

SLIP AND FALLS CAUSED BY SNOW AND ICE

[Ref. Tort Theories, Para. 1.10]

It was late December in Massachusetts and the skies were clear, but the temperature was below freezing. Emanuel arrived at a Target department store around 11 a.m. Recently snow had been plowed from the parking lot, but areas of scattered snow and ice remained. Emanuel safely entered the store, but as he was returning to his car he slipped and fell on a patch of ice in the parking lot. The ice that caused Emanuel's accident was either a chunk that had fallen from snow that was piled on the median by the plows, or was formed when snow melted from the pile and froze. Emanuel was injured and filed a lawsuit against Target and the contractor responsible for snow and ice removal, arguing that they failed to properly protect lawful visitors from the hazards caused by snow and ice. The defendants argued that they did not breach a duty of care even though snow and ice were present in the parking lot.

The trial court, applying the long-standing "Natural Accumulation" or "Massachusetts Rule," dismissed Emanuel's claim. Under the Massachusetts Rule, a property owner is not liable for injuries that result from the "natural accumulation" of snow and ice on his property. The ice that caused Emanuel's accident was, in the eyes of the trial court, a natural accumulation. It's likely the outcome would've been the same in other jurisdictions that follow the Massachusetts Rule.

Emanuel appealed and, in *Papadopoulos v. Target Corporation*, 930 NE2d 142 (Mass. 2010), the Massachusetts Supreme Court revisited the natural accumulation rule, rejecting it in favor of a reasonable care standard similar to the standard most states apply to all slip and fall cases. The reasonable care standard requires the landowner to use reasonable care to keep his property free from dangerous conditions.

This article will analyze the natural accumulation rule and the reasonable care standard as they apply to falls on snow and ice.

THE EVOLUTION OF THE MASSACHUSETTS RULE

At the heart of the Massachusetts Rule is the distinction between the natural accumulation of snow and ice and an accumulation that is not natural. The Massachusetts Supreme Court in *Papadopoulos* explained that many believe this distinction derives from cases decided in the late 1800s.

In *Watkins v. Goodall*, 138 Mass. 533 (Mass. 1885), a tenement owner was sued by a tenant who

fell down stairs after she slipped on a ridge of ice. The ice accumulation was caused by water that drained from the building's cracked downspout. An overnight snowfall covered the ice prior to the plaintiff's accident. The Massachusetts Supreme Court framed the issue:

The question is not whether the defendant was under any obligation to put the conductor and pipes there, or to take any measures to protect the passageway from water from the eaves; but whether, having placed them there and arranged them so that they would divert the water from its natural course and carry it away from the platform, and having let the tenements in that condition, he was liable for a want of repair in the pipe by which the water was discharged artificially in one place upon the platform so as to make it dangerous when frozen. We think it was an artificial formation of ice, resulting directly from the negligent omission of the defendant, for which he was as much responsible as if he had placed the water there by his voluntary act.

The *Watkins* decision distinguished natural and artificial accumulations, but initially Massachusetts courts limited the distinction to landlord-tenant cases. The rule was first applied to other entrants on land in *Aylward v. McCloskey*, 587 NE2d 228 (Mass. 1992). In *Aylward*, the plaintiff broke her leg when she slipped on snow and ice on the defendants' driveway. The court ruled for the defendants, concluding that the natural accumulation of snow and ice is not a property defect that creates liability. The *Papadopoulos* court discussed the *Aylward* ruling:

In *Aylward v. McCloskey* ... the court affirmed the grant of summary judgment for the defendants on the plaintiff's complaint that she had been injured by slipping on snow and ice that had been left unshovelled and unplowed in the defendants' driveway. The defendants had been away from the area at the time of the snowfall and did not know that there was snow or ice on their driveway. The court recognized that the duty owed by the defendants was one of "reasonable care in the circumstances." It noted that "the simple fact that a person slips on ice on another's property does not subject the property owner to liability" and concluded that there was no evidence in the record that the defendants had failed to exercise reasonable care in the circumstances. ... The court also declared, however, that landowners are liable only for injuries caused by defects existing on their property and that "the law does not regard the natural accumulation of snow and ice as an actionable property defect, if it regards such weather conditions as a defect at all." There was no evidence, the court said in affirming judgment, that the defendants had "created a defective condition on their property." In this manner, a relic of abandoned landlord-tenant law was resurrected as an exception to the governing standard of reasonable care. ... The court therefore created in *Aylward*, for the first time in our jurisprudence, a standard of liability specific to slips and falls on snow or ice that depended on a fact finder's determination whether the snow or ice was a natural or unnatural accumulation.

