

Summer, 2021

COMMERCIAL LANDOWNERS AND THE ONGOING STORM RULE

[Ref. Tort Theories and Defenses, Para. 1.10]

FACTS: On the morning of January 12, 2015, the plaintiff parked across the street from his office, which was located on property owned by the defendant. The defendant's property had a paved parking lot with a concrete driveway apron. There had been several snowstorms the preceding six days and there were pockets of rain and freezing rain falling while the plaintiff drove to work.

The plaintiff crossed the street wearing slip-resistant shoes and followed the sidewalk, which had snow piled on either side from an earlier storm. The plaintiff's path required him to cross the defendant's driveway apron where he slipped and fell on black ice and broke his hip. The defendant employed a contractor for snow and ice removal, but it was unclear whether any removal services were performed before the plaintiff's accident.

The plaintiff sued the defendant arguing that it had a duty to use reasonable care to keep walkway surfaces free of dangerous conditions. The defendant, however, asserted that its duty to clear snow and ice was suspended during the storm. It argued that under the "ongoing storm rule" it could wait until after the storm to address the hazard created by the ice.

The trial court granted the defendant's summary judgment and the plaintiff appealed. The appellate court reversed and held that a commercial landowner owed a duty of care even when precipitation was falling. According to the court, the ongoing storm rule did not apply and a commercial property owner could be liable for failing to take reasonable steps to make its property safe during a storm if it had actual or constructive notice of a foreseeable hazard caused by snow or ice. The defendant property owner appealed to the New Jersey Supreme Court.

QUESTION: Do commercial landowners have a duty to remove snow and ice from their property during a winter storm?

ANSWER: No, according to the New Jersey Supreme Court in *Pareja v. Princeton International Properties*, 221 N.J. LEXIS 549 (N.J. 2021). The court held that the ongoing storm rule applied and according to that rule a commercial landowner could wait until after a storm to remove snow and ice.

The court began its analysis by reviewing New Jersey case law on sidewalk liability. Under the common law, landowners were not responsible for the normal wear and tear on public sidewalks adjoining their property and they also had no duty to remove snow and ice. Over time, however, New Jersey courts recognized that commercial landowners had a duty to maintain sidewalks

abutting their property in reasonably good condition and could be liable to injured pedestrians for their failure to do so. This duty eventually expanded to removing or reducing the hazards associated with snow and ice after a storm, but none of the cases addressed a commercial landowner's duty during a storm.

Next, the New Jersey Supreme Court addressed the appellate court's ruling that if it had actual or constructive notice of a foreseeable hazard caused by snow and ice a commercial landowner has a reasonable duty of care to make its property safe during a storm. Although a reasonableness standard is consistent with negligence law, the supreme court was concerned that the duty created by the appellate court couldn't be applied consistently to all commercial landowners. Specifically, the court observed that this analysis did not factor in "the size, resources, and ability of individual commercial landowners" or "recognize that what may be reasonable for larger commercial landowners may not be reasonable – or even possible – for smaller ones." According to the court this standard made it difficult to create clear, uniform guidance about what a reasonable commercial property owner should do during a winter storm.

Balancing these factors against the need to provide redress to those injured by hazards caused by snow and ice, the supreme court elected to adopt the ongoing storm rule:

Our precedent makes clear, and we reiterate today, that absent unusual circumstances, a commercial landowner's duty to remove snow and ice hazards arises not during the storm, but rather within a reasonable time after the storm. Given the unreasonableness of removing the accumulation of snow and ice while a storm is ongoing, adopting the ongoing storm rule today is consistent with our case law on sidewalk liability and snow removal.

The court, in adopting the majority rule, cited decisions in the following states with climates similar to New Jersey's:

- Connecticut - *Kraus v. Newton*, 558 A2d 240 (Conn. 1989)
- Delaware - *Laine v. Speedway*, 177 A3d 1227 (Del. 2018)
- New York - *Solazzo v. N.Y.C. Transit Authority*, 843 NE2d 748 (N.Y. 2005)
- Pennsylvania - *Goodman v. Corn Exchange National Bank*, 200 A 642 (Pa. 1938)

It's worth noting that Iowa's Supreme Court recently analyzed the ongoing storm rule and reached the same conclusion as the New Jersey Supreme Court. In *Gries v. Ames Ecumenical Housing, Inc.*, 944 NW2d 626 (Iowa 2020), the plaintiff sued her landlord after she fell on an icy sidewalk outside her apartment building and sustained injury. She asked the court to abandon the ongoing storm rule in favor of a reasonableness standard and pointed out that Iowa had already abolished common law classifications of land entrants in favor of the reasonableness standard of the Restatement (Third) of Torts. The Iowa Supreme Court, citing case law from other states that apply the ongoing storm rule, rejected her argument:

The continuing storm doctrine recognizes a land possessor is not a de facto insurer responsible for all accidents occurring on its property. ... The doctrine also allows businesses to remain open to travelers and others who might need provisions or other supplies during a winter storm by alleviating the concerns of business owners that if they stay open during a storm they will expose themselves to the expense of tort suits over falls that are a natural risk in any storm situation involving icy or snowy conditions.

