

**‘Tis the season:
a snow-and-ice case primer
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Winter is upon us and with it, unfortunately but inevitably, injuries caused by slipping on ice and snow. The reality of life in New England weather is that many such accidents are simply not preventable. Moreover, Massachusetts courts have conscientiously avoided imposing unreasonable burdens on property owners relative to dealing with snow or ice on their premises. It is therefore important for victims’ attorneys evaluating and/or pursuing snow or ice related cases to be cognizant of the special rules distinguishing these cases from other premises claims.

A landowner or one in control of premises owes a duty of reasonable care to all lawful visitors. *Mounsey v. Ellard*, 363 Mass. 693, 707–08 (1973). He/she has a duty to take steps that are reasonable and appropriate to prevent injury under all of the circumstances, taking into account the likelihood of injury to others, the seriousness of the harm that may occur, the burden of avoiding its risk, and proper allocation of the risks involved. That duty includes taking “reasonable precautions for the safety of visitors, including measures against the hazards caused by ice or snow conditions.” *Reardon v. Parisi*, 63 Mass.App.Ct. 39, 44 (2005), quoting *Intriligator v. Boston*, 18 Mass.App.Ct. 703, 705 (1984), *SJC* 395 Mass. 489 (1985).

Under Massachusetts common law, landowners are liable only for injuries caused by defects existing on their property, and the natural accumulation of snow and ice is not by itself regarded as an actionable property defect. *Aylward v. McCloskey*, 412 Mass. 77, 79 (1992). The simple fact that a person slips on snow or ice on another person's property does not subject the property owner to liability. *Id.* at 80. The plaintiff must demonstrate some evidence of negligence in order to recover because "[i]t is common knowledge that in this climate ... a number of conditions might exist which within a very short time could cause the formation of ice ... without the fault of the owner and without reasonable opportunity on his part to remove it or warn against it or even ascertain its presence." *Id.* at 80-81, quoting *Collins v. Collins*, 301 Mass. 151, 152 (1938). The landowner's duty is not violated by a failure to remove a natural accumulation of snow or ice. Even under the Massachusetts rule, however, liability may attach 'where some act or failure to act has changed the condition of naturally accumulated snow and ice, and the elements alone or in connection with the land become a hazard to lawful visitors. *Reardon v. Parisi*, 63 Mass.App.Ct. 39, 44-45 (2005). However, "it is clear that not every human act or failure to act -not even those that foreseeably increase the risk of mishap- - transforms a natural accumulation of snow and ice into an unnatural one, so as to permit a finding of liability. For example, piling snow uphill of a walkway onto which it then melts and refreezes is not grounds for a finding of negligence in Massachusetts. See *Cooper v. Braver, Healey & Co.*, 320 Mass. 138, 139-140 (1946). Neither is incomplete shoveling that removes

snow but thereby exposes a thin layer of ice covering a ramp. See *Sullivan v. Brookline*, 416 Mass. [825,] 828 & n. 2 [1994].” *Goulart v. Canton Hous. Authy.*, 57 Mass.App.Ct. 440, 443 (2003).

UNNATURAL ACCUMULATIONS

Physical Defects

Of course, if unsafe ice accumulates unnaturally due to a physical defect such as a defective gutter or spout the resulting unsafe condition is actionable. See, e.g., *MacDonald v. Adamian*, 294 Mass. 187 (1936); *Donahue v. O’Keefe, Inc.*, 255 Mass. 35 (1926). Similarly, an unsafe accumulation of snow or ice may be deemed unnatural if its formation or hazardous nature was created or heightened by the manmade grading of the parking lot or walkway on which it occurs. *Reardon v. Parisi*, 63 Mass.App.Ct. 39 (2005). A plaintiff must be able to show that the defect caused the snow or ice to accumulate differently than it would have unaffected by the artificial condition. In *Reardon* the plaintiff proffered expert testimony that the degree of slope of a parking lot was more than acceptable or necessary for water to flow quickly to the drain grate; that the degree of danger and hazard of the iced-over slope increases with the degree of pitch; and that the degree of vigilance required on the part of the owner ... increases with the degree of pitch of the iced slope, requiring constant vigilance to maintain a safe site through regular and liberal application of salt and sand to melt the ice. The Court concluded, “This evidence, if believed, was sufficient to establish that “some act or failure to act has changed the condition of naturally

accumulated snow and ice, and the elements alone or in connection with the land [became] a hazard to lawful visitors.” *Id at 45*.

