THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL
IDC QUARTERLY

Feature Article

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The Times They are a'Changin': Snow and Ice Cases following *Murphy-Hylton* and the Snow Removal Service Liability Limitation Act

Before 2016, the Illinois Supreme Court consistently affirmed the viability of the "natural accumulation rule." "Under the natural accumulation rule, a landowner or possessor of real property has no duty to remove natural accumulations of ice, snow, or water from its property." *Krywin v. Chic. Transit Auth.*, 238 Ill. 2d 215, 227 (2010). Landowners consistently relied upon the natural accumulation rule to shield themselves from liability. The Illinois Supreme Court's recent decision in *Murphy-Hylton v. Lieberman Management Services*, 2016 IL 120394, however, may signal that the exceptions to the rule will swallow it, making any accumulation of snow and ice on which injury occurs the responsibility of the landowner. This decision comes on the heels of the passage of the Snow Removal Service Liability Limitation Act, 815 ILCS 675/1 through 67599 (the Act), which took effect on August 25, 2016. For contracts entered into after that date, the Act renders void all indemnity agreements for snow and ice removal in favor of the landowner. This article will discuss these recent changes and the steps to be taken by counsel and clients in response.

State of Snow and Ice Law Prior to 2016

Prior to 2016, the natural accumulation rule was well-established in Illinois. The reason for the natural accumulation rule was that it would be unreasonable to require a property owner to expend funds and perform the labor necessary to keep its walks reasonably free from ice and snow during the winter months. *Graham v. City of Chicago*, 346 Ill. 638, 643 (1931). In *Graham*, the Illinois Supreme Court held that the City of Chicago could not be held liable for the natural accumulation of snow and ice on its streets, but ultimately affirmed an award of damages for a fall on ice which had formed in an "artificial way." *Graham*, 346 Ill. at 642-43. In noting that a plaintiff could not bring an action arising out of a natural accumulation, the court noted it did not want to impose an unreasonable duty on municipalities. *Id*. at 641-42. Subsequently, the natural accumulation rule was expanded to private land owners. *Riccitelli v. Sternfeld*, 1 Ill. 2d 133, 135 (1953).

The general rule that property owners have no duty to remove natural accumulations of ice and snow from their property has been applied without regard to (1) any ongoing precipitation (*Sheffer v. Springfield Airport Auth.*, 261 Ill. App. 3d 151, 155-56 (4th Dist. 1994)) or (2) the length of time the natural accumulation has existed (*Fredrick v. Professional Truck Driver Training Sch., Inc.*, 328 Ill. App. 3d 472, 478 (1st Dist. 2002)).

"Along with snow removal operations like shoveling and plowing, '[t]he mere sprinkling of salt, causing ice to melt, although it may later refreeze, does not aggravate a natural condition so as to form a basis for liability on the part of the property owner.'" *Barber v. G.J. Partners, Inc.*, 2012 IL App (4th) 110992, ¶ 20. "Ruts and uneven surfaces created by traffic in snow and ice are not considered unnatural and cannot form the basis of liability." *Barber*, 2012 IL App (4th) 110992, ¶ 20. In *Barber*, the plaintiff sued after falling on ice in a gas station parking lot. *Id*. ¶ 4. Evidence showed that the property owner had the lot plowed by a contractor and that the owner's employees salted in the area where plaintiff fell. *Id*. ¶ 6. The court found that the aforementioned evidence was insufficient to establish an unnatural accumulation. *Id*. ¶ 26.

"The application of salt to an accumulation of snow and/or ice causes a change in the composition of the wintery mix. If the melted material refreezes, the composition will again change and form a new accumulation, one that the case law does not consider unnatural. A snowplow traversing a snowy parking lot . . . may change the composition of what is below the plow, but what remains does not amount to an unnatural accumulation." *Id*. ¶ 24.

When a defendant causes an unnatural accumulation of ice and snow by his use or maintenance of the area, and the accumulation exists on the premises long enough to charge the defendant with knowledge, the defendant is under a duty to make the premises reasonably safe. *Ordman v. Dacon Mgmt. Corp.*, 261 Ill. App. 3d 275, 281 (3d Dist. 1994). In an unnatural accumulation case, a "[p]laintiff must show that the property owner had actual or constructive knowledge of the condition." *Ostry v. Chateau Ltd. P'ship*, 241 Ill. App. 3d 436, 444 (2d Dist. 1993).