Other jurisdictions adopted the Massachusetts Rule over the years and various exceptions were created. Like the Massachusetts Supreme Court that held the natural accumulation of snow and ice is not a property defect, some jurisdictions reason that the natural accumulation of snow and ice is not an unreasonably dangerous condition. The Texas Supreme Court took this position in *Scott and White Memorial Hospital v. Gary Fair and Linda Fair*, 310 SW3d 411 (Tex. 2010). In *Scott and White*, the plaintiff slipped and fell on ice while walking from the defendant hospital to his car. The plaintiff and his wife sued. The court, ruling for the hospital, said:

On several occasions we have addressed whether certain naturally occurring conditions create unreasonable risks of harm. We have held that dirt in its natural state does not pose such a risk. More recently, we held that ordinary mud that

accumulates naturally on an outdoor concrete slab without the assistance or involvement of unnatural contact is, in normal circumstances, nothing more than dirt in its natural state and, therefore, is not a condition posing an unreasonable risk of harm. ... We recognized that holding a landowner accountable for naturally accumulated mud would impose a heavy burden because rain, a cause of mud, is beyond the premises owner's control. Further, mud-induced accidents are likely to occur regardless of precautions taken by landowners, and invitees are often better positioned to avoid the dangers associated with muddy walkways. ... Numerous courts of appeals have applied this holding to premises liability cases involving other naturally occurring conditions, including ice, and have consistently concluded that naturally formed ice is not an unreasonably dangerous condition for premises liability purposes.

Significantly, the court rejected the plaintiffs' contention that ice should be treated differently than mud because ice rarely occurs in Texas. The court concluded that ice, like mud, results from precipitation beyond the landowner's control and it would be too heavy of a burden to require landowners to guard against wintery conditions. Through testimony of a local meteorologist, the defendant established that the ice was caused by a winter storm and was in a natural state, which the court defined as ice that "accumulates as a result of an act of nature." The plaintiffs challenged this by arguing that the application of deicer transformed the ice into an unnatural, more dangerous state. The court, however, rejected this argument:

The Fairs assert that Scott and White's negligent deicing caused the ice to refreeze, rendering it unnatural. But the mere fact that a premises owner salted a sidewalk and then allowed the sidewalk to freeze again does not turn the natural accumulation of snow and ice into an accumulation that is unnatural. ... In other words, salting, shoveling, and applying deicer to a natural ice accumulation does not transform it into an unnatural one. To find otherwise would punish business owners who, as a courtesy to invitees, attempt to make their premises safe.

The Texas Supreme Court's decision in *Scott and White* illustrates what a plaintiff must prove to recover in a jurisdiction that applies the natural accumulation rule. Texas landowners are not liable for ice present in its "natural" state, and they are also insulated from liability for accidents that result from melting or shoveling the ice because these activities generally do not transform a natural ice accumulation into an unnatural one.

Ohio courts, like many courts that apply the natural accumulation rule, recognize two exceptions to the rule of no landowner liability for slip and falls on natural accumulations. According to the court in *Jeffries v. United States*, discussed next, the exceptions applied in Ohio are:

- ◆ The landowner had actual or implied notice that snow and ice accumulations created a substantially more dangerous condition than invitees should have anticipated based on their knowledge of conditions generally prevailing in the area; or
- ◆ an intervening act of the landowner perpetuated or aggravated the preexisting, hazardous presence of ice or snow.

These exceptions can be difficult to prove.

In *Jeffries v. United States*, 2010 U.S. Dist. LEXIS 30426 (N.D. Ohio 2010), the plaintiff, a veteran, slipped and fell on snow or ice on the sidewalk of a VA clinic. At the outset, the district court noted that Ohio landowners do not have a duty to protect business invitees from dangers that "are so open and apparent to such invitee that he may reasonably be expected to discover them and protect

himself against them.” In Ohio, natural accumulations of snow and ice are considered to be “obvious and apparent” risks. The plaintiff argued that the natural accumulation doctrine did not apply because imperfections in the sidewalk made the accumulation of snow “non-natural” and substantially more dangerous than it should have been. The plaintiff presented photos of the claimed sidewalk defects. He also argued that he did not voluntarily assume the risk of walking on snow and ice because he had to attend his medical appointment. The court rejected these arguments and ruled for the defendant. Relying on Ohio case law, the court first explained how natural accumulations of snow and ice are transformed into unnatural accumulations: “An unnatural accumulation is one where there is evidence of an intervening act by the landlord/owner which perpetuates or aggravates the preexisting, hazardous presence of ice and snow.”

