

Slip and Fall: A Litigator's Tale

By Scott Noto

Attorney James Bronasky stared at the notice of appearance, the pages still warm from the copier. He removed his reading glasses and set them on his desk. "Great," he said with characteristic sarcasm.

His partner, Frank Cummings, overheard him.

"Well?"

When he stood in the doorway to Bronasky's office, the sunlight partially lit his wavy white hair. Cummings, the senior partner in the two-person firm of Cummings & Bronasky, P.C., concerned himself mostly with firm marketing and client development these days. Bronasky remained the rainmaker. He left Wurston, Drang, & Bonk, LLP after a dispute among the managing partners that has since become folklore among members of the local bar. The two litigators founded their firm in 1984, concentrating exclusively on personal injury claims. Tort reform, however, has compelled them to expand their practice and they have since moved from the building they once shared with an auto repair shop. "These days, we'll take anything that walks through the door," Bronasky quietly admitted to a former classmate one day at lunch in the Peninsular Club.

Cummings pressed.

"So? Who is it?"

"Ken Masner from McWitt & Jankoff in Detroit." He shook his head in disbelief.

"How the hell did I get stuck with a Detroit lawyer on *this* case?"

"Oh, I've heard of him. Bob Huitzma had a case against him a few years back. You should call him—this Masner guy is a real stickler. Classic side-show defense counsel."

Cummings chuckled. "You'll be yelling at him within five minutes of a deposition!"

“Of course!” Bronasky snapped. He shook his head. “A Detroit lawyer and a judge with a moustache.” He retained quirky superstitions when it came to filing lawsuits. “Judge Hendricks in Eaton County—he had a moustache. Remember that case?” He uttered another sarcastic chuckle as he assessed his chances of surviving summary disposition. “Hell, Hitler and Stalin both had moustaches!”

Cummings laughed. “But they weren’t judges.”

“Might as well have been. What about Holmes?”

The partners looked at each other with childlike amusement.

“Three generations of imbeciles are enough!”

The firm employed two secretaries and two paralegals, one of which was the firm’s intake paralegal, responsible for taking the many calls the firm receives from prospective clients. Despite receiving numerous inquiries for potential representation, Cummings & Bronasky were very selective. “The challenge with plaintiff’s work is that most people don’t have a cognizable claim and either don’t understand it or don’t want to understand it when you tell them,” Cummings once wrote in a *Michigan Bar Journal* article. “Emotive wrongs do not always warrant legal redress.”

Like many in the Plaintiffs’ Bar, Cummings was unabashedly candid about his political biases, taking an active role in the successful campaign to unseat the chief justice of the Michigan Supreme Court. “Now if we can scale back ‘tort reform!’” he once told a cheering crowd at a local Plaintiff’s Bar luncheon.

Civil case no. 08-4351-CK, filed in Kent County Circuit Court, was not unlike many of the cases filed by the firm of Cummings & Bronasky. Jennifer, the intake paralegal, received the call from Evanda Thomas over a month ago and summarized the call as follows:

Evanda's mother, Etta, was walking back to her apartment when she slipped on a patch of snow and ice on the apartment walkway and broke her right hip. The accident occurred in the evening. Weather was below freezing and windy, but not snowing. Area was lit, but the lighting was dim. Etta didn't see the ice until after the accident. She doesn't know how long the ice has been there, but said that the management never does a good job of clearing the walkway. Apartment complex is two floors, 36 units, owned by GTH Realty, LLC, a Michigan company.

"A colorable claim," Bronasky told his paralegal. "Let's get them in here. And check on the landlord—I'm not about to sue another judgment-proof LLC."

Jennifer prepared a standard 30 percent contingency retainer agreement for Etta's signature and scheduled a client consultation for the following Wednesday. After the meeting, she immediately started drafting the complaint for Bronasky's review. The firm brought two claims on behalf of Etta Thomas: common law negligence, based on a landlord's duty to maintain common areas of an apartment complex, and a claim for violation of MCL 554.139, which imposes a duty to keep common areas fit for their intended use.

"You know you'll run into an 'open and obvious' defense," Cummings said after Bronasky filed the complaint.

