

WNED LAW LINE TRANSCRIPT

DECEMBER 4, 2010

Good Morning and welcome to the Law Line. For the next half hour you'll be have a chance to discuss your questions and problems with a qualified attorney. Our broadcast is made possible by grants from the Erie County Bar Foundation and the Lawyer Referral and Information Service of the Bar Association of Erie County. If you have a question for our guest, call us now at 845-7044. And now, here the host of the Law Line, Mike Desmond.

Today we are going to be talking about dogs, trees and sidewalks. At this time of year, it is all important. Bill Moore is here again. Good morning Bill.

Good Morning Mike, thanks for having me.

DESMOND: For residents in some areas of the community right now, sidewalks are a big issue because you can't find them. They are somewhere under that snow bank. Are people required, if they have sidewalks, to shovel?

MOORE: In some municipalities, they are. It depends on the municipalities. It is incumbent upon the resident in the certain municipality to find out whether or not they are required to shovel their own sidewalk because sometimes you are, sometime you are not and you don't want to find out after the fact, when someone has been injured so to speak on your property that this was your responsibility so lets say for instance, in the City of Buffalo, they shift that burden onto the property owners to keep their sidewalks clear while some other municipalities do not do that, so again, it depends on where you live and what the requirements are.

DESMOND: From a purely cover yourself point of view, even if it is not required, would it be smart of you to do it?

MOORE: Of course

DESMOND: What about salt for ice? The same thing?

MOORE: The same thing. What ever you can do, even if it's not your responsibility, why not protect yourself in the event anyway. Go out, grab the shovel, and clean it up. Do what is reasonable under the circumstances, throw some salt out and you know, you've done what you can and in the event someone gets hurt, then you have a logical excuse, well not necessarily an excuse, but a good explanation of what you did that was reasonable under the circumstances given what the sidewalk was looking like at the time.

DESMOND: Does this also apply to the sidewalk right up to your front door, separate from your sidewalk that runs across the property, which I think is sort of the city and sort of isn't, depends on the lawyers or depends, you know the steps that the guy, that the letter carrier walks up to my front door and up my steps, so forth, if I am going to clean the sidewalk, should I keep it clean too?

MOORE: Keep it clear. Rule of thumb, keep it clear. Unless the only out you have as a land owner is what is called the "storm in progress". So if you have, what we had this week, non-stop snow in the southern tier over and over, do you best to keep it clear but you are not under an obligation to, under those circumstances, while the storm is in progress, but, once the storm has ceased, you as the land owner, have to keep the sidewalk, up to your porch or stairs clear. Keep your stairs clear and do what is best for your letter carriers because they have to do their job too.

DESMOND: Obviously then if the worst happens it is legally significant, if you can, to go out there at least once?

MOORE: Certainly, if you have taken, what we call reasonable steps, to prevent any type of injury then that is better for you. But if you have done nothing, then you might have a tough hill to climb.

DESMOND: If you have a driveway, do you have to shovel that section of the driveway, in the City of Buffalo, between the sidewalk and the street or is that considered yours and you don't have to do that....you might not get your car out but....

MOORE: Are you speaking of the apron of the driveway?

DESMOND: Yeah.

MOORE: I would clear it all.

DESMOND: What about commercial property? If you go up Elmwood Avenue, I don't know what percentage of the commercial property is owned by the people who use it but I would think most of it is rental space, who has to clear that?

MOORE: The City of Buffalo is the land owner or the lessee or lessor. Basically, you have to keep that area in between the street and the business clear of any type of debris, ice, snow or whatever is there so you'll see many of the business owners clearing that area.

DESMOND: Now, business owners but not necessarily building owners. If another lawyer in your firm is asked by a client who has one of these businesses should I do that or wait for the landlord, what kind of advice would that business owner likely get?

