Gingrich: None of you has? Because you, gentlemen, represented the railroad.

O'Brien: We did?

Willie Gingrich: And lost the case.[2]

Yet even if the credibility of both lawyers is low, we are the ones with the burden of proof. So a tie means a loss. While *The Fortune Cookie* is now very old, *many people still feel this way about premises liability cases and the lawyers who pursue them*. Television shows like *Better Call Saul* still portray slip and falls as scams. Saul's prior identity was "Slippin'" Jimmy McGill. Lawyers accepting these cases should never forget they have two strikes against them when they start. In baseball, swinging at a pitch outside the strike zone is an unnecessary risk—if you don't swing, it can't hurt you. Beginning lawyers considering premises cases should swing only at good pitches. Yet all premises cases carry risks. Therefore, let's tweak the advice: Don't take *exceptionally* risky liability cases. When you get more experienced, you can break some rules—but only under the right circumstances.

Premises Cases Are Expensive

Never forget that *premises liability cases are not car wreck cases!* Because people have experience driving and can intuitively understand a car wreck, you can sometimes try a small car wreck case by taking only the plaintiff's and defendant's depositions. The only records involved may be the police report and the medical bills. As a young lawyer, if I spent $10,000 on a case, that was *a lot* of money.

Premises cases are a decidedly different animal. It is not unusual for a case file to have tens of thousands of pages of documents. A case I am working on now has 250,000 pages of emails.

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2 Billy Wilder and I.A.L. Diamond, *The Fortune Cookie*, directed by Billy Wilder (1966; MGM Vintage Classics, 2001), DVD.

A complex premises case can easily cost six figures to get through discovery, let alone to get through trial and to try it well. Many people ask me, "Can you try the case for less money?" As a businessperson, that is a good question to ask. But the better question is, "Can you try the case *well* for less money?" Often, the answer is no.

To understand and win a premises liability case, you must ask a series of important questions. The first is, *Why* did it happen? This is fundamentally an investigative question, but do not proceed with a premises case until you answer it. Most states do not allow plaintiffs to recover if they cannot provide some evidence of *the hazard*, not just *the fall*. Did the defendant act with ordinary care to confront a known hazard? Did the defendant act with ordinary care to discover an unknown hazard? Should the defendant be charged with constructive knowledge of the hazard if the defendant claims having no knowledge of the hazard? We typically don't have experience addressing these issues in simple car wreck cases. Yet all of these questions are crucial to assess in premises cases.

What's Your Case Value Threshold?

I've explained my firm's case value criteria for selecting premises cases. At my firm, we identify a minimum characteristic we want in terms of liability and damages evidence. Case selection is one of the most important law practice management and business decisions trial lawyers must face, and it must be approached with discipline. Setting a minimum *case threshold* is a philosophical and business rule of thumb, which holds that a law firm will not accept a case if the expected recovery does not exceed a certain minimum value. This is important for a practical reason: it allows you to clearly communicate the types of cases for which you and your firm would be interested in receiving referrals. We have four lawyers in my firm. We have

lawyers who are lead counsel on six-figure cases. I spend most of my time on cases worth $1 million or more. We all collaborate, and if a case goes to trial, at least two lawyers are working at trial. Now you know what I would say at a lunch with another lawyer. Consider what you will and won't accept and be able to convey it clearly to other lawyers. It is an important mental discipline and good marketing practice.

Some law firms might take a car wreck that has an expected value of $10,000 to $15,000, because it won't take that much time or money to pursue and perhaps the liability risk is low (such as with a rear-end collision). However, I wouldn't recommend taking a premises liability case with damages of $10,000 or $15,000 (unless you really want the trial experience). For you to set your own threshold, you should consider the questions that follow.

Practical Questions before Accepting a Premises Liability Case

How Much Lawyer and Staff Time Will You Need to Invest?

Abraham Lincoln once said, "A lawyer's time and advice are his stock in trade." True. We can work on cases only if we or others in our firm have time to work on them.