Put another way, "[i]n order to defeat a motion for summary judgment in a slip-and-fall case, the plaintiff must affirmatively show that the accumulation of ice, snow or water is due to an unnatural accumulation *and that the property owner had actual or constructive knowledge of the condition*." *Wells v. Great Atl. & Pac. Tea Co.*, 171 Ill. App. 3d 1012, 1015 (1st Dist. 1988) (emphasis added). A plaintiff must present sufficient evidence to show that the defective condition existed long enough to charge the responsible party with notice and knowledge of the dangerous condition. *Wells*, 171 Ill. App. 3d at 1016.

If the evidence establishes that the ice was caused by an unnatural accumulation and that the defendant's conduct caused the unnatural accumulation, the plaintiff does not need to show notice. *Hornacek v. 5th Ave. Prop. Mgmt.*, 2011 IL App (1st) 103502, ¶ 30. If plaintiff can establish that the ice was caused by an unnatural accumulation but cannot show that the defendant's conduct caused the condition, the plaintiff can still establish liability by showing that the defendant had actual or constructive notice of the unnatural accumulation. *Hornacek*, 2011 IL App (1st) 103502, ¶¶ 29-31.

Sample Snow and Ice Cases

In *McElligott v. Ill. Cent. R.R. Co*., 37 Ill. 2d 459, 461-62 (1967) the decedent was killed when his car slid into the defendant's train. The slide was caused by snow and ice. *McElligott*, 37 Ill. 2d at 461-62. The evidence showed that snow and ice had accumulated near the crossing on the land owned by the defendant. *Id*. The court held that the defendant had no duty to remove natural accumulations of ice and snow. *Id*. at 469-70. Judgment was properly granted in favor of the defendant because the plaintiff could not show there was an unnatural accumulation of snow and ice. *Id*.

Similarly, in *Serritos v. Chicago Transit Authority*, 153 Ill. App. 3d 265, 266 (1st Dist. 1987), the plaintiff was injured when she slipped stepping on to a CTA bus in the winter. The evidence showed that the entry way to the bus was covered with slush from passengers entering and exiting the bus. *Serritos*, 153 Ill. App. 3d at 266. The court held that,

despite the fact that the CTA is a common carrier, because it would be impracticable to keep the steps clear of snow and slush no duty existed. *Id*. at 271-72.

Likewise, in *Shoemaker v. Rush-Presbyterian-St. Luke's Medical Center*, 187 Ill. App. 3d 1040, 1041 (1st Dist. 1989), the plaintiff was injured when she stepped off an elevator and slipped on a floor wet with rain water tracked in by patrons. The court held that summary judgment was properly entered in favor of the plaintiff based upon the finding that rain water was a natural accumulation and that the defendant did not have a duty to warn the plaintiff about the slippery condition. *Shoemaker*, 187 Ill. App. 3d at 1044-45.

Further, in *Sheffer v. Springfield Airport Authority*, 261 Ill. App. 3d 151, 152 (4th Dist. 1994), the plaintiff was a passenger on one of the defendant's planes who slipped on ice located on the tarmac at the airport after disembarking from the plane. Following a trial, the jury returned verdict for the plaintiff. *Sheffer*, 261 Ill. App. 3d at 151-52. The court reversed finding that (1) the plaintiff did not establish it was unnatural accumulation of ice, and (2) the defendant had no duty to warn about the ice. *Id*. at 153-54.

The Obligation of the Snow and Ice Remover

In the absence of a contractual obligation, a non-land owner generally has no duty to remove accumulations of snow and ice. *McBride v. Taxman Corp.*, 327 Ill. App. 3d 992, 996 (1st Dist. 2002). The scope of a snow removal company's obligations to remove snow and ice is set forth in their contract. *Flight v. Am. Cmty. Mgmt. Inc.*, 384 Ill. App. 3d 540, 544 (1st Dist. 2008). Illinois law does not require a snow removal contractor to inspect the property constantly and remove all traces of ice, as such an obligation is unreasonable. *Crane v. Triangle Plaza, Inc.*, 228 Ill. App. 3d 325, 330 (2d Dist. 1992).

Where a party has untaken a contractual obligation to remove snow and ice, the duty encompasses only the non-negligent removal of snow and ice. In other words, the snow removal contractor must refrain from creating or aggravating an unnatural accumulation when removing snow or ice. *McBride*, 327 Ill. App. 3d at 996. In cases involving a snow removal contractor, it is the plaintiff's obligation to establish that the contractor caused the unnatural accumulation. *Id*. at 997. To meet this burden, the plaintiff must establish a causal nexus between the contractor's work and the unnatural accumulation. *Tzakis v. Dominick's Finer Foods, Inc.*, 356 Ill. App. 3d 740, 747 (1st Dist. 2005).