MOORE: Well the business owner, I'm sure that there is something within the lease and I'm sure it puts it on the business owner to clear the ice and snow because surely the building owner, half of the time in the City, the business owner doesn't live here. He might be half way across the world for all we know and that is the truth so the notice is on the business owner to keep the area clear and safe for any type of people traffic.

DESMOND: Have you sued someone, a business owner in these situations, where somebody slips and falls on the sidewalk?

MOORE: Certainly.

DESMOND: Do you ask to see the lease or something like that?

MOORE: We get the language of whatever the lease is, find out who's responsibility it is sometimes the business owner will have a Contract with a snow removal company and you want to see what those papers say as well, so there are many different types of situations that you need to look at including the paperwork which you will get through the course of discovery if you initiate a lawsuit.

Here on the Law Line today, William Moore is with us and we are talking about premises liability and most people have a premises whether they think of it or not and if you have a question, give us a call at 845-7044 and Jim Nowicki will put the call through

DESMOND: If you rent a house or an apartment, first of all, from your experience, is it a good idea to have insurance of your own for your premises on the second floor of a classic two family flat, that sort of thing

MOORE: Yes, it is a very good idea to have the insurance because it covers your personal effects, you are not necessarily worried about the house itself because you are just renting, but if you have personal effects or a couch or whatever you have, you want to make sure that is covered under an insurance policy so having renters insurance is important and it also covers you in the event that the property, say that there is a fire, they will put you up somewhere else and you'll be covered in that respect too until a reasonable time passes for you to find somewhere else to live so you don't want to be out in the cold.

DESMOND: What about situations when you have a party and people get a little carried away and someone, in the worst case, falls off the porch, or the porch falls down, there have been a couple of cases around the country in recent years where the porch has fallen down because there are just too many people out there, first of all you have to be careful of how many people you have out there probably, but

MOORE: Well it depends on whether you have notice of the dangerous condition itself. I am aware of the case you are speaking of that happened out in Chicago and as the renter, if your out there and upon reasonable inspection of your property, you notice something, you let your homeowner know immediately and give them time to remedy the situation because you don't want to find yourself in a situation where you didn't let them know and someone else has gotten severely injured or killed.

DESMOND: On the other side of the issue, the Landlord and lets say that it is a 2-family flat, classic situation, the owner lives downstairs or upstairs, occupies one of the 2 apartments, are the rules different on insurance in that case or in liability say if the back porch falls down – you should be on notice of the condition of your house, right?

MOORE: Yes, I think it is still the same situation whether or not the owner of the premises lives there or not. Certainly they have an obligation to make sure that the premises is in good condition and that it is not going to fall down, that the porch railings are in good condition. Reasonable inspection that we all do with our own property. Walk around, take a look and give it a shake to see if it is safe or not. If repairs need to be made, make them because you don't want to be in a situation afterwards. Because if you had the chance to remedy the problem and you didn't, shame on you.

DESMOND: Obviously, a very high percentage of Americans own their own house, they have, in many cases, the white picket fence out front which they may or may not paint. They have a car, driveway, dog, bird, some of them have swimming pools some of them have little wading pools that they blow up, and some are in ground. There are risks with all of those, right?

MOORE: Certainly.

DESMOND: Obviously, in defense of yourself, you have some obligation to yourself to be careful. I mean if you have a dead tree branch sitting over the sidewalk and you don't know if it is your tree or a municipal tree but you want to get that branch off

MOORE: As I told you earlier, I've handled cases like that and the best thing to do is if you see a problem but you are not sure if it is your responsibility, write to your municipality, do not call them, write. Because the only way they are going to keep a record of it is a written notice and I can't stress that enough to your listeners that if there is a problem with your sidewalk, if there is a problem with a tree over your property, something that you perceive to be a problem or a hazard to others or yourself you have to have prior written notice to have liability against a municipality. So write a letter to your municipality, explain what the problem is then they will have a record of it and then the clock starts ticking. It is on them to remedy the dangerous condition.