I remember what it was like to be a sole practitioner. I made the copies and licked the envelopes. I requested and reviewed the medical records. It was tough, but I knew every aspect of what was going on. There is a limit, however, to what one person can do. If you want to take a premises liability case, you have to realize that your bandwidth is going to diminish. Consider your current caseload and how much available time you have. Ask yourself if you are willing (and if it is prudent) to invest available time in this case. Remember that if you commit to this case,

it will leave less time available to commit to the next case, or the ones you already have.

Consider that a medium-size premises liability case can take as much work as *five or ten car wrecks*. That may sound like hyperbole, but many car wreck cases can be settled with a pre-suit demand. That is rare in premises liability. Also consider the number of documents you'll need—policies and procedures, incident reports, training documents, videos, and other similar items. Policies, training documents, and similar instances could easily be hundreds and hundreds of pages.

Also, you will likely fight numerous discovery disputes and have to file one or more motions to compel to get the discovery you're entitled to. Big companies hold on tightly to their policies and procedures and their training documents. In contrast, I've rarely filed motions to compel in car wreck cases. The evidence is usually cut and dry. (Word of caution: trucking cases are a very different animal—they are typically very contentious with many discovery disputes.)

All motions take more time in premises cases. In nearly every premises case (including ones where liability appears to be clear), you will have to fight summary judgment. You will need to set aside substantial time for writing briefs for your responses.

Don't forget that you'll have an expert witness, which means that he or she may face a *Daubert* challenge.

Prep time and trial time for a premises case are through the roof. Larger premises cases frequently take one to two weeks to try, and another six to eight weeks to prepare for trial. These are time investments you need to accept and plan for on the front end of a case. Discipline on case selection is important.

How Much Are the Expected Case Expenses?

A premises case with a liability expert, a video deposition of the records keeper, a 30(b)(6) witness, and two other defendant employees is likely to cost $20,000 to get through discovery,

factoring in the defendant's expert and the defendant's deposition of your client and your expert. And don't forget the need to consider damages evidence. Make sure you understand and accept the financial risks before you take the case. Ask yourself these questions:

- Is this case a good bet?
- Am I risking funds I shouldn't risk?
- Where am I in my practice in terms of experience?
- How are cash reserves?
- What is my anticipated cash flow for short, medium, and long term?
- Can I afford to tie up assets for two, three, or five years?
- Is the upside there for damages?

What Are the Risks of Winning or Losing?

Most car wreck cases are simple, in that what happened can easily be explained—not so with premises cases. Based on the introductory investigation outlined above, you will have to assess how the defendants could have avoided the hazard and avoided seriously injuring your client. If you can't find solid answers to your introductory questions, you may want to decline representation.

What Blame May the Defense Place on Your Client?

Every premises liability case is likely to have a blame-the-victim defense. Later, we will address how to counterattack this defense. However, be aware that there is a heavy bias against victims: "You should look where you are going" or "You are responsible for

knowing where you are at all times." Be mindful that these inherent biases arise even in cases involving rape, kidnapping, or other assaults. While this anti-plaintiff bias is not often fair or rooted in facts, you should consider it before taking a case.

What Blame May the Defense Place on Nonparties?

Tort reform legislation around the country in the late 90s and early 2000s made it possible for many defendants to overtly blame other entities (some of whom are nonparties) for injuries to plaintiffs. This makes premises cases, particularly cases with multiple owners or managers, even more difficult. Make sure you understand the current law in your jurisdiction as well as the blame that may be assigned to others.

What Are the Damages?

Understanding the damages is definitely important in deciding whether to accept a case on a contingency fee basis. However, given that many premises cases need to be tried, you will need to consider whether your client will reach maximum medical improvement before the case ends, or whether you'll have a clear picture of the evidence. Many people seriously injured in a premises case have chronic pain from injuries like broken bones, herniated discs, or complex regional pain syndrome.