In Ohio, low temperatures, inclement weather conditions, and drifting snow blown by strong winds do not transform naturally accumulated snow and ice into an unnatural state. Likewise, the failure to clear away snow or ice and the failure to salt a sidewalk, generally do not make snow or ice unnatural. In all of these situations, the natural accumulation defense is still available to the landowner. The court, citing Ohio case law, added:

To find that a dip or depression in a sidewalk results in an unnatural accumulation of ice and snow would ignore two essential yet simple realities. First, snow and ice are part of wintertime life in Ohio and hazardous winter weather conditions and their attendant dangers are to be expected in this part of the country. ... Second, every sidewalk, street, or parking lot cannot be expected to be completely free of all constructional imperfections, defects or blemishes. To hold otherwise would cause every builder of a sidewalk as well as the abutting property owner and municipality in which it is located to become an absolute insurer.

The court also ruled that the plaintiff failed to show that he encountered a hazard that was “substantially more dangerous” than he could have anticipated because there was no evidence that the snow and ice concealed a danger. According to the court, the imperfections in the sidewalk were minor. Regarding the plaintiff’s argument that he could not avoid the snow or ice because he had a medical appointment, the court emphasized that there was no evidence the plaintiff sought assistance in finding another way into the building or attempted to reschedule his appointment.

In *Moore v. The Kroger Co.*, 2010 Ohio 5721 (Ohio App. 2010), an Ohio appellate court rejected the plaintiff’s argument that snow and ice covering a speed bump outside a grocery store was an unnatural accumulation of snow that created a substantially more dangerous condition than a patron could anticipate. In this case, the plaintiff presented expert testimony that: (1) the speed bump’s length and arc created a slope that made it dangerous when snow and ice accumulated on it; (2) the snow and ice accumulated faster and melted slower on the speed bump because the yellow paint on the bump acted as a sealant against the absorption of snow and ice; and (3) the speed bump caused snow and ice to dislodge from the undercarriages of passing vehicles, creating an unnatural accumulation on the speed bump. The plaintiff also claimed that the speed bump was not visible and that snow and ice piled around it caused her fall. The court, however, concluded that there was no evidence to suggest that the snow and ice accumulation was anything other than the natural buildup of snow and ice during the winter season:

Snow falling from the sky that is thereafter displaced by usual and normal foot and vehicular traffic does not bear a significant enough fingerprint of human intervention to render it an unnatural accumulation. That snow and ice may collect in areas of a parking lot or sidewalk because it has shifted underfoot or under a tire must be anticipated by those who live in a region frequented by snow, ice, and low temperatures. The fact that vehicles contributed to the movement of slush does not create a duty on the part of the property owner to remove it. ... Furthermore, that the

natural accumulation of snow displaced by common foot and vehicular traffic was then deposited in another area bearing no uncommon or extraordinary characteristics does not transmute the snow into an unnatural accumulation. ... Snow that is moved against and on top of a standard speed bump by foot and vehicular traffic is normal and must be anticipated by pedestrians.

The court went on to say that the arc of the speed bump and the yellow paint were normal characteristics of speed bumps to assure the safety of motor vehicle operators and pedestrians. These characteristics did not make the snow accumulation unnatural. The court elaborated on the type of evidence needed to prove landowner liability:

Many man-made objects and man-placed objects may alter the landscape and how the snow accumulates thereon. It has never been the law that merely because snow accumulated on a man-made surface, a question of fact exists whether the accumulation was unnatural. Grass is planted where there was once dirt, asphalt is laid where there was once grass, and steps are placed where there were once none. All of these man-made and man-placed objects change the way snow collects, blows, and melts. It is only when these objects or their placement is unreasonable, improper or exceptionally unusual that negligence may arise. Here, there is no evidence that the speed bump was abnormal in its characteristics or caused any snow accumulations that are not expected to be encountered under these circumstances.