DESMOND: Cities demolish, I think the mayor told me the other day, 4,000 houses. We have large squabs of property in the city where there are no houses left anymore but the sidewalks are still there, the trees may still be there and your grandchild may be riding his or her bicycle up and down the street. Now if the sidewalk is going bad, should you also write the letter to the mayor, council member, whomever?

MOORE: Write to the city. You can send it to City Hall and it will find itself to the right place. Even if the sidewalk in question isn't out front of your house, even if it is up the street and you perceive it to be a problem, write a letter, write a letter. Because without a letter, it doesn't exist. A telephone call does not suffice it does not protect anyone. Once they have written notice of the dangerous condition it is on the city to remedy the situation.

DESMOND: This is a multi-cultural city. Does it have to be in English? Serious question.

MOORE: Well, anyway you write it I'm sure would suffice

DESMOND: Just as long as it is in writing?

MOORE: That is the biggest issue, having it in writing. And the municipalities, often, their biggest defense is we did not have prior written notice, Well then did you create the dangerous condition, did you have actual or constructive notice to the dangerous condition? There are many factors that come into play but we as residents need to keep our streets safe, safe for our children and that includes the sidewalks so we have to take the steps. Cities and municipalities won't always take the steps to keep everything ship shape

DESMOND: It's expensive?

MOORE: It is expensive but if you perceive it as a hazard, it is on you and take it as your own responsibility just to write the letter, it is 5 minutes and it could really make the difference to someone down the line who does have an injury as a result to that.

DESMOND: Who's responsibility is it if you don't know who owns the property? I mean, obviously we have a lot of foreclosures today and there are vacant buildings and the mayor had a press conference a few weeks ago in front of a vacant house on Linwood Avenue and all they know is the corporation that owns the building and there is a mailing address but the guy just won't pay the taxes. Does it matter that the city is on notice if the house is a problem?

MOORE: The house is a problem and you have a deadbeat home owner or they skipped town and you can't find them which happens quite often, I've had many a case where that is the situation then you are dealing with a house that is empty and if it is not demolished or on a demolish list and there are children in the neighborhood playing on or around the house and get injured

DESMOND: I've seen it

MOORE: Yep, then it depends on whether or not someone has written a notice to the city about the issue. Call them up and say the front door of this house is gone, there are kids inside, drug paraphernalia, it all depends what we do as citizens in advising our leaders of potential problems

DESMOND: You're on the Law Line and attorney Bill Moore is here and we are talking about premises liability and if you have a question we are at 845-7044. When I was coming into work today, I was backing out the driveway, making sure my back window was clear and there was a neighbor walking her dog. Bella is a nice little dog but there are dogs that run loose, that are walking and have muzzles on them. How much responsibility do the owner's of dogs have to make sure that the dog, classic, doesn't bite?

MOORE: Well, biting isn't necessarily the standard these days anymore. The liability used to be what we will call the "one bite rule" so if a dog bit once and then bit again your on the hook. That is no longer the case. Today it is called Vicious Propensity. Now the word vicious is a strong word and it doesn't necessarily mean that the animal has to be vicious in nature but what we deal with is the propensity of the dog to act in a certain way. If the dog has the propensity to act in a certain way that could cause harm to another person then the owner would be on the hook if someone were injured. What I am trying to get at is say you have a dog that is rambunctious and jumps up and you know that every time someone comes to the house that dog jumps up, it's the nicest dog it's a black Labrador and he'll lick ya but he jumps up. You have somebody over that isn't so good on their feet and the dog jumps up on that individual and that individual falls down and breaks a hip, you are on the hook. You might say why? The dog is doing what dogs do, he jumps up. The dog has a propensity for jumping up and the dog or the animal has a propensity to act a certain way, this is a standard, has a propensity to act in a way that could cause harm to another and you have notice of it, they you could be on the hook, legally.

