SANDS ANDERSON

Risk Manager

Yes Virginia, There is an Assumption of the Risk Doctrine

By: Justin Ward. ***Monday, September 10th, 2012***

By: Terrence L. Graves

In a recent decision from the United States District Court for the Eastern District of Virginia – Alexandria Division, summary judgment was granted to a defendant based upon the assumption of the risk of the plaintiff. In the case of *Raymond S. Burns, Jr. v. Washington Metropolitan Area Transit Authority*, decided on July 12, 2012, the court determined that the plaintiff assumed the risk of his injuries and damages.

Mr. Jones suffered a severely fractured arm as a result of a fall in a parking garage that was owned, operated, and maintained by the Washington Metropolitan Area Transit Authority ("WMATA"). On March 1, 2009, the Washington, D.C. Metropolitan Area experienced a snow fall sufficient for the WMATA to declare a snow event / snow emergency following the issuance of a winter storm warning by the National Weather Services. WMATA put into action its snow preparedness activities which included dispatching personnel to the Vienna / Fairfax – GMU Metro Station ("the garage") to remove snow and to treat for ice with deicer.

The plaintiff parked in the garage on Monday, March 2, 2009, on the third level of the building. On the morning of March 2, the weather was reportedly below freezing based upon testimony by the plaintiff. The plaintiff observed that snow was "packed down across the steps" in the stairwell that he utilized to get to the ground level. As he proceeded down the stairwell on Monday morning, he held onto the handrail and also walked in the footsteps of others. When he returned from work that afternoon, the plaintiff took the elevator up to the level where he had parked his vehicle.

The following morning, Tuesday, March 3, 2009, the plaintiff went again to park his vehicle in the same section of the same garage and used the same stairwell to exit the garage. Plaintiff indicated during his testimony that he saw that the condition of the stairs had not changed and he proceeded to go down the stairs utilizing the same method that he used on Monday. Once again, when he came back to the garage following his work day on Tuesday afternoon, the plaintiff took the elevator back up to where his car was parked.

On Wednesday morning, March 4, 2009, the plaintiff once again parked his car on the same level and in the same section of the garage and proceeded down the same stairwell in order to exit the garage. The plaintiff testified that the stairs were still in the same condition as they were the previous two mornings and that there

was snow on most of the steps leading down from the third level of the garage down to the street. The plaintiff testified that he once again gripped the handrail and was being careful of where he stepped while placing his feet in the footsteps of others. As the plaintiff was approximately half way down the flight of stairs, his foot slipped off a metal portion of the stair and subsequently fell forward, landing on the platform and severely fractured his arm.

WMATA moved for summary judgment based upon a lack of negligence in its maintenance of the garage, contributory negligence by the plaintiff, and assumption of the risk by the plaintiff. The court noted that in Virginia assumption of the risk is a complete bar to recovery citing the case of *Thurmond v. Prince William Professional Baseball Club*, 574 S.E.2d 246, 249 (Va. 2003). In order for the Doctrine of Assumption of the Risk to apply, there are two elements that must be met. Those two elements are as follows: (1) the nature and extent of the risk are fully appreciated; and (2) the risk is voluntarily incurred. *Monk v. Hess*, 191 S.E.2d 229, 230 (Va. 1972).

Obviously, the decision in this case is all about the specific facts. The plaintiff drove to work on three separate days following the snow fall and on each day he noted that the condition of the stairs had not changed. He acted as if the stairwell was dangerous and made sure to communicate that during his deposition testimony. He noted that the temperature was below freezing. It is common sense that ice will form when temperatures are below freezing. Additionally, the plaintiff availed himself of the elevators each evening in order to get back up to where his vehicle was parked. Although the court did not specifically state this, this obviously demonstrated that there was an alternative route that the plaintiff could use to get down to the street from where he parked his car. The fact that he chose to use the steps in the mornings even though the snow was obviously there and the steps were in the same condition that he had observed on the previous mornings, indicated to the court that he had assumed the risk of his injuries and damages.

Although assumption of the risk is a doctrine that has fallen into disuse due to a number of factors, this case shows that it is still alive and well in Virginia jurisprudence. For a full copy of the Eastern District of Virginia – Alexandria Division's memorandum opinion, please click here: **Opinion in Burns v. Washington Metro Area Transit Authority** .