"That's open and obvious," Bronasky quipped.

"Well, keep me posted," Cummings urged. He said that to his junior partner each time he filed a complaint.

Weeks later, shortly after he received Masner's notice of appearance, Bronasky phoned fellow plaintiff attorney Bob Huitzma. "Tell me about this guy," he said.

Veteran defense litigator Kenneth Masner liked to wear black opal cufflinks in the courtroom, but he typically reserved them for trials or dispositive motions. His curly white hair was tamed somewhat on the top of his head, pressed to his scalp with a dollop of

mousse, but on the back and sides it was unruly. A pink, French-cuff dress shirt was the favorite among his vast wardrobe, of which he was rather meticulous, requiring his secretary to send his shirts to the cleaners every Thursday. They were always starched and wrinkle-free, falling gracefully over his oversized gut and fastened secularly behind one of his many Brooks Brothers sport coats. Exercise was not in Masner's lexicon. "A workaholic," said one of the partners at McWitt. Masner wouldn't deny it. Twice divorced, his career never came anything but first. Years of tort litigation rendered his face plump, rounded, and red, set atop a double-chin that jiggled whenever he talked.

"A perfect cross between Jabba the Hutt and Santa Claus," joked Huitzma. "Has he sent you the letter threatening sanctions for filing a 'frivolous' lawsuit?"

"No."

"Well, look for it next week."

Bronasky leaned forward in his chair, clutching the phone. "Are you *serious*?"

"Dead serious."

"Unbelievable!"

"How strong is the case?" Huitzma asked.

Bronasky explained the facts. "Not a 'jackpot' by any means," he concluded. "But I have a sympathetic elderly client."

"Who's the judge?"

"Reynolds."

"Oh, the new one?"

"Yeah."

"Haven't heard much about him."

Meanwhile, from his corner office on the 35th floor of a building in downtown Detroit, Ken Masner explained the lawsuit to his new client.

“Typical, steeple-chasing plaintiff’s lawyer,” he told George Horrigan, president of GTH Realty, LLC, as he tried to sooth his new client’s indignation. But Masner’s deep, booming voice was anything but soothing.

GTH Realty was a large residential landowner in west Michigan with properties—mostly suburban apartment complexes—located in the Detroit, Grand Rapids, and Lansing areas. “How is it our fault this woman fell?” Horrigan shouted from his cell phone unaware that he was being billed for the call. “I mean, it’s winter, for crying out loud! Of course the walkways are going to have snow and ice on them! Any idiot knows that!”

“There are two critical issues,” Masner explained, as calmly as possible. “First, could the plaintiff have avoided slipping? And second, did you guys know about the condition of the walkway before she fell?”

“Of course, we didn’t know about it,” Horrigan responded. “We manage over 20 properties. We can’t keep track of every little detail of every property.”

“Right,” Masner responded.

Horrigan continued. “How do we know they’re not just making this up to extort money out of my company? I mean, this is ridiculous!”

“Uh-huh.”

Horrigan’s indignation intensified. “And, by the way, who’s her attorney? Doesn’t he have any ethics? Can’t he get disbarred for filing a frivolous lawsuit like this? I mean ...”

Masner interrupted. “I hear you, George. I know how it is. Remember, I’ve been litigating cases like this for over 20 years. I’ve seen every slick plaintiff’s lawyer out there.” Masner knew, of course, that defending such lawsuits had made him a rich man. “I’ll ...”

“Can’t I sue him for malicious prosecution?”

“Don’t worry; we’ll throw every defense at them that we can, OK? Anyway, I gotta get ...”

“What about extortion?”

Masner’s voice grew somewhat irritated. “No, George. We can’t sue them for extortion.” He transitioned quickly. “Hey, we’ll talk again once we’re ready to file our response, OK?”

The conversation finally ended. Masner clicked the stopwatch on his computer screen with his mouse. “A half-hour?” he sighed.

He called to his secretary. “Deb, draft a letter to this Bronasky guy and tell him that our client is adamant that his client could have easily avoided her alleged accident simply by observing the weather conditions and watching where she was going. Also, tell him our client had no way of knowing just how icy the walkway was or how long the ice was allegedly there. If he wants to press this suit he should expect a request for costs and fees for filing a frivolous lawsuit.”