DESMOND: Mark, you are on the line with William Moore, what is your question?

MARK (caller): My question is about writing letters to the municipality. Is it necessary or at least advisable that they be certified so that you can have a record of it that you did send a letter?

MOORE: It is not a bad idea to send a certified letter and keep a copy for your own records and then you have a return receipt and it really comes down to the end of the day that you know who was hurt on the premises and come forward and say I wrote a letter, but they do keep files of the letters written. I've had cases where through the course of discovery they come out with a letter or several letters indicating that they were aware of the condition but never got to it or never remedied the situation. But there are a lot of situations; especially up in the Falls where people don't write the letters and the sidewalks are like Beirut. It's terrible, so your best action is reaction and that is to write the letter, send it certified and get it to your municipality and they will have a record of it and at the very least you are not only doing yourself a service but those around you a good service should they need it.

DESMOND: This is the same situation as writing to a municipality about humongous pot holes.

MOORE: Sure, any situation that you perceive to be dangerous in nature, write to your municipality. I've had cases, the pot hole cases, where they say we were unaware of it, we did not know of it. If we don't have prior written notice of it then we have to come down and change our approach to the case as to whether or not they either created the condition and whether or not they had any other type of notice of the condition. So there are cases out there where the City can actually be on the hook where you may have a significant pot hole in the street, they put down the cold patch, cars keep running over and the city has a band aid just keeps filling it in. We all see this, but now we know they are aware of it, we just have to go further with it. IN going further, we know that they are continuing to put the cold patch in, so they are in a sense creating a dangerous condition themselves.

DESMOND: Mark, does that answer your question?

MARK (caller): Yes it does, thank you very much.

MOORE: Thanks Mark.

DESMOND: That raises the question, we have a street near my house that apparently has really bad water lines and over the years we have had a couple of cases where we could actually see the street sag and apparently there was a leaky water line underneath and it was washing the fill under and eventually the street would cave in and they closed it for a year and a half. Does the same rule apply if you see water coming out of the pavement or something like that? Write a letter or call, probably write a letter.

MOORE: Absolutely, the same thing. Quickly, I just had a case like that where the city did a demolition and they did a plumbers cut to the street to cut off the plumbing to the house and they back filled the hole in the street then they put a cold patch but they did it improperly so it kept sinking and sinking every year and they kept filling it in with the blacktop. Instead of pulling it out and doing it correctly, with a cap they call it and unfortunately a woman fell in that and was seriously injured

DESMOND: We were talking about dogs before. What about animals behind a fence of some sort?

MOORE: Well that is an interesting situation because there is a case law out there not just about dogs but about horses and other farm animals, so to speak, you need to keep them restraint. Say you have a rambunctious dog or a horse that is able to get out and jump the fence, let's get back to the dog, say the dog you know gets excited, jumps the fence and runs out into the street, and gets away every once in awhile, well now your on notice. Now lets say the dog runs out into the street and causes a car accident, now your on the hook for the car accident.

DESMOND: Some of this sounds like absolute common sense but some of it just....

MOORE: Well some people think dogs will be dogs or horses will be horses but the action is upon us as the owners of these animals to be sure that we keep control of them and again like I said it is not necessarily like its dogs or animals being bad in nature, its all about the propensity of an animal to act in a certain way that could injure anybody

DESMOND: What about an idiot human that goes over that fence or into the pasture or into the yard...classic case, the buffalo zoo years ago when people went over the fence in the middle of the night after coming out of a bar would go into the bear pit and they would end up having to shoot the bear, can the person who does bad behavior like that, who goes over the fence,

MOORE: Well, I don't think I would take a case like that but it really depends on the situation and you would have to look at everything as a whole and I would think that the zoo or property owner would have a better defense in a case like that than it would in a plaintiff's case.