Of course, with cases involving assault or rape, make sure you understand the timeline of treatment for counseling as well.

Also, are there confounding issues that make it difficult for a jury to return a large verdict for your client?

- Is your client a convicted felon?
- Are you suing a local church?

- Are there significant preexisting conditions, like diabetes, that may lead someone to conclude it wasn't the negligence that caused the damages?

Remember: plaintiffs are less likely to get the benefit of the doubt in a premises liability case.

What Are the Appellate Risks?

Unlike in many types of cases, in premises cases you should consider whether any verdict will be appealed. Remember that insurance companies are keenly aware of bad precedent in a jurisdiction. If your theory of liability pushes the boundaries of your state's law on premises cases, expect that you will spend extended time briefing for your jurisdiction's appellate courts. Premises cases are much more likely to be appealed because there are many issues that could interject error into a case. Thus, when assessing your commitment to this case, add to your estimated time budget how long your state's court of appeals takes to decide cases. Some premises cases will go to the court of appeals more than once. Can you invest your time and money into a case that may have a five-to-ten-year time period before conclusion?

How Much Time and Stress Do You Want?

I meet a good deal of lawyers. It seems that all of us at times think the grass is greener in another practice area. If you meet a successful mass torts lawyer, it may make you wonder if you should try mass torts. I know some lawyers have volume practices, and they love it. Others occasionally regret that they don't have time to devote to a large case. If you've met a lawyer who successfully handles complex premises liability cases, and you answer affirmatively to the question, "Am I willing to invest years and years waiting for an opportunity to be compensated for my time, efforts, and risk?" then keep reading.

We juggle several factors when we decide what cases to accept. For my law practice, going for twenty-plus years, the upshot is that damages must be severe for us to accept a case—that is, a brain injury, death, a surgery or surgeries, chronic pain, high special damages, and so on. Accepting a case in which a nonsurgical broken leg occurred from a truck wreck is likely a good business decision. Accepting a case for a nonsurgical broken leg due to inadequate security will likely be a very bad idea. Remember to balance the time and the risk along with the damages.

Legal Questions before Accepting a Premises Liability Case

What Is the Plaintiff's Legal Status?

You must determine the legal status of the potential plaintiff before you take a case. It's important for the obvious legal reasons, but it's also necessary from a psychological perspective for the jury.

People on property owned by someone else are considered either an invitee, a licensee, or a trespasser. An invitee is a person invited onto the land by an owner or occupier of the land for the possibility of doing business. When you walk into the supermarket with the thought that maybe you'll buy something for dinner, you are an invitee of the supermarket.

A licensee is on the property with permission for a specific purpose or as a social guest. A trespasser is someone who has no permission to be on the property. In most states, a sliding scale places the duty of care as strongest to the invitee, then lower to the licensee, and least to the trespasser. If you cannot prove the status of the injured person, you risk losing on summary judgment because the court may apply a different standard from the one you prefer (often an invitee).

So, when analyzing whether to accept a potential premises liability case, first determine why the potential client was on the property. If the client was an invitee, that case will have the easiest route to prove liability. Ask questions such as these:

- Why were you there?
- When did you arrive?
- Did you stay on the property the whole time?
- Do you have any proof you were there—a receipt, a parking ticket, a credit card statement, a selfie, and so on?

Don't assume the basis for the injured person's legal status on the property.

What Potential Defendants Could Be Sued?

When assessing whether to take a case, you'll also want to consider all the potential defendants who might be sued, as well as what you'll need to find the information. Ask yourself the following:

- Who owns the property?
- How do I find out who owns the property?
- Do I go to the courthouse and look it up myself?
- Do I hire someone else to do it?
- Can I determine the entity operating the business from the secretary of state's website?

- Can I determine the entity through the business records office?

- Will I have to submit open records requests?

Next ask, does the owner of the property have a duty of care in my state? Generally, the answer is yes. However, in many circumstances the owner of the dirt will enter into a lease with another corporate entity (Corporation #2) in which the owner (the lessor) grants rights to Corporation #2 (the lessee).

