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Weathering the Storm

An Overview of Snow and Ice Related Premises Liability Standards for Pennsylvania, New Jersey, New York, Maryland, Delaware and West Virginia

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I. Background and Overview

The following will provide a survey and overview of the standards for snow and ice related premises liability matters in Pennsylvania, New York, New Jersey, Delaware, Maryland and West Virginia.

II. State-by-State Survey

A. PENNSYLVANIA

In Pennsylvania, the first line of defense in a slip-and-fall claim related to the accumulation of snow or ice is known as the "Hills and Ridges" Doctrine. This Doctrine applies to paved areas, including both sidewalks and parking lots, where the public or business invitees may be expected to travel.

1. Overview of the "Hills and Ridges" Doctrine

The "Hills and Ridges" Doctrine was formally established by the Pennsylvania Supreme Court in Rinaldi v. Levine, 176 A.2d 623 (Pa. 1962), where the Court held that in order for a plaintiff to recover she must show that "ridges or elevations", and not just generally slippery conditions, were the cause of the fall. The current standard in Pennsylvania was summarized by the Superior Court in Harvey v. Rouse Chamberlin, Ltd. as follows:

> The "hills and ridges" doctrine protects an owner or occupier of land from liability for generally slippery conditions resulting from ice and snow

> where the owner has not permitted the ice and snow to *unreasonably* accumulate in ridges or elevations.

Harvey v. Rouse Chamberlin, Ltd., 901 A.2d 523, 526 (2006) (citations omitted) (emphasis added).

In Gilligan v. Villanova Univ., 584 A.2d 1005, 1007 (Pa.Super. 1991), the Court emphasized that the property owner's only duty with respect to the accumulation of snow and/or ice is to act within a "**reasonable time**" after it has received notice of the condition. Citing Rinaldi, the Gilligan Court held that, in order to recover for a fall on an ice- or snow-covered sidewalk, a plaintiff must prove that:

> (1) snow and ice had accumulated on the sidewalk *in ridges or elevations of such size and character as to unreasonably obstruct travel and constitute a danger to pedestrians travelling thereon*;
>
> (2) the property owner had notice, either actual or constructive, of the existence of such condition; and
>
> (3) it was the dangerous accumulation of snow and ice that caused the plaintiff to fall.

Id. (emphasis added) (citations omitted).

With regard to the first element, (i.e. whether the condition constitutes a "hill" or "ridge"), Pennsylvania Courts continue to rely on the explanatory language originally supplied by the Rinaldi Court, that:

> "the burden is upon a plaintiff to prove not only that there was an accumulation of snow and ice on the sidewalk but that such accumulation, whether in the form of ridges or other elevations, was of such size and character to constitute a substantial obstruction to travel. A mere uneven surface caused by persons walking on the snow and ice as it freezes will not constitute such an obstruction to travel."

See Rinaldi, supra.

In further explaining this standard, the Rinaldi Court relied on the Court's prior decision in Kohler et ux. v. Penn Township:

> It is also true that ice when in the process of formation, or when softened by a rise in temperature will show footprints of the pedestrians who walk thereon, and thereby its surface will become uneven and rough. This is characteristic of all walks, and is as impossible to prevent, as is the presence of the ice.

Kohler v. Penn Twp., 157 A. 681, 681 (1931).

2. Noteworthy Exceptions

Obviously, this Doctrine has been (and continues to be) heavily relied upon in defending all slip-and-fall-type claims involving the accumulation of snow and/or ice. However, the Doctrine does not create an impenetrable immunity for property owners, and several exceptions have been developed since Rinaldi.

Most significantly, Courts have held that the accumulation of snow and ice must be *natural*, and not caused by a defect in the property. In Bacsick v. Barnes, 234 Pa.Super. 616, 341 A.2d 157 (1975), the Court emphasized that "the 'hills and ridges' doctrine may be applied only in cases where the snow and ice complained of are the result of an *entirely natural accumulation,* following a recent snowfall." Id. The Harvey Court, citing Bacsick *further reiterated* "that the protection afforded by the doctrine is predicated on the assumption that '[t]hese formations are [n]atural phenomena incidental to our climate.'" Harvey v. Rouse Chamberlin, Ltd, A.2d 523, 526 (Pa.Super. 2006) *citing* Bacsick, supra.