DESMOND: Well I suppose the classic example for the citizen is reaching over a fence and saying "nice doggie" and petting the dog and the dog bites

MOORE: Well then you get back to the vicious propensity issue. You might be dealing with culpable conduct on both parties. You might have the plaintiff who was bitten as some responsibility for obviously sticking his hand over the fence but then again you have a dog that bites and if you are aware that he bites, you might be on the hook for that dog.

DESMOND: What about a breed of dog? And I know this is a very touchy, legal area, that is regarded as being genetically nasty? I was involved in getting somebody to the hospital years ago who was bitten by a chow and who needed surgery on their arm and so forth and a lot of us think of dogs such as chows as dangerous

MOORE: Well the courts don't necessarily think of the breed although I disagree with this in some circumstances, especially as it relates to certain breeds like a pit bull, the courts don't consider the breed of the dog, they consider the actions of the dogs and the prior actions of the dogs and whether or not the owner had knowledge. You could very well have a pit bull that is the nicest dog in the world and there are some out there and I saw a segment recently where pit bulls are being trained as seeing eye dogs, unbelievable

as that it is, but it really depends on whether or not you have knowledge of this dog's propensity to act in a certain way.

DESMOND: We had, when I was a kid, a police dog, which everyone called German Shepherds in those days, and the father in this family was a very high level police officer and very nice dog, good with the kids but very protective of the kids, you didn't want to hassle one of this dog's humans because this dog would come after you.

MOORE: Sure

DESMOND: I would think that this gets legally complicated. You have some kid who punches out the human that this dog is protecting and gets bitten, I would think that this is a bar exam question as to if anyone is responsible.

MOORE: If you have a dog that is protected in nature, you need to keep control of that dog, because once again, it comes down to your knowledge of the dog having a propensity to act in a way to protect its owner. It is your obligation as the owner of the animal to keep it under control. You can't control an animal and tell an animal to stop; it is on the owner to control the animal.

DESMOND: One of the things you see with people walking dogs these days, in the older days owners would have a lease 3 feet long, now you get these leashes that unroll I don't know how long they the person will be walking along and the leashes stretch out and I would think that that is almost an open invitation for something to go wrong.

MOORE: Certainly. It really depends on the situation. I know exactly what you are talking about the hand held devices, again it comes down to your actions and it depends on what your dog did. IF it is a foreign action by the dog and the dog has never done that before, a fluke, then maybe there isn't liability there but if your dog is the type that runs off and might go after this person or that person, you better keep him close at hand.

DESMOND: What about situation on your own property. Do you need to have a fence around your pool? Is it necessary to keep your dog isolated if your having a party just because it's a dog, are there things you can do to protect yourself?

MOORE: There are always things you can do to protect yourself. With the pools, we all know it's a hazard especially when it comes to small children and a fence, you've got to have a fence around the pool and some people go even further by having another protective fence around the pool if they have a larger backyard just to avoid a tragedy. A fence is always a good idea and your insurance company, you might want to talk to them about it because they may have their own requirements in terms of what you need to do in order to insure that property as it relates to your own animal and your own house, say you are having a party, again, how is your animal around other people, will he just look for hand outs or little droppings from a plate or is your dog going to jump up on every person that comes to the house, you have to use your own, good common sense.

DESMOND: People coming onto the dog's turf

MOORE: Right – use common sense, you know your dog, sometimes you don't know your dog, sometimes you don't know how your dog is going to react to a sound, a voice, a quick movement, so

DESMOND: Thanks for listening to Law Line today. Bill Moore has been here and he can offer you legal advice.

MOORE: Yes, I am at Lipsitz Green Scime Cambria LLP and if you have any questions about these types of cases, I am a Plaintiff's attorney and I can be reached at 849-1333 x. 306 and again my name is William Moore.

DESMOND: Next week on the Law Line, Bankruptcy Judge William Bucki and we'll talk about how to stay afloat in rough times whether in business or a family or a person. Bill thanks for being here.

MOORE: Thank you very much.