The court also rejected the plaintiff's argument that the covered speed bump was a substantially more dangerous condition than she should have anticipated. It contrasted the plaintiff's claim with an earlier case in which a property owner was held liable for an invitee's slip and fall caused by a snow covered, seven-inch hole in the property owner's parking lot. The court reasoned that an invitee cannot be required to anticipate a snow covered hole in a parking lot while a speed bump can reasonably be expected, especially considering that the plaintiff had been shopping on the defendant's premises since she was a child.

Be aware, however, that even in states that apply the natural accumulation rule, it isn't always applied in all circumstances. The Supreme Court of North Dakota, in *Makeeff v. The City of Bismarck*, 693 NW2d 639 (N.D. 2005), refused to expand its natural accumulation rule from sidewalks to staircases. In *Makeeff*, the plaintiff slipped and fell on a building's icy stairs and claimed that the defendant city negligently failed to inspect the staircase and remove the ice. The city argued that the court should apply the same standard it applies to snow and ice on sidewalks, which is similar to the Massachusetts Rule. North Dakota's Supreme Court declined to extend its natural accumulation rule to stairs. Citing cases from other jurisdictions, the court was concerned that expanding the rule would undermine a landowner's basic public responsibility to maintain his property in a reasonably safe condition and prevent injury to those whose presence on the property is foreseeable.

Claims professionals should also be aware that jurisdictions that have a natural accumulation rule similar to the Massachusetts Rule often do not apply it to slip and falls when there is a state statute or local ordinance that also applies. This typically occurs in slip and fall cases involving sidewalks. In *Pinnacle Bank v. Rosemary Villa*, 100 P3d 1287 (Wyo. 2004), the Supreme Court of Wyoming reiterated that landowners in Wyoming are generally not liable for injuries caused by the natural accumulation of snow and ice, but acknowledged that "... as early as 1963, this court suggested that the existence of an ordinance requiring a different standard of care for the removal of snow and ice might override Wyoming's natural accumulation of snow and ice common law." Thus, the Wyoming Supreme Court did not apply its natural accumulation rule when a city ordinance required landowners to keep adjoining sidewalks clear of snow, ice, slush, mud, and other impediments.

Similarly, some states, such as Maine, only apply the natural accumulation rule in landlord-tenant claims. For other slip and falls, a reasonable care standard is used.

A CHANGE OF COURSE IN MASSACHUSETTS

The reasonable care standard that modern courts apply to slip and fall cases involving snow and ice can be found in the Restatement of Torts (Second) § 343 (1965). The Connecticut Supreme Court's decision in *Reardon v. Abraham Shimelman*, 102 Conn. 383 (Conn. 1925) contributed to the modern rule. This case, like the early Massachusetts cases, involved a slip and fall on ice and snow at a tenement. The Connecticut Supreme Court, however, specifically considered the Massachusetts Rule and rejected it:

Approaching the question from the standpoint of principle, we are wholly unable to justify the Massachusetts rule. The duty of the landlord being to exercise reasonable care to prevent the occurrence of defective or dangerous conditions in the common approaches, the fact that a particular danger arose from the fall of snow or freezing of ice can afford no ground of distinction. ... To set apart this particular source of danger is to create distinction without a sound difference. ... So here we say, an accumulation of ice or snow upon a common approach to a tenement house may impose upon the landlord a liability for injuries due to it, provided he knew, or in the exercise of reasonable oversight ought to have known, of the existence of the dangerous condition and failed to exercise reasonable care to provide against injury by reason of it.

Interestingly, the Massachusetts Supreme Court in its 2010 *Papadopoulos* decision, adopted Connecticut's reasonable care standard for much the same reason the Connecticut Supreme Court rejected the Massachusetts Rule in 1925 – there is no sound reason to distinguish between natural and unnatural snow accumulations in slip and fall cases. Specifically, the Massachusetts Supreme Court said:

Like the long-standing distinctions among tenants, licensees, and invitees now discarded, the reliance on a distinction between natural and unnatural accumulation has sown confusion and conflict in case law. ... Determining liability for a slip and fall injury based on whether the plaintiff fell on a natural rather than an unnatural accumulation of snow and ice is not based upon proper considerations. The only rationale the decisions of this court have offered in support of this rule is that the property owner owes a duty to repair or warn of defects on the property, and a natural accumulation of snow or ice is not a defect. ... Implicit in this rationale is that a dangerous condition on one's property can be a defect only if it is created or caused by the property owner. We do not accept this rationale where a property owner knows or has reason to know that a banana peel has been left on a floor by a careless customer; we have long held that the property owner has a duty to keep the property reasonably safe for lawful visitors regardless of the source of the danger. The rationale has no greater force when the source of the danger is an act of nature rather than an act of another person.