In practice, this standard has been interpreted to preclude the "Hills and Ridges" defense where the accumulation of snow or ice was caused by a defect existing in the underlying surface of the property. For example, in Reedy v. Pittsburgh, 363 Pa. 365, 69 A.2d 93 (1949), the plaintiff was injured when she fell on a patch of ice concealed by a

fresh snowfall. It was revealed that the ice had formed because a defective rainspout had caused water to accumulate on the sidewalk. The Court held that where (a) the defect had existed for several years, and the (b) owner had had notice and failed to correct the defect, there was sufficient evidence to submit the issue of the owner's negligence to the jury. See e.g. Clayton v. Durham, 273 Pa. Super. 571, 576, 417 A.2d 1196, 1198 (1980), *citing* Reedy, supra.

This concept, as the Clayton court noted, was further clarified in Casey v. Singer, 372 Pa. 284, 93 A.2d 470 (1953). There, a depression in the sidewalk in front of defendant's property had filled with water and froze to form a patch of ice. Plaintiff slipped and fell on the ice at a time when it was covered with a layer of dust. The Court held that the custodian of the property had known that a defect existed and failed to correct it, and that it was foreseeable that a pedestrian would slip and fall. Such a situation, the Court concluded, differed from a general slippery condition. As such, the right to recover did not depend upon a showing of hills and ridges of ice. See Clayton, supra.

3. Local Statutory Codes and Requirements

Business and property owners must also be aware that many local municipalities have established more stringent and specific requirements regarding the clearing of snow and ice from public walkways. For example, in Philadelphia;

> "(1) the owner, agent, and tenants of any building or premise shall clear a path of not less than 36" in width on all sidewalks, including curb cuts, abutting the building or premises **within 6 (six) hours after the snow has ceased to fall**. **The path shall be thoroughly cleared of snow and ice**. Where the width of any pavement measured from the property line to the curb is less than 3 (three) feet, the path cleared may be only 12 inches in width. When the building in question is a multifamily dwelling the owner or his agent shall be responsible for compliance with the requirements of this section."

Philadelphia Code (10-720) (emphasis added).

Generally, courts have held that these local provisions are relevant with respect to the question of negligence, but do not supersede the basic tenets of the "Hills and Ridges" doctrine. See, e.g., Sellers v. Cline, 49 A.2d 873 (Pa. Super. Ct. 1946).[1] In Sellers, plaintiff slipped and fell on a smooth surface of ice covered by snow on the sidewalk abutting defendant's property. Id. at 874. Since the snow accumulation did not take the shape of ridges or hills, the court held that plaintiff's fall was not the result of defendant's negligence. Id.

Plaintiff alternatively argued that defendant violated a Philadelphia snow removal ordinance, amounting to negligence *per se*. Id. At the time of Sellers, there was a city ordinance in effect that required snow to be cleared no later than six hours after it ceased falling. Id. Plaintiff argued that defendant violated same because she slipped more than eleven hours after the snow stopped falling. Id. However, the court rejected plaintiff's argument, holding that **"[t]he violation of a city or borough ordinance is not, per se, negligence**." Id., (emphasis added). The court reasoned that "[s]uch ordinances are evidentiary matters to be considered with all other testimony in the case as bearing upon the question of negligence." Id. The court found no other evidence tending to support plaintiff's negligence and accordingly affirmed the lower court's finding in favor of defendant. Id.; see also Reid v. City of Phila., 904 A.3d 54 (Pa. Commw. 2006); Sarver v. Sherwin Williams Co., 2013 WL 3939539 (E.D. Pa. July 31, 2013); Mack v. AAA Mid-Atlantic, Inc., 511 F. Supp. 2d 539 (E.D. Pa. 2007) (requiring plaintiffs to satisfy the

[1] This case predates Rinaldi, but the negligence standard relied upon by the court is substantially similar to the "Hills and Ridges" doctrine. Sellers, 49 A.2d at 874 (quoting Bailey v. Oil City et al., 305 Pa. 325 (1931)) ([g]eneral 'slipperiness' is not enough [to establish negligence] unless the accumulations take the shape of 'ridges or hills'").