Decision in *Murphy-Hylton v. Lieberman Management*

The plaintiff, Ms. Hylton, was injured when she fell on ice that had accumulated on a sidewalk at the Klein Creek Condominium. *Murphy-Hylton*, 2016 IL 120394, ¶¶ 3-4. She filed suit against the Association alleging that their snow and ice removal efforts, at least in part, caused her injuries. *Id*. ¶ 4. In early February 2011, snow in excess of 20 inches fell at the condominium complex. *Id*. On February 7, 2011, a snow removal contractor cleared snow and ice from the sidewalks within the complex. *Id*. The plaintiff fell on February 18, 2011, on a sidewalk leading from her building to the parking lot. *Id*. Discovery revealed that no snow had fallen between February 7 and February 18. *Id*. ¶ 5. Ms. Hylton did not see the ice before she fell. *Id*.

Following discovery, Ms. Hylton amended her complaint to remove any allegations of snow and ice removal efforts caused her injuries. *Id*. ¶ 4. Instead, she alleged that the ice upon which she fell was caused by improper drainage from downspouts near the sidewalk. *Id*.

The Association filed a summary judgment motion invoking the immunity provided by the Snow and Ice Removal Act, 745 ILCS 75/2. *Id*. ¶ 12. In 1979, the Illinois Legislature enacted the Snow and Ice Removal Act, which provided immunity for landowners for snow and ice removal efforts. In relevant part, the statute provides:

> Sec. 1. It is declared to be the public policy of this State that owners and others residing in residential units be encouraged to clean the sidewalks abutting their residences of snow and ice. The General Assembly, therefore, determines that it is undesirable for any person to be found liable for damages due to his or her efforts in the removal of snow or ice from such sidewalks, except for acts which amount to clear wrongdoing, as described in Section 2 of this Act.

745 ILCS 75/1.

> Sec. 2. Any owner, lessor, occupant or other person in charge of any residential property, or any agent of or other person engaged by any such party, who removes or attempts to remove snow or ice from sidewalks abutting the property shall not be liable for any personal injuries allegedly caused by the snowy or icy condition of the sidewalk resulting from his or her acts or omissions unless the alleged misconduct was willful or wanton.

745 ILCS 75/2.

This case was pending in the Circuit Court of Cook County. Prior to the trial court's decision, several cases had addressed the Act and had come to different conclusions. The Illinois Appellate Court Fourth District had ruled that the plain language of the Act only provides immunity for those actions directly tied to snow and ice removal efforts. *Greene v. Wood River Trust*, 2013 IL App (4th) 130036, ¶ 18. The *Greene* court noted "that the plain language of the Act does not provide immunity for injuries if the unnatural accumulation of ice was caused by defective construction or improper or insufficient maintenance of the premises, and not snow and ice removal efforts." *Greene*, 2013 IL App (4th) 130036, ¶ 19. The Illinois Appellate Court Second District read a more broad interpretation into the Act and held that the immunity provided extends to claims for negligence, even if not directly tied to snow and ice removal efforts. *Ryan v. Glen Ellyn Raintree Condo. Ass'n*, 2014 IL App (2d) 130682, ¶ 20. The *Ryan* court held that an affirmative showing of snow and ice removal efforts is sufficient to trigger the immunity under the Act and that the Act does not require that such snow removal efforts be plead by the plaintiff in order to invoke the protections of the Act.

In *Murphy-Hylton*, the trial court reviewed the case law pertaining to the Act and granted the the Association's motion for summary judgment. *Murphy-Hylton*. 2016 IL 120394, ¶ 12. The appellate court reversed and held that the plaintiff's pleading controlled the issue and as the complaint did not contain any allegations of negligence relating to snow or ice removal that immunity under the Act was precluded. *Id*. ¶ 13.

The Illinois Supreme Court upheld the appellate court's decision. *Id*. ¶ 1. The court undertook an exhaustive look at the common law pertaining to natural and unnatural accumulations. The opinion notes that, under the common law,

landowners had a duty of reasonable care to prevent unnatural accumulations of ice and snow, provided that they had actual or constructive knowledge of the condition. *Id*. ¶ 20.