If the owner or lessor conveys "the exclusive right to occupy" the property to Corporation #2 (the lessee), the law in your state may protect the owner from liability. Thus, if there aren't other important factors, the law in your state might grant summary judgment to the owner if the owner has conveyed through the lease the exclusive right to occupy to another entity. *Because of this general rule, a new premises lawyer practitioner should exercise extreme caution (and probably consult an experienced premises lawyer) when considering a new case just before the end of the statute of limitations.* There is significant risk of not naming the correct party or corporate entity within the expiration of the statute. You, your client, and your professional liability carrier will not be happy.

Yet Corporation #2 may not be the proper party either. Consider a strip mall shopping center. The dirt owner may lease the property to a developer (Corporation #2). The developer may build the property and then hire a property manager (Corporation #3). The property manager will then lease a store in the strip mall to a retail business (Corporation #4). The property manager might also retain a security company (Corporation #5) to patrol the property.

Additionally, the store or the property manager may bring additional vendors onto the property, who may also have a responsibility. For example, a supermarket may hire a vendor

(Corporation #6) to install or service a hot-food bar/buffet. If that hot-food bar is leaking water, you might add them as a defendant in addition to the supermarket. That is a strategy decision often based on what the facts show.

- Did the hot-food vendor fail in its efforts to fix the leaking hot buffet?
- Did the hot-food vendor make a reasonable effort to fix the problem and then warn the supermarket that they had a problem that couldn't be fixed?
- Did the supermarket replace the leaking unit?
- Did the supermarket put out mats or warning signs?
- Did the supermarket post people in the area to look for puddles and then remove them?

Depending on the case, you might sue one or more of the six corporate entities. Again, premises liability cases are not the kinds of cases you want to hold onto for a long time. In other words, you cannot run a volume practice of premises cases.

If you decide to take a premises case, you'll want to file suit to allow time to do discovery on the proper parties and to add them well before the expiration of the statute of limitations.

Who Are the Possible Witnesses?

When you are investigating the possibility of taking on a premises liability case, you'll want to question the potential client about any possible witnesses. Witnesses can be known (Aunt Sue who accompanied the client to the store) or unknown (the nice man who helped the client afterward).

Your client may be able to recognize the helpful person. You might then be able to track that person to checkout at a register and even a credit card receipt. Incident reports and EMT records may have the contact information you need, but don't hesitate to get creative in searching for witnesses.

Also, send a prompt spoliation letter (with delivery confirmation) to the establishment, asking them to preserve *all* video for the day. In my experience, most businesses will not provide you with a video prior to the lawsuit unless the video is very damning to your client's case. Regardless, asking for *all* videos allows you to do the following:

1. Gather video footage of your client before the fall, which is a valuable tool against preexisting condition arguments.

2. Help identify witnesses who saw your client or the fall.

Experts can be a great help in determining whether a case is viable during the pre-suit investigation. We will talk in greater detail later about expert witnesses in premises liability cases, but in short, they may be able to tell you what standards apply to the possible defendants and what safety codes apply. They may also be able to give you a scouting report on how particular defendants litigate. Either way, recognize that you will need them eventually in a premises liability case, and good experts typically aren't cheap. Don't be cheap if you can help it. Experienced experts know how they will be cross-examined, which aids in their vision of the case.

What Is the "Mechanism of Injury"?

Investigate and understand why the client got injured. The mechanism of injury can appear simple. The potential client may call in and describe slipping in a "puddle" at the supermarket. *Don't be content with this description*. You must follow up to determine

what and where the substance was. Here are some follow-up questions that may help you:

- Did you slip in water? How do you know?
- Did the liquid have any kind of smell or taste?
- Were your clothes soaked, or just a little damp?
- If there was no liquid, was the floor slick or waxy?
- Have your clothes been washed or cleaned since the fall? (ideally, not)
- Where, exactly, did the fall occur? What department were you in?
- Were there any freezers or coolers around? How about flower displays?

