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Landowners Are Not Required to Exercise Greater Care Toward Licensees Than Invitees

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vestigations of serious defects in various makes and models of new cars, which often were not discovered during the standard one year/12,000 mile warranty. In light of this, the court stated that the New York State legislature had enacted section 198-a(b) to redress the significant problem with the automotive industry's warranty practices.

The court disagreed with the Association's contention that the costs of complying with the law impacted adversely on interstate commerce. First, most automobile manufacturers were not affected by the statute because they offered warranties in excess of the statutory requirements. Second, many of those affected by the statute had simply passed along the costs of compliance to purchasers. For instance, Ford Motors charged New York consumers an extra \$115.00 for "Mandatory New York Repair Coverage" on a new car. Finally, manufacturers had shown an ability to adapt to other state regulations having a much greater impact on the distribution and manufacture of cars than did section 198-a(b). Automobile manufacturers had made such adjustments as re-programming computers, changing advertising, tracing the ownership of vehicles and even offering distinct warranties. The record showed that manufacturers were able to make these adjustments with minimal disruption to the nationwide automobile distribution.

The Association further argued that it was impossible for manufacturers to put state-specific warranty information in vehicles prior to shipment to dealers. However, the court held that this claim was frivolous. Ford Motor Company currently disclosed the contents of section 198-a(b) to New York purchasers. Furthermore, as the record showed, manufacturers had little difficulty in disclosing other state-specific substantive information. Moreover, the court noted, section 198-a(b) did not require manufacturers to disclose anything. The court noted that even if the statute required disclosure, such disclosure would be feasible. By analogy, the credit card indus-

try disclosed the interest rates charged in all fifty states. Regardless, the court stated that disclosure is a "tolerable by-product" of doing business on the national level.

The Association finally argued that section 198-a(b) advantaged in-state business over out-of-state business. The court held that the statute did not advantage some manufacturers at the expense of others because the statute applied to all manufacturers equally. Accordingly, the court held that the benefits of section 198-a(b) exceeded the burdens it imposed on interstate commerce. Because the burden was minimal and did not discriminate against out-of-state businesses, the court upheld the section 198-a(b) repair provision.

Marianne L. Simonini

LANDOWNERS ARE NOT REQUIRED TO EXERCISE GREATER CARE TOWARD LICENSEES THAN INVITEES

In *Gallegos v. Phipps*, 779 P.2d 856 (Colo. 1989), the Colorado Supreme Court examined a Colorado landowner's duty to protect an invitee injured upon his land under a recently enacted landowner liability statute. 6A Colo. Rev. Stat. § 13-21-115 (1987). The court determined that the statute violated both the federal and state constitutional guarantee of equal protection by imposing on landowners a higher standard of care for licensees than for invitees.

Background

On December 28, 1986, appellant, Bernie L. Gallegos ("Gallegos") patronized The Ram, a restaurant and bar located in Georgetown, Colorado. Gallegos became visibly intoxicated during his visit there, and upon leaving The Ram, fell down a flight of stairs and was seriously injured. Gallegos brought suit against The Ram's management (Red Ram

Management) and the owners of the premises (Red Ram Venture) (all co-defendants are hereinafter referred to collectively as "Red Ram").

At the jury trial, Gallegos argued that Red Ram violated section 13-21-115 of the Colorado Revised Statutes, Colo. Rev. Stat. § 13-21-115 (1987), by serving Gallegos too much alcohol and then deliberately failing to exercise reasonable care to protect him against a known danger: the stairwell. Gallegos contended that the stairwell created a danger not ordinarily present on property of that type. Gallegos also argued, in the alternative, that section 13-21-115 denied him equal protection of the laws because it required landowners to warn licensees, but not invitees, of dangers on their property.

Red Ram offered evidence that not only were the stairs typical of those found in similar Georgetown buildings, but that the stairs were safely constructed and maintained. Red Ram further contended that Gallegos fell down the stairs while in a self-induced "drunken stupor."

The jury returned a verdict in favor of Red Ram, specifically finding that Gallegos' injuries were not caused by any dangerous condition at The Ram, that Red Ram did not deliberately fail to exercise reasonable care, and that Gallegos was injured by his own negligence.

