



White and Williams LLP



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SUMMARY OF THE THIRD CIRCUIT COURT DECISION IN *HOLMES V. LOWE'S HOME CENTERS, INC., ET AL*

By: Robert G. Devine, Esq., and Christopher P. Morgan, Esq.

White and Williams LLP recently obtained a ruling which will provide guidance to New Jersey commercial property owners and tenants alike concerning common area liability and maintenance. In the matter of *Holmes v. Lowe's Home Centers, Inc., et al*, the United States Court of Appeals for the Third Circuit, predicting how the New Jersey Supreme Court would rule, held that a stand-alone tenant in a multi-tenant shopping center does not owe a duty of care over the common-area parking lot that is owned, controlled, and maintained by the owner of the property.

In reaching its decision, the majority noted that the landlord already has a duty in addition to financial incentive to maintain the parking lot in a hazard-free condition. Consequently, there is little risk of not imposing a duty upon the tenants, where as here, the landlord had a contract for snow removal services that provided constant coverage for the parking lot. However, imposing a duty upon the tenants would result in redundant, duplicative efforts and would interfere with the maintenance program of the landlord.

The court also noted that imposing a duty upon tenants in a multi-tenant shopping center would not be cost efficient. Tenants in these shopping centers typically pay common area maintenance fees as part of their lease agreements. These fees are based upon an apportioned share of the overall maintenance fees for the shopping center. Were a duty to be imposed upon them, the tenant would continue paying these common area maintenance fees, but would also have to incur the costs of having their own maintenance performed on common areas of the shopping center. Thus, the public policy considerations against imposing a duty upon the tenants outweigh those factors in favor of such a duty.

The tenants and the landlord in these shopping centers are free to allocate responsibility for liability costs between them however they see fit. This allocation is typically done through indemnification clauses within the lease agreements. To

impose a duty upon tenants would encourage "shotgun" litigation whereby to include all tenants in the shopping center as parties to a lawsuit and would shift the risk allocation mechanism from one of contractual indemnification to contribution under a theory of joint and several liability. The majority decision observed that its holding is consistent with the vast majority of other jurisdictions to have considered the issue.

Robert G. Devine, a partner in our litigation department, presented the argument to the United States Court of Appeals for the Third Circuit. Christopher P. Morgan, an associate in the litigation department assisted with the briefing. The litigation department regularly represents commercial tenants and property owners in matters involving personal injury, property damage and contractual disputes and invites any inquiry on these topics.

CONTACT INFORMATION



ROBERT G. DEVINE

P: 856.317.3647

E: deviner@whiteandwilliams.com



CHRISTOPHER MORGAN

P: 856.317.3655

E: morganc@whiteandwilliams.com

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