Don't be satisfied until you can get substantive responses to these questions. You may also need to do a quick site visit to the location, particularly if the fall occurred recently. Pinpoint the location of the store's security cameras and spill stations, and note the store's use of mats and other safety measures. As we'll discuss later, this evidence will be crucial. The supermarket could be negligent for spilling water from a bucket. Or the supermarket may avoid liability because a customer spilled a drink just a few minutes before and didn't tell anyone. Or the supermarket's vendor may be responsible.

Be Curious and Ask Extra Questions

The *why* question is only the first in an important line of questions you need to think about very early on after receiving a call from a potential client. You must also ask the *how* questions:

- How was this injury *avoidable*?
- How many *chances* did the defendant have to act reasonably (ordinary care) to eliminate the hazard?
- How much *fault* might a jury assign to the plaintiff?

These three questions, while sometimes relevant in car wreck cases, are absolutely essential in premises liability cases because they help you gauge your trial risk.

Generally, the jury does not appreciate it when a corporation had multiple chances to fix a condition or address a hazard and chose not to do so. Often, the ability to avoid a hazard amounts to a few dollars from the corporation—or sometimes just a line on a sweep log to be followed by existing employees.

Remember that all premises liability cases still have a stigma attached to them. It is not enough to have serious damages and a plausible, technical, barely legally sufficient claim for liability. You must have more at trial. Otherwise, failure is a distinct possibility. Don't be so seduced by significant damages that you overlook the liability hurdles you will have to overcome.

The Client Interview Process

Contingency lawyers are in a joint venture/partnership with their clients. One can be a great lawyer and lose the case because the client isn't likeable (though a competent lawyer is going to work very hard to find something about a client that is redeeming and to show that redeeming value to a jury). A disappointing verdict can be a loss as well. Let's say that you bill $200 an hour for your time. If you spend 500 hours handling a premises liability case through trial, you need to earn a $100,000 fee in order to make that worth your time. Actually, you need to earn $150,000 to compensate for the risk and the time value of money as well.

Early in my career, I wanted that trial experience. So I tried some car wreck cases that had unattractive liability and damages evidence (and I lost). My recollection of the people I represented way back then was that they were decent, honest folks. I'd guess that in my career the "problem" clients have been less than 5 percent. In those cases, I would settle or withdraw. A few times I got deep into cases with problem clients, and it was always miserable.

Reminder

Do not try premises cases for basic trial experience. You already have your hands full as a newer trial lawyer figuring out evidentiary hurdles and how not to hyperventilate in front of the jury. Try car wreck cases. They are simpler and less expensive, have fewer legal pitfalls, and have less emotional baggage (less social stigma). When you want a greater trial challenge than a rear-end car wreck, try a disputed liability car wreck (or two, or three, or four). After that, you might be ready for a smaller premises liability trial.

The first priority in talking to a potential client in a premises case is to find out if you like that person and trust that person. We have used a client questionnaire to help us in investigating new-client cases. It is based in part on questions that we know will be coming in Defendant Interrogatories and Requests for Documents. Our questionnaire has nine sections:

- Section 1: Client and Client's Family
- Section 2: Facts of Fall/Incident
- Section 3: Injuries
- Section 4: Insurance
- Section 5: Education History
- Section 6: Employment History
- Section 7: Health and Medical History
- Section 8: Driving History
- Section 9: Personal Information

Here are some things you definitely want to hear and see your client explain:

- the lighting or security at the premises
- any distractions (in a fall case)
- obstructions to walking paths, handrails, stairs, curbs, and ramps

- any other known incidents in the same area or at the same property
- signs or warnings of hazard in the area
- witness names and contact information
- client vision issues
- physical or mobility challenges
- client's shoes and clothes (preserved? used since the fall?)
- type of floor and finish on the floor (wax? other finish?)
- type of matting on the floor
- the biomechanics of the fall (how did it happen? slip back? trip forward?)