The Colorado Supreme Court's Decision

Gallegos appealed directly to the Supreme Court of Colorado, asserting, among other things, that section 13-21-115 unconstitutionally violated his rights to equal protection under the laws. Specifically, he argued that the statutory scheme was arbitrary, unreasonable, and bore no rational relationship to a legitimate state objective because it provided less protection to invitees than to licensees. The statute caused similarly situated parties (tort victims) to be treated dissimilarly because tort victims of landowners must prove that the landowner acted deliberately, while victims of other types of tortfeasors need only prove negli-

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Landowner Liability (continued from page 85)

gence.

The Colorado Supreme Court first considered Gallegos' claim that section 13-21-115 violated the protections provided by the fourteenth amendment of the United States Constitution, U.S. Const. amend. XIV, § 1, and the due process clause of the Colorado Constitution, Colo. Const. art. II, § 25. The first section of the fourteenth amendment provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Article II, section 25, of the Colorado Constitution "guarantees that all parties who are similarly situated receive like treatment by the law." Colo. Const. art. II, § 25. Since the statute did not infringe on a fundamental right, a suspect class, or a classification triggering an intermediate standard of review, the court determined that in order to prevail in his claim that section 13-21-115 was unconstitutional, Gallegos had to prove that the section 13-21-115 had no rational basis in fact and bore no rational relationship to a legitimate Colorado state interest. To determine whether Gallegos met his burden, the court used a two part test. First, the court ascertained the legitimate state interest that section 13-21-115 was intended to promote. Next, the court determined whether the statute actually promoted that interest.

Purpose of Landowner Liability Statute. The court ascertained the Colorado legislature's purpose in enacting section 13-21-115 by reviewing the history of Colorado landowner liability law, the circumstances surrounding the statute's enactment, and the intentions expressed by the legislators who sponsored the legislation in the General Assembly. The court noted that prior to 1971, Colorado followed the common law with respect to landowner liability. The common law traditionally imposed upon landowners a greater duty of care towards invitees than licensees or trespassers. For example, a landowner was merely required to

refrain from willfully or wantonly injuring a licensee, but the landowner had an affirmative duty to make his land reasonably safe for invitees.

In 1971, the Colorado Supreme Court abolished the use of the common law distinctions between licensees, invitees, and trespassers, and imposed a general standard of care upon landowners. *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971). Under this more general standard, a landowner was simply required to manage his land as a reasonable person would in view of the foreseeability of injuries to others. However, in 1986, the Colorado legislature noted that the reasonable person standard established by *Mile High Fence* led to unpredictable and inequitable results, especially with regard to trespassers. Therefore, the legislature enacted section 13-21-115.

The Colorado legislature expressly enacted section 13-21-115 to promote responsibility among both landowners and those upon the land by re-establishing the common law distinction among trespassers, licensees, and invitees, and defining a landowner's duty of care according to the landowner's relationship to the person upon his land. The court in the present case found that this purpose addressed a legitimate state interest, and thereby satisfied the first part of the two part test.

Promoting the State's Interest. The court next addressed whether section 13-21-115 promoted the state's interest. The court examined the language of the section as it pertained to licensees and invitees and determined that section 13-21-115 inverted a landowner's duties, as compared to the common law, by according a higher degree of protection to a licensee than an invitee. This result defeated the Colorado legislature's intent of re-establishing the common law scheme of landowner liability. It also contradicted logical reasoning which requires a landowner to take more precautions to protect someone he has invited on his land for

his own purposes, than a person whose presence is merely permitted. The court held that section 13-21-115 could not be interpreted to fairly allocate responsibility within the limitations imposed by the federal and state constitutional guarantees of equal protection of the law, and was, therefore, unconstitutional.

Because the verdict against Gallegos was based on Red Ram's duties toward Gallegos under section 13-21-115, the court reversed the judgment and remanded the case for a new trial under the standard of liability imposed prior to the enactment of section 13-21-115.

Karen M. Cichowski

TAMPONS AND SANITARY NAPKINS ARE MEDICAL APPLIANCES EXEMPT FROM CHICAGO SALES TAX

In *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill.2d 389, 544 N.E.2d 344 (1989), purchasers of female hygienic products ("the purchasers") brought a class action suit alleging that the City of Chicago illegally taxed tampons and sanitary napkins purchased from various retailers. The Illinois Supreme Court found that because the products were necessities with no substitutes, the purchasers had no choice but to pay the taxes. Therefore, the court held that the purchasers, having paid under duress, could challenge the tax. On the merits, the court held that tampons and sanitary napkins were "medical appliances" and exempt from the city sales tax.

Background

The purchasers' class action suit alleged that the Illinois Department of Revenue, the City of Chicago, the Chicago Department of Revenue, and the Regional