The *Papadopoulos* court also rejected the rationale that dangers associated with snow and ice accumulation are open and obvious, and that the invitee is solely responsible for his own safety when encountering snow and ice. The court noted that while a property owner may have no duty to warn of an open and obvious danger, he is not necessarily relieved of the duty to remedy that danger and the rule should be no different in situations involving winter precipitation. The court said:

It is not reasonable for a property owner to leave snow or ice on a walkway where it is reasonable to expect that a hard New England visitor would choose to risk crossing snow or ice rather than turn back or attempt an equally or more perilous walk around it. Therefore, even if snow and ice were properly viewed as an open and obvious danger, this fact alone will not always relieve a property owner of the duty to use reasonable care in making the property reasonably safe for lawful visitors. In addition, the openness and obviousness of snow and ice have nothing to do with whether such accumulations are natural rather than unnatural, so the open and obvious doctrine cannot justify the distinction we now abandon.

The court also rejected another justification for the Massachusetts Rule: that the weather and cold climate make it impractical, if not impossible, to impose on landowners an obligation to remove snow or ice. Interestingly, the court noted that every other supreme court in New England had already rejected (at least in part) this line of reasoning. A simple, yet persuasive explanation was offered by the Rhode Island Supreme Court in *Fuller v. Housing Auth. of Providence*, 279 A2d 438 (R.I. 1971):

We believe that today a landlord, armed with an ample supply of salt, sand, scrapers, shovels and even perhaps a snow blower, can acquit himself quite admirably as he takes to the common passageways to do battle with the fallen snow, the sun-melted snow turned to ice, or the frozen rain. We fail to see the rationale for a rule which grants a seasonal exemption from liability to a landlord because he has failed to take adequate precautions against the hazards that can arise from the presence of unshoveled snow or unsanded or salt-free ice found in the areas of his responsibility but yet hold him liable on a year round basis for other types of defects attributable to the workings of mother nature in the very same portions of the property.

Finally, the *Papadopoulos* court was persuaded by the problems in prior cases associated with distinguishing between natural and unnatural accumulations of snow and ice when accidents occurred after landowners had attempted to clear the snow and ice. In particular, one Massachusetts court reversed a verdict in favor of a plaintiff who slipped and fell on an entrance ramp after the defendant had shoveled away snow and exposed a layer of ice. Even though the shoveling may have made the ramp more dangerous, the court held that “there was no evidence that the shoveling actually created the ice on the ramp” and ruled that “liability does not attach ... when a property owner removes a portion of an accumulation of snow or ice and a person is injured by slipping and falling on the remainder because the unremoved snow or ice remains as a natural accumulation.” Similarly, another Massachusetts appellate court had ruled that depending on the specific circumstances, snow shoveled into a snow bank might or might not be a natural accumulation and that even snow removal efforts that increase a risk of harm may not transform naturally accumulated snow into an unnatural accumulation for liability purposes. Distinctions like these did not make sense to the *Papadopoulos* court, which pointed out that the distinctions “contravene the general rule of tort law that, once a person acts to mitigate a potential hazard to another, he will be liable for harm resulting from the failure to exercise reasonable care, even where no preexisting duty to act was owed.” In other words, courts should not distinguish a landowner who had a duty to act and created a dangerous condition by doing an inadequate job of removing snow and ice, from other landowners who had no preexisting duty to act but assumed a duty with good intentions and negligently created a more dangerous condition in the process.

It remains to be seen whether other jurisdictions that apply the natural accumulation rule will follow the lead of the Massachusetts Supreme Court in *Papadopoulos* and replace it with a reasonable care standard.

CONCLUSION

In *Papadopoulos v. Target Corporation*, the Massachusetts Supreme Court overruled its prior common law rule and adopted a reasonable care standard for slip and fall cases involving snow and ice. Rejecting the long-standing rule of distinguishing between natural and unnatural accumulations of snow and ice as a “relic of abandoned landlord-tenant law,” the court announced that the liability of Massachusetts landowners for removing snow and ice, or failing to remove it, will be governed by traditional premises liability principles. As a result, when faced with snow and ice on their property, landowners must act as a reasonable person would under the same or similar circumstances. And to determine whether that standard was met, courts will consider the likelihood of injuries to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.