As he was talking, Deb opened up a similar letter Masner had sent in a prior case. “OK,” she said.

“Well, I’m off to a lunch meeting with Mr. Kent. I’ll be back around 1:30.”

Days later, Bronasky received the letter. “Son of a—”

“Hey, you can’t say Bob didn’t warn you,” Cummings said, as he laughed at his partner.

“To hell with him. This case is going to trial.”

“Well, that’s if your client holds up at her dep,” Cummings responded.

“Well, yeah. Of course.”

Three months later, at the deposition of Etta Thomas, Masner went in for the kill.

“Now, Mrs. Thomas, could you see the ice on the walkway?”

“Yeah. There was ice all over the walkway.”

“But it was patchy ice, right? I mean, the entire walkway wasn’t covered, right?”

Bronasky objected. “Compound. One at a time, please.” Masner glared at him.

“Yes, patchy ice. That’s how I would describe it.”

“Were you watching where you were going?”

“Objection. Vague and ambiguous. You can answer.”

“Well, I was carrying groceries. So no, I wasn’t looking down at the walkway, if that’s what you’re talking about.

Masner’s tone shifted to condescension. “Yeah, that’s what I’m talking about. You saw the ice after you fell, though, right?”

“Well, yeah.”

“How big was the patch of ice?”

“Objection to form.”

Masner’s face reddened. “Counsel, the form of that question is perfectly fine!”

“That’s your opinion,” Bronasky snapped.

Masner returned his piercing glare to Etta Thomas. “Can you repeat the question?” she asked.

“Sure. HOW BIG was the patch of ice?”

“Well, it wasn’t covering the entire walkway.”

“Was it as wide as the walkway?”

“No. I’d say about half as wide. Maybe just smaller than half.”

Bronasky shifted his weight. “Remember to answer the question,” he advised nervously, trying to subtly remind his client not to volunteer information.

“So, in other words Mrs. Thomas, you could’ve walked around it?”

“Well, I suppose so. But, like I said, I wasn’t paying attention. I was carrying my groceries.”

Later that afternoon, Cummings visited Bronasky’s office for a recap. “Well?”

“Not great,” Bronasky admitted. “A very credible witness, but too honest. She practically admitted she could’ve avoided the patch of ice.” He threw his pen onto his desk. “Settlement value just took a hit.”

“Well, you hadn’t had any luck settling this thing anyway. If you can survive summary disposition you got a sympathetic witness.”

“Right ... if.”

Two months after the close of discovery, the parties appeared in the Kent County Circuit Court to hear GTH Realty’s motion for summary disposition. The January day was cold, windy, and dry. Masner wore a pair of black rabbit fur earmuffs to match his cashmere overcoat. His characteristic opal cufflinks secured the white cuffs of his baby blue dress shirt. When he took the podium, Masner argued that anyone could have avoided the small patch of ice and that the plaintiff had not demonstrated that the lighting was so poor so as to prevent someone from avoiding the patch of ice. As such, Masner concluded, the ice presented no “special aspects” that made the sidewalk unreasonably dangerous. Secondly, Masner argued, even in absence of the open and obvious doctrine, plaintiff didn’t prove that

GTH Realty had any knowledge of the condition or knew that the ice had existed for an extended period of time.

When it was his turn, Bronasky argued that the lighting made it difficult to see the dangerous condition, that his client's age had to be considered in determining what a "reasonable person" would have done, and that the weather around the period of Mrs. Thomas' accident raised an issue of fact as to whether defendant should have known of the condition.

"Of course they knew," Bronasky told Judge Reynolds. "Or they should have known. It snowed just two days before the accident!"

But Judge Reynolds was not persuaded. At the close of the hearing he ruled from the bench, granting summary disposition in favor of defendant GTH Realty. "The parties can expect a written opinion detailing my ruling in two weeks," he said at the close of the hearing. "Anything else?"

"No, your Honor," Masner answered, his face reddened with excitement.

"No," Bronasky answered, his head down as gathered his papers. He then looked up to find Masner approaching him, hand extended.