Conditions Affected By Foreseeable Traffic on the Land

A natural accumulation of ice and snow can also become unnatural when changed by the foreseeable traffic on the land. *Sullivan v. Brookline*, 416 Mass. 825, 828 n.2 (1994); *Delano v. Garrettson-Ellis Lumber Co.*, 361 Mass. 500, 501 (1972) (muddy ice with tire marks and ruts unnatural); *Thornton v. First Nat'l Stores, Inc.*, 340 Mass. 222, 224 (1960) (thick ice frozen solid to steps and "potted" by foot traffic unnatural); *Phipps v. Aptucxet Post # 5988 V.F.W. Bldg. Ass'n, Inc.*, 7 Mass. App. Ct. 928, 929 (1979) (ice with footprints and tire tracks unnatural); *O'Brien v. Leahy Landscaping, Inc.* 2007 WL 1202863 (permissible to infer that smooth ice on mall entry way stairs affected by foot traffic of mall customers).

Passage of Time

Ice and snow which naturally accumulates can become an unnatural accumulation due to the passage of time. *Sullivan v. Brookline*, 416 Mass. 825, 829 n.3 (1994); see *Yanowitz v. Augenstern*, 343 Mass. 513, 514 (1962) (ice left for several hours became unnatural); *Willett v. Pilotte*, 329 Mass 610, 613 (1953) (hard packed ice with ruts indicated ice was unnatural due to the passage of time); *Mansfield v. Spear*, 313 Mass. 685, 687 (1943) (fact that nearby ice in parking lot was broken up by traffic indicated ice at entrance way had been present long enough to be unnatural); *Baldassari v. Produce Terminal Realty Corp.*, 361 Mass.

738, 744 (1972) (ice accumulation in plain view for sufficient time to enable the defendant and his servants, in the exercise of reasonable care, to make platform safe for travel). See *Yanowitz v. Augenstern*, 343 Mass. 513, 514 (1962) (ice left several hours became unnatural). In *Thornton v. First Natl. Stores, Inc.*, 340 Mass. 222 (1960), the Court concluded that the jury reasonably could have inferred that ice -- one and one-half to two and one-half inches thick, dirty, and frozen solid to the step -- had been present at the defendant store owner's front entrance for long enough that, in the exercise of due care, the defendant should have discovered and removed it. *Id.* at 224_225.

Massachusetts courts have sensibly applied the natural accumulation rule so as not to impose irrational burdens on property owners and their contractors in light of the vicissitudes of New England winters. However, the Supreme Judicial Court has neither stated nor intimated a rule pursuant to which property owners may ignore with impunity discoverable conditions threatening the safety of their lawful visitors. The Court has yet to establish a precise temporal guideline for determining when snow or ice conditions become unnatural due to passage of time; rather, the issue has been framed as whether the conditions had been present for so long that, in the exercise of reasonable care, the defendant should have discovered and removed it. See *Thornton v. First Nat'l Stores, Inc.*, 340 Mass. 222, 224 (1960); see also *Goulart v. Canton Housing Authority*, 57 Mass. App. 440 (2003) (evidence did not establish that subject accumulation existed long enough that it should have been discovered and removed). See *Mansfield v.*

Spear, 313 Mass. 685 (1943) (Injury to retail customer on approach to/from commercial premises – it could have been found that the ice was in plain view for sufficient time to enable the defendant and his servants, in the exercise of reasonable care, to make it safe). Cf. *Reardon v. Parisi*, 63 Mass.App.Ct. 39 (2005). (Having found evidence sufficient to demonstrate physical defect, Court declined to “address whether liability could attach in the absence of man-made conditions which contributed to the hazard, but where the landlord had ample opportunity after the snowbank had melted and ice formed to sand and salt the area he had designated for travel.”).