"Hills and Ridges" doctrine, even where defendants violated local snow removal ordinances).

Although the violation of these standards is not dispositive of a showing of negligence *per se*, it may help prove the elements of negligence. Therefore, it is important to have local counsel who are familiar with and understand all applicable local provisions, in order to most effectively protect clients' interests in these cases.

For more information on Pennsylvania's "Hills and Ridges" Doctrine, please contact our authors:

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B. NEW JERSEY

1. Background – Duties Dependent Upon Status of Persons

The duty owed by an occupier of land to third persons coming on to land in New Jersey involves an inquiry identifying, weighing, and balancing several factors – the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and considerations of public policy. See Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 44-45, 48-49 (2012); see also Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993). New Jersey common law has developed well-defined categories based on the status of the plaintiff. If the plaintiff falls into the predetermined category of an invitee, licensee, or trespasser, the category itself establishes the duty. However, if the facts in a given case do not fit into any of the above-mentioned categories, a New Jersey court will undertake a duty analysis weighing the above-listed factors and, if a duty is ascertained,

the Court must also define the scope of said duty. See Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993).

In New Jersey, an **invitee** is one who is permitted to enter or remain on land (or premises) for a purpose of the owner/occupier. See Brody v. Albert Lipson & Sons, 17 N.J. 383 (1955). As the name suggests, the invitee is one who enters by invitation, express or implied. The owner/occupier of the land is under a duty to exercise ordinary care to render the premises reasonably safe for the purposes embraced in the invitation. Moreover, they must exercise reasonable care for the invitee's safety and take such steps as are reasonable and prudent to correct or give warning of hazardous conditions or defects actually known to him (or his employees), and of hazardous conditions or defects which he (or his employees) by the exercise of reasonable care, could discovery.

A **licensee** in New Jersey is a person who has the right to enter or remain upon land by the consent of the possessor. See Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 44-45, 48-49 (2012). The person is not invited but their presence is deemed tolerated. The owner/occupier of the property owes a duty to a licensee to abstain from willfully injurious acts. If the owner/occupier knows of a hazardous condition on the premises and the owner/occupier could reasonably anticipate the licensee would not observe and avoid such condition, then the owner/occupier must either give warning of it or make the condition reasonably safe.

A **trespasser** in New Jersey is a person who enters or remains upon land in the possession of another without a right to enter or remain on the property. See Snyder v. I. Jay Realty Co., 30 N.J. 303, 312 (1959). An owner/occupier of property owes a duty to a

trespasser to refrain from acts that willfully injure the trespasser. See Snyder v. I. Jay Realty Co., 30 N.J. 303, 312 (1959).

2. Common Areas

New Jersey law does not impose a duty of common-area maintenance on the commercial tenant of a multi-tenant facility unless the tenant contractually assumes the duty of common-area maintenance. See Barrows v. Trustees of Princeton University, 244 N.J. Super. 144, 145-146 (Law Div. 1990). However, courts have also held that a commercial tenant cannot ignore a continuously existing or reoccurring hazardous condition in the common-area. Nielsen v. Wal-Mart Store No. 2171, 429 N.J. Super. 251 (App. Div. 2013).

