

## And The Defense Wins

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### Kathleen Reid



DRI member [Kathleen Reid](#) of **Grotefeld, Hoffmann, Gordon, Ochoa & Evinger, LLP** secured summary judgment in favor of her retail client in the Northern District of Illinois, Eastern Division. The Plaintiff alleged that the retail defendant was liable for Plaintiff’s significant injuries she suffered after allegedly slipping and falling on a “flyer” in the store. Plaintiff demanded upwards of \$2.5 million in damages and attempted to recover under three theories of liability: common law negligence, *res ipsa loquitur*, and premises liability.

In her premises liability count, Plaintiff alleged that she need not prove notice under the “notice exception,” and even if she did, there was sufficient evidence of constructive notice to survive summary judgment. The defense argued that, where there was no evidence that the flyer was related to the Defendant retail store, the notice exception did not apply. Additionally, the defense countered any possibility of constructive notice by arguing that evidence that merely establishes that the flyer could have been on the aisle floor at various times before Plaintiff’s fall is too vague and speculative to create a genuine issue of fact to be submitted to a jury.

In connection with her *res ipsa loquitur* claim, Plaintiff argued that she could not have slipped on the subject flyer without the retail store being negligent. The defense focused its argument on the element of control, arguing that just because a flyer was on the floor of the subject premises does not give rise to the single inference that the flyer was on the floor due to the store’s negligence, as the flyer was not in the “exclusive control” of the retail store, even when given a flexible meaning to the term. The court agreed, finding that where it is equally plausible that an employee or another individual was the reason for the instrumentality being on the floor of the premises, the

*res ipsa loquitur* doctrine cannot apply to give rise to the inference of negligence.

The court also found for the defense on Plaintiff’s common law negligence count, agreeing that where there is no evidence that the defendant store caused the flyer to be on the floor, and there is no evidence of how the flyer came to be on the floor, there is no genuine issue of fact as to breach. Additionally, the Plaintiff tried to argue that the defendant store violated its own policies and procedures, evidencing negligence. The Northern District agreed with the defense’s argument, that a business policy does not impose a new or heightened legal duty of care beyond what is required by law.

### Scott F. Gibson and Emma J. Chalverus



DRI members [Scott F. Gibson](#) and [Emma J. Chalverus](#) of **Davis Miles McGuire Gardner, PLLC** in Tempe, Arizona successfully defended Karekin Kaprelian, dba Vertex Wealth Advisors, in a breach of contract, defamation, and false light lawsuit.

Plaintiff, a financial advisor, sold his book of business to Defendant, the owner of a wealth advisor firm. The sale price of the book of business was subject to a claw back provision. After only a fraction of the business actually transferred to Defendant, Defendant ultimately overpaid Plaintiff for the value of the book of business. Defendant did not renew the business relationship beyond the six month term of their agreement. Defendant filed a Form U5 with the Financial Industry Regulatory Authority (“FINRA”) stating that Defendant terminated Plaintiff for lack of performance. Defendant also sent a letter to the transferred clients notifying them that Plaintiff no longer worked with Defendant.

Plaintiff sued Defendant for breach of contract for alleged underpayment for the value of his book of business. Plaintiff also alleged defamation and false light invasion of privacy based on the language in the both Form U5 and the letter to the clients. Defendants obtained summary judgment on Plaintiff’s claims relating to the breach of contract claim and the defamation and false light claims relating to the client letter.

A four day trial was held on Plaintiff’s claims for defamation and false light in relation to the Form U5. Plaintiff sought about \$1 million of lost expected income