This was most recently summarized in an unpublished decision of the Appeals Court in *O'Brien v. Leahy Landscaping, Inc.* 2007 WL 1202863:

Snow and ice conditions can be transformed from natural to unnatural accumulations by virtue of the passage of time, this on the theory that when a dangerous condition has existed for a sufficient time, the landowner has been afforded the opportunity to become aware of it and, in the exercise of reasonable care, to correct it. Whether there has been sufficient passage of time to render the accumulation unnatural is for the finder of fact and may be proven by circumstantial evidence and descriptions of the condition of the snow and ice at the time of injury. See *Mansfield v. Spear*, 313 Mass. 685, 686-687 (1943) (ice rough and broken where trucks had cut it up; dirty ice in front of office door); *Willett v. Pilote*, 329 Mass. 610, 613 (1953) (hard packed ice with ruts two or three inches deep); *Thornton v. First Natl. Stores, Inc.*, 340 Mass. 222, 224 (1960) (dirty ice under freshly fallen snow was “about an inch and a half to two and a half inches thick ‘frozen solid to the step’ ”); *Delano v. Garrettson-Ellis Lumber Co.*, 361 Mass. 500, 501 (1972) (“ ‘muddy ice,’ with tire marks and ruts three and four inches deep, covered and obscured by about half an inch of powdery snow”; major snowstorm six days before fall, with minor accumulations five, four, and three days before fall); *Phipps v. Aptucxet Post # 5988 V.F.W. Bldg. Assn., Inc.*, 7 Mass.App.Ct. 928, 929 (1979) (two days after snowfall, “footprints ... and ruts like automobile tire tracks that had been frozen”).

Opinions in many snow and ice cases focus upon the appearance of the ice -- coloring, ruts, tracks, *etc.* It is important to keep in mind that the significance of such evidence is less to establish that the rut or other irregularity constitutes a defect (although it may), than to establish that the ice has been present for considerable time.

[R]uts and footprints are not prerequisites; they merely serve to describe the condition of certain snow and ice conditions at the time of injury and, in so doing, tend to evidence the passage of time, itself pertinent to whether the “condition had existed for such length of time that the defendant had, or, in the exercise of reasonable care, should have had, knowledge of it.” *Lanagan v. Jordan Marsh Co.*, 324 Mass. 540, 541 (1949). Evidence other than ruts or footprints may also suffice to show that the defendant was or should have been aware of the dangerous condition and had time to correct it. See *Yanowitz v. Augenstern*, 343 Mass. 513, 514 (1962); *Baldassari v. Produce Terminal Realty Corp.*, 361 Mass. 738, 742, 744 (1972).

O'Brien v. Leahy Landscaping, Inc. 2007 WL 120286.

LIABILITY FOR NATURAL ACCUMULATIONS

The common law duty of a landowner is limited to exercising reasonable care relative to unnatural accumulations of ice or snow. Nonetheless, there may be circumstances in which a possessor of property is obligated by voluntary contractual undertaking or by statutory or regulatory imposition to protect certain persons from unsafe natural accumulations.

Violation of Safety Regulation

Violation of a statute or safety regulation, including the State Building Code or State Sanitary Code constitutes evidence of negligence on the part of the violator as to all the consequences the regulation was intended to prevent. *McAllister v. Boston Housing Authority*, 429 Mass. 300 (1999); *Perry v. Medeiros*, 369 Mass. 836, 841 (1976). The State Building Code requires owners of buildings to keep all exterior stairways free of snow and ice. 780 C.M.R. §§ 1028.1, 1028.2; 780 C.M.R. § 1002.1; see 780 C.M.R. § 1014.0. In addition, Code requires grading and drainage to be designed to minimize pooling of water or accumulation of ice across the base of a curb cut or walkway. 521 CMR sections 21.5 , 22.6. (The requirements of 521 CMR have general application because it is incorporated into the state building code by 780 CMR 101.6 and Appendix A.). The State Sanitary Code requires an owner maintain all means of egress at all times in a safe, operable condition and keep all exterior stairways, fire escapes, egress balconies and bridges free of snow and ice. 105 CMR 410.452.

Significantly, the duty imposed by these types of regulation should not be dependent upon a showing that the accumulation of snow or ice on a stairway is unnatural. In *McAllister v. Boston Housing Authority*, 429 Mass. 300 (1999), the Court focused on an accident caused by an accumulation of snow and ice which the Court characterized as “natural.” Nonetheless, the Court ruled that these portions of the Building Code were “admissible” and that the “provisions established a duty on the part of the defendant to remove snow and ice.” 429 Mass. at 304. The resulting jury issue was whether the defendant violated its duty of care. The Court termed it proper to

instruct the jury “that a violation of the codes was to be considered as evidence of negligence.”