The *Murphy-Hylton* court framed the question as whether "the immunity extends to claims of liability for negligence arising from a defective condition or a failure to maintain the premises that causes an unnatural accumulation of ice on the sidewalk." *Id*. ¶ 24. The court answered this question in the negative, finding that the Act would be in derogation of the common law if it were to provide immunity for unnatural accumulations of snow and ice. *Id*. ¶¶ 32-33. The court stated that "the immunity provided under the Act does not insulate defendants from the theory of liability in the instant case." *Id*. ¶ 35. The court focused on the plaintiff's allegations to hold that "the Act is not an affirmative defense to plaintiff's theory of negligence." *Id*. ¶ 36.

The problems with the *Murphy-Hylton* decision are abundantly clear. Although a plaintiff is the master of the complaint, the immunity granted under the Act should not be so easily dismissed through the crafty pleading of the plaintiff. To hold that the immunity granted to landowners can be so easily discarded simply through the pleading of the plaintiff is an affront to the purpose of the Act. Now, any landowner that previously held immunity for snow and ice removal efforts no longer has such immunity, provided that the plaintiff can plead some defect or condition that is unrelated to snow and ice removal. As with other statutorily created immunities, the burden of proof that the immunity applies should be on the defendant. The court has, by this decision, taken that ability away from Illinois residential landowners.

The Snow Removal Service Liability Limitation Act

Compounding the changes to the handling of snow and ice cases is the passage of Senate Bill 2138, the Snow Removal Service Liability Limitation Act, 815 ILCS 675/1 through 675/99 (eff. Aug. 25, 2016 by passage of P.A. 99-0889). This statute, which was adopted on August 25, 2016, voids all contractual requirements entered into after that date for a snow and ice remover or a snow and ice receiver to defend, indemnify, or hold harmless the other for tort liability resulting from its own negligence. This statute puts snow and ice removers and receivers in the same position as those covered by the Construction Contract Indemnification for Negligence Act, 740 ILCS 35/1 through 35/3, commonly referred to as the Anti-Indemnity Act. This is the first statute of its kind in the country. It is important to note that the statute does not apply to public entities or public utilities. This statute ends the turnkey manner in which owners have dealt with snow and ice by relying on the natural accumulation rule, and then foisting any remaining liability onto the snow and ice removers. As discussed above, the first of that protection has been severally eroded; and now the second aspect has been eliminated almost entirely.

As result of these twin changes, there will be changes in the dynamic between owners and snow removers in litigation, in which owners have previously been able to turn liability over to the snow remover in a circumstance in which an injured person claims that they slipped or fell on snow or ice. The statute makes each responsible for their own negligence, which could lead to actively litigated counterclaims between the owner and snow remover, to the benefit of the plaintiff. To mitigate the likelihood and damage of this circumstance, which would allow the plaintiff to sit back and allow the defendants to fight among themselves, is the role that the owner being named as an additional insured on the snow remover's policy of insurance may have on the control, funding, and coordination of the defense. The statute does not void those arrangements.

While the statute may prevent wholesale assumption of liability under the snow remover's policy, consideration should be made between the owner's insurer and the snow remover's insurer to share the cost and control of the defense

as well as any indemnity obligation that may arise. The alternative is to litigate competing counterclaims between the owner and snow remover as to who was responsible for the condition that caused the plaintiff's injury; this would only aid the plaintiff's claim that he was an innocent injured person. Accordingly, defendants' counsel, both those that represent owners and snow removers, as well as insurers for each, should prepare to change their strategy for the handling of these cases. As the statute went into effect before most of the snow and ice contracts were entered into for the 2016-17 snow and ice season, the bulk of the cases that will arise under this new act will not be filed until 2018-19. That gives more than enough time for the parties, defense counsel, and insurers to formulate how they want to deal with this landscape.

Conclusion

Proving once again that the only constant is change, the handling of snow and ice cases will have to change drastically based upon the decision in *Murphy-Hylton* and the passage of the Snow Removal Service Liability Limitation Act. Those that adapt to these changes will be in the best position to succeed because what it not changing is that Illinois will continue to have snow and ice and that people will continue to fall on it. Accordingly, in order to reduce the scope of liability property owners in Illinois should inspect their properties and make repairs as appropriate. Reviewing contacts to ensure that they are in conformity with the Snow Removal Service Liability Limitation Act is also essential. The Farmers' Almanac has predicted numbing cold and snowy conditions in Illinois this winter. *See 2017 Winter Outlook*, FARMERS' ALMANAC (2017), *available at* http://farmersalmanac.com/weather-outlook/2017-winter-forecast/.

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