Preparing by Starting at the End

Now that you have established a case value threshold and accepted your premises liability case, let's look at getting organized to win. When I was a young lawyer, I was given advice to "start at the end." That means get your jury instructions prepared before you start discovery.

This approach can seem counterintuitive—many trial lawyers want to jump into the fray and start the fight. I can recall signing up a client and then wanting to rush out and gather the evidence, file the case, and proceed to trial. That type of energy is good, but it's counterproductive in a premises case.

Car wrecks are great cases to obtain trial experience because fundamentally the law is pretty simple. Did the driver violate a rule of the road? Typically a car wreck case, particularly a rear-end collision, doesn't require tremendous legal analysis. Instead, we usually do a factual investigation. Are there witnesses? Were drugs or alcohol involved? How about distracted driving? Since most of us have a background in driving, we already have a sense of the questions that should be asked. That is a very good thing because young trial lawyers have enough on their plate trying to get through the basics. A young lawyer can work a rear-end car wreck case pretty quickly and intuitively.

However, if you have a truck wreck, it is an entirely different animal because the rules of the road are different when trying to control an 80,000-pound, loaded vehicle. You'll want to read the Commercial Driver's Manual for your state. (You'll also want to look at the Federal Motor Carrier Safety Administration's Regulations.) You'll likely need an accident reconstructionist. Experienced truck wreck lawyers can go on and on about all the different issues involved in a truck wreck versus a car wreck. What do the driver's hours of service look like? How much sleep did he get? Does he (likely) have sleep apnea? Like a truck wreck, premises liability cases require much more insight and are much less intuitive.

Premises Cases Require Specialized Knowledge

Premises liability cases are generally not intuitive. And, frequently, the law favors the defendant or property owner. Some folks have a talent for obtaining evidence or testimony and telling a good story. That is a huge advantage for a trial lawyer. However, you don't want to get to the end of your case and learn the hard way that you left out proof that wasn't necessary to tell a good story but *was* necessary to overcome

legal obstacles to liability. Starting at the end forces a lawyer to familiarize himself with the law through likely jury instructions. Once you know what you need to prove, you can plan to obtain that evidence.

The Danger of Starting Elsewhere

If we were to treat a premises liability case like a car wreck case, our first question might be "Why did the fall happen?" That is a good question. However, if we summarily answer the question with "because there was water on the floor that shouldn't have been there," we might be tempted to run on to damages. That would be a rookie mistake. That conclusion and immediate leap might be something that you can get away with in a rear-end collision by a drunken motorist. In a premises liability case, there are many more follow-up questions to consider before turning the page from liability to damages. Avoid jeopardizing your client's case. Do the research on the law and begin to figure out the questions you'll need to answer in order to convince the judge, the jury, and the appellate courts that your client deserves compensation. In chapter 3, I will start that process by reviewing some jury instructions we used in 2012 to obtain a $2.79 million verdict against Kroger that was affirmed by the Georgia Court of Appeals. While those instructions address a slip and fall case, many of the legal duties will be the same regardless of whether the injury occurs as a result of a trip, slip, or other hazard.

Conclusion

Before you get on the premises merry-go-round, have a plan.

- Consider and set a value threshold for premises liability cases that is significantly above car wreck cases. Don't ever forget that these cases require more time, money, work, and risk than car wreck cases.

- Associate a more experienced lawyer for your first couple premises cases to learn the ropes. Then for your first voyage as lead counsel, select a less risky liability pattern. For example, a case with multiple favorable witnesses (preferably not related to the plaintiff) or a case with video. Also, a case with a building code violation may set you up for a negligence *per se* argument.

- Start at the end. Think about how the case can conclude successfully. I presume you already know what is involved in putting together the damages part. Premises liability cases typically have more challenging liability pieces. Put together the law and start looking for facts and evidence that support liability.

In the next chapter, we will look at the different types of premises cases and the facts you must seek to support a successful conclusion.