“The judge defined negligence as ‘the performance or the omission of some act in violation of a legal duty.’ He instructed that, because the defendant had a duty, the plaintiff was required to show that ‘the Defendant failed to exercise the ... amount of care that a prudent person would exercise [in] the circumstances.’ He then read from the codes and explained that a violation of a code provision is not conclusive on the issue of liability. Rather, it is evidence of negligence. This instruction is consistent with the language used in *Perry v. Medeiros*, 369 Mass. 836, 841, 343 N.E.2d 859 (1976). See *id.*, and cases cited. There was no error.”

429 Mass. at 304-305. It is therefore apparent that violation of the regulatory duty to keep exterior stairways free of snow and ice constitutes evidence of negligence and may give rise to liability for negligence without regard to the status of the snow or ice as naturally or unnaturally accumulated.

Duty Assumed By Contract

Moreover, an express or implied contractual undertaking by a landlord to remove natural accumulations of snow from common areas may give rise to a duty to a tenant, the breach of which is actionable in negligence. *Anderson v. Hawksville Village Homeowners Corp.*, 424 Mass 365, 367 (1997); *Falden v. Gordan*, 333 Mass 135, 137 (1955); *Carey v. Malley*, 327 Mass 189, 193 (1951). The Supreme Judicial Court has made clear that it is disinclined to apply such contractual duties in favor of accident victims who are not parties to or clearly and definitely identified as intended beneficiaries to the contract.

A non-owner who contractually undertakes a duty to perform snow removal and sanding/salting on behalf of a property owner or manager may be liable to third persons who are foreseeably exposed to danger and injured as a result of its negligent failure to

carry out that obligation,” but concomitantly enjoys the same freedom from liability as the owner and manager. *Anderson v. Fox Hill Village Homeowners*, 424 Mass. 365, 367-69 (1997), quoting from *Parent v. Stone & Webster Engr. Corp.*, 408 Mass. 108, 114 (1990); *Restatement (Second) Torts* § 383. Consequently, claims against snow removal contractors are subject to the same natural accumulation rule as the owners who hire them.

OFF PREMISES INJURY – PUBLIC SIDEWALK

Massachusetts courts have consistently held that an owner of premises abutting a public sidewalk has no duty to keep it “clear from snow, ice or water which is upon it from natural causes, or to guard against accident by placing sawdust or other substances upon the sidewalk.’ ” *Gamere v. 236 Commonwealth Ave. Condominium Assn.*, 19 Mass.App.Ct. 359, 362 (1985), quoting *Mahoney v. Perreault*, 275 Mass. 251, 253, (1931). Municipal bylaws and ordinances requiring owners to clear snow or ice do not create a duty cognizable in tort because the obligation created by the enactment runs to municipality and is not for benefit of persons injured by falls. *Gamere v. 236 Commonwealth Ave. Condominium Assn.*, 19 Mass. App. Ct. at 361, 362 n. 3.

However, the landowner does have an affirmative duty to refrain from using his land or maintaining conditions or structures thereon in a manner which will interfere with the safety and convenience of travelers on the public way. The owner must not do anything to “enhance in quantity or distribute dangerously the natural precipitation above the sidewalk.” *Jefferson v. L'Heureux*, 293 Mass. 490, 494 (1936). The owner must exercise care: to prevent snow and ice from falling onto persons on an adjoining property or way; to prevent unnatural formation of ice caused by water flowing or dripping from structures overhanging a sidewalk; and not to create or maintain on the property so as to

collect water into a definite channel by a spout or otherwise and pour it upon a public way. *Shepard v. Creamer*, 160 Mass. 496, 498 (1894); *Field v. Gowdy*, 199 Mass. 568, 570 (1908). In these cases the claim is on for nuisance. See generally *Pritchard v. Mabrey*, 358 Mass. 137 (1970).

CONCLUSION

Awareness of the specific rules governing Massachusetts snow and ice cases is essential if a claimant's attorney is to recognize liability (and the absence of liability), and thus to identify and accept meritorious cases. In addition these rules should provide the focus conducting discovery in a way that will build a record to withstand summary judgment, establishing a jury question at trial, and better yet motivate the defendant's insurer to settle the case.