Iowa's Supreme Court explained that pedestrians who venture out during storms know of the

hazards caused by snow and ice and are aware that there is a risk of injury. It concluded that the social costs of requiring landowners to engage in snow and ice removal during a storm exceeded the benefits of temporarily cleared passageways that will soon become covered by additional accumulations.

THE MINORITY REASONABLENESS STANDARD: The decision of the New Jersey Supreme Court in *Pareja* was not unanimous. Two dissenting justices argued that it was wrong to adopt the ongoing storm rule and emphasized that an important purpose of tort law is to prevent accidents by encouraging landowners to exercise reasonable care to protect entrants on their premises. The dissent observed that placing this duty on landowners deters wrongful conduct, protects invitees and pedestrians, and brings an economic benefit to businesses that maintain their sidewalks.

The adoption of the ongoing storm rule is certainly a boon to commercial landowners who will have no duty to go to the expense of salting or shoveling a sidewalk while even slight precipitation is falling. But what about the safety of a public employee ... who works in a commercially owned building and leaves the office at 7:00 p.m., and falls and fractures her hip on an icy sidewalk because the building's live-in maintenance manager made no effort to salt or shovel the sidewalk of snow or sleet while precipitation still fell? ... To be sure, those at risk for the most serious injuries from the ongoing storm rule will be the elderly and those with physical disabilities.

The dissent pointed to jurisdictions that had either rejected the ongoing storm rule, or applied a reasonableness standard:

- Indiana - *Henderson v. Reid Hospital & Healthcare Services*, 17 NE3d 311, (Ind. App. 2014), recognized that there is no requirement that a storm cease before a commercial property owner's duty to exercise reasonable care applies to maintain its business premises, sidewalks, and parking lots in a reasonably safe condition.
- Maine - *Budzko v. One City Center Associates Limited Partnership*, 767 A.2d 310 (Me. 2001), rejected an argument that a commercial property owner has no duty to remove freezing precipitation as it falls, and concluded that business owners must reasonably respond to foreseeable dangers and keep the premises reasonably safe when invitees can be anticipated to enter or leave the premises during a winter storm.
- Michigan - *Lundy v. Groty*, 367 NW2d 448 (Mich. App. 1985), held that it's for a jury to decide whether it is reasonable for a commercial landowner to wait for snow to stop falling before taking safety measures such as shoveling, salting, and sanding.
- Nebraska - *Danner v. Myott Park, Ltd.*, 306 NW2d 580 (Neb. 1981), endorsed a reasonableness standard and rejected a lower court's jury instruction that a landowner may wait until the end of a storm to remove snow.
- Washington - *Cramer v. Van Parys*, 500 P2d. 1255 (Wash. App. 1972), refused to apply the ongoing storm rule and recognized that permitting a landlord to wait until the end of a storm before removing snow would create a rigidity inconsistent with tort law.

CONCLUSION: The New Jersey Supreme Court adopted the ongoing storm rule and explained that one of its chief aims was to fashion a rule that applied consistently to all commercial landowners, regardless of size or resources. Courts that apply this rule also reason that it's unfair to require a commercial property owner to clear snow and ice during a storm because it's tantamount to making the property owner an insurer of its guests' safety. These courts also believe that clearing snow and ice during a storm is impracticable and fear that enforcing the property owner's duty to make the premises safe under these circumstances could unnecessarily

put the property owner and its employees in harms way.

The reasoning of the dissent in *Pareja* and of courts in jurisdictions that reject the ongoing storm rule in favor of a reasonableness standard is consistent with the legal standard applied in most tort cases. They trust that juries are capable of balancing the risks associated with attempting to remove snow and ice during a storm against the likelihood of making the premises safer. These courts also reason that putting the onus on the commercial property owner to decide whether to address the snow and ice is consistent with the underlying goal of tort law – to deter wrongful behavior and prevent accidents.