3. Parking Lots

In general, New Jersey Courts have consistently held that parking lots, outdoor paths and walkways constitute an "integral part" of a commercial entity's business premises. See Nelson v. Great Atlantic & Pacific Tea Co., 48 N.J. Super. 300, 305-06 (App. Div. 1958). Based upon this recognition, New Jersey Courts have held that commercial defendants have a duty to provide its customers with a "reasonably safe place" to transact business. This duty encompasses parking lots owned by the defendant in conjunction with its business premises, as well as those offered for use by the commercial defendant to its customers. See MacGrath v. Levin Properties, 256 N.J. Super. 247, 250 (App. Div.), cert. denied 130 N.J. 19 (1992). Moreover, the above duty to provide a reasonably safe environment also covers outdoor paths and walkways located on commercial defendant's property. See Skupienski v. Maly, 27 N.J. 240, 248 (1958).

With respect to accumulations of snow, New Jersey Courts have held that a commercial defendant has a duty to clear accumulations of snow or ice in its parking lots and pathways. See Moore v. Schering Plough, Inc., 328 N.J. Super. 300, 307 (App. Div. 2000). If a parking lot is separated from the defendant's business premises by a roadway, the defendant has a duty to address the danger presented by motor vehicles as customers cross the road from the lot to the principal business location. See Warrington v. Bird, 204 N.J. Super. 611, 617-18 (App. Div. 1985), cert. denied 103 N.J. 473 (1986).

It should be noted that, in New Jersey, a commercial defendant has no duty to maintain a parking lot that it does not own, that is not part of its business' common area or which it does not provided for its customers, such as an adjacent or an across the roadway parking lot, even if it is aware that customers sometimes park there. See Puterman v. City of Long Branch, 372 N.J. Super. 567, 572, 574-76 (Law Div. 2004). Additionally, a commercial defendant generally has no duty to maintain a pathway on a neighboring property owned by another entity, such as a dirt path or another shortcut, even if it defendant knows or has reason to believe that its customers may use the pathway while travelling to or from the defendant's business. See Chimiente v. Adam Corp., 221 N.J. Super. 580, 583-85 (App. Div. 1987).

4. Sidewalks

In New Jersey, the owner or tenant of a commercial property must maintain the public sidewalk abutting its commercial premises, including removal or reduction of hazard of snow and ice. See Mirza v. Filmore Corp., 92 N.J. 390, 394-96 (1983). The owner has a duty to take reasonable steps to alleviate the danger, by making the sidewalk reasonable safe, within a reasonable time (estimated to be approximately 12 hours after daylight of snowfall) after receiving actual or constructive notice of the existence of

accumulation of snow or ice. See Mirza v. Filmore Corp., 92 N.J. 390, 394-96 (1983). With regards to a claim alleging ice formation as the result of negligent maintenance of a drainage system, New Jersey Courts require proof that the commercial defendant possessed actual or constructive notice of the problem. See Cavanagh v. Hoboken Land & Improvement Co., 93 N.J.L. 163, 165-66 (E. & A. 1919). Lastly, a business operator has an obligation to clear snow and ice from a public sidewalk connecting its parking lot to its business premises. See Jackson v. K-Mart Corp., 182 N.J. Super. 645, 650-51 (Law Div. 1981).

5. Residential Areas

In New Jersey, an owner or tenant of residential property has no duty to maintain the public sidewalks adjacent to its premises. See Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 159 (1981); see also Luchejko v. City of Hoboken, 207 N.J. 191, 210 (2011). Moreover, New Jersey law does not impose a duty on an owner of a residential property to clear or otherwise to treat a natural accumulation of snow or ice on an adjoining sidewalk. See Brown v. Kelly, 42 N.J. 362, 363 (1964).

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C. NEW YORK

1. Duty of Care

New York no longer differentiates between guests, licensees, invitees and trespassers. Basso v. Miller, 352 N.E.2d 868 (NY, 1976). Recovery by trespassers is not prohibited, but if a trespasser's presence on the premises or the actions of the trespasser which led to the injury were not foreseeable, this can provide a defense. Boltax v. Joy

Day Camp, 490 N.E.2d 527 (NY, 1986); Basso, supra.; Elwood v. Alpha Sigma Phi, 878 N.Y.S.2d 449 (3 Dept., 2009).