"Well, Mr. Bronasky, good luck to you," he gloated.

Bronasky snapped shut his litigation bag. "Judges with moustaches," he said to himself, shaking his head "Always judges with moustaches." He waited a few minutes to allow Masner to leave the courtroom, then got on the elevator back to the courthouse lobby. "What kind of judge rules from the bench on summary disposition?" Bronasky said to himself as he left the courtroom.

Activity in the courthouse lobby was routine. Deputies from the Kent County Sheriff's Department scanned bags as courthouse visitors stepped through security, some of

whom gingerly walked toward the jury assembly area clutching their jury duty summons. Attorneys hustled over to the elevators. Some carried large litigation bags, others just a small folder of papers. A court clerk held a styrofoam cup of coffee as she talked to one of the sheriff's deputies.

Outside, at the bottom of the courthouse steps, children from Ms. Jean's fifth-grade class at Forest Glen Elementary School had assembled after their brief field trip to observe the intricacies of the American justice system. Dylan Sanderson was trying to make snowballs out of the dry, brittle snow, but his efforts always ended with a puff of white powder scattered across the courtroom steps. A group of his friends—Michael Krochick, Jared Vankamp, and Cameron Heist—laughed gleefully in their efforts to imitate their friend. The boys' antics, as always, provoked admonishment from Ms. Jean.

“We only make snowpersons and snow forts out of the snow,” she said, as calmly and positively as possible as she tried to corral her class.

Skyler Evans and her best friends, Sienna Van Dam and Alyson Leitner, continued chatting about the Jonas Brothers, emitting high-pitched shrieks when their enthusiasm got the better of them.

“Girls, girls, we are outside, but this is not a playground. Can you please try to keep your voices down?”

Even little Jimmy Murphy, a shy transfer student from the recently closed St. Jude's School, inhaled the brisk, numbing freedom of the moment, laughing at Billy and the gang as he wiped a snot bubble from beneath his nose with his black mitten.

As she waited for the yellow school bus, the January cold began to thin Ms. Jean's patience. “Whoa! People! It is way too loud out here!” she shouted. But none of the students listened. Dylan tested her by repeatedly kicking the mound of snow that had been shoveled

off to the side of the walkway, smiling as little chunks of ice and airbursts of powder exploded across the courthouse steps. Sienna emitted another high-pitched squeal. Little Jimmy sniffled as he tried to keep the snot from dripping out of his nose.

“Well, back out into the cold again,” Masner said to himself as he pulled his black rabbit fur earmuffs out of his coat pocket. He turned to a passerby. “I can never get used to this weather. I hate it,” he said. But the passerby just gave him a blank stare. With earmuffs securely covering his ears, Masner looked ahead at the unruly group from Forest Glen Elementary School.

“Boy, some kids have had a little too much sugar today,” he said in a somewhat hushed tone. As he approached the steps, he grew a bit irritated. “Excuse me, kids! Coming through!” he shouted.

“Kids, for the last time ... get off the steps!” yelled Ms. Jean. For a moment, Dylan stopped kicking snow, but the chatty group of girls continued on about the Jonas Brothers. At the bottom of the steps, little Jimmy Murphy’s eyes grew big as he glanced upward at the imposing figure of veteran tort litigator Kenneth Masner waddling down the courthouse steps. Their eyes locked for a brief moment, but then suddenly ...

“OWWWWWW!” Masner’s robust rear end hit the ground with a heavy thud.

Little Jimmy wiped his nose. “Whoa, did you see THAT?!” yelled Dylan Sanderson.

“Mister, are you all right?” asked a soft, squeaky voice from the crowd of students.

“DAMMITALL!” Masner shouted angrily, ignoring the crowd of school children.

He got up and brushed off the bottom of his coat. His face was a deep red from the accelerated combination of cold, anger, and embarrassment. “DON’T THEY KNOW HOW TO USE SALT AROUND HERE?”

Then a voice piped up from the top of the stairs. “Salt doesn’t work when it gets this cold,” said attorney Jim Bronasky from underneath a brown fedora. “Besides, you could’ve walked around it.” And, with that, the personal injury attorney went on his way.