The owner/occupant of land is judged on whether it had sufficient notice (actual or constructive) of a defect, such as snow and ice on the property, to clear it before the incident occurred. Gordon v. American Museum of Natural History, 492 N.E.2d 774 (NY, 1986). Liability will be found if (1) defendant created the defect; (2) defendant actually knew about the defect; or (3) the defect existed for a sufficient length of time that defendant should have known about and corrected it (constructive notice). Id.

The same is true for snow and ice cases. If the owner or occupant of a property was aware of the slippery condition before the incident occurred, or should have in the exercise of due care noticed and remedied it, he or she will be liable. Simmons v. Metropolitan Life Ins. Co., 646 N.E.2d 798 (NY, 1994); DeCanio v. Principal Bldg. Services Inc., 983 N.Y.S.2d 2 (1 Dept., 2014); Medina v. La Fiura Development Corp., 895 N.Y.S.2d 982 (2 Dept., 2010); Robinson v. Albany Housing Authority, 754 N.Y.S.2d 450 (3 Dept., 2003).

The duty owed is to exercise reasonable care in removing or piling snow and to not create a dangerous condition. Calderon v. New York City Housing Authority, 326 N.Y.S.2d 18 (2 Dept., 1971). The general rule is that a failure to remove all of the snow and ice off one's property is not negligence; it must be shown that the hazard was increased by what was done in the process of removing snow and ice. Recto v. City of New York, 686 N.Y.S.2d 426 (1 Dept 1999).

If the defendant created the condition, notice is established by this very fact and need not be further established by the plaintiff. Grillo v. Brooklyn Hosp., 720 N.Y.S.2d

519 (2d Dept, 2001); Suntken v. 226 W. 75th St., 685 N.Y.S.2d 217 (1 Dept., 1999). This includes scenarios where defendant or its instrumentalities cause snow or ice to melt and refreeze, thus causing hazardous conditions. Glick v. City of New York, 526 N.Y.S.2d 464 (1 Dept., 2007); Grillo, supra.; Grizzaffi v. Paparodero Holding Corp., 690 N.Y.S.2d 93 (2 Dept., 1999); Reidy v. EZE Equip. Co., 652 N.Y.S.2d 534 (2 Dept., 1999).

However, where a plaintiff did not see the icy condition that allegedly caused her accident and can only speculate on its creation or the duration of its existence, the case may be defensible. Wilson v. Prazza, 761 N.Y.S.2d 321 (2 Dept., 2003); Boddie v. New Plan Realty Trust, 758 N.Y.S.2d 379 (2 Dept., 2003).

2. Storm in Progress

There is an exception to the notice rule where it concerns snow and ice in the form of the "storm-in-progress" defense. In sum, a defendant "will not be held liable for accidents occurring … as a result of the accumulation of snow and/or ice until a reasonable period of time has passed, following the … the storm." Sfakianos v. Big Six Towers, Inc., 846 N.Y.S.2d 584 (2 Dept., 2007). See also Smith v. Christ's First Presbyterian Church of Hempstead, 941 N.Y.S.2d 211 (2 Dept., 2012); Gleeson v. New York City Transit Authority, 905 N.Y.S.2d 26 (1 Dept., 2010); Boynton v. Eaves, 888 N.Y.S.2d 253 (3 Dept., 2009); Baia v. Allright Parking Buffalo, Inc., 811 N.Y.S.2d 843 (4 Dept., 2006).

3. Black Ice

"Black ice," which cannot be seen, cannot form the basis of notice for liability purposes. Gjongi v. 108 Rego Developers Corp., 852 N.Y.S.2d 255 (2 Dept. 2008).

4. "Open & Obvious" Defects

New York recognizes an "open and obvious" defense, though depending on the circumstances it may support a motion for summary judgment. Meagher-Cox v Winarski, 820 N.Y.S.2d 98 (2 Dept., 2006). See also Koval v. Markley, 940 N.Y.S.2d 367 [4 Dept., 2012]) or may be merely evidence of plaintiff's culpable conduct to be used at trial. See, e.g., Cucuzza v. City of New York, 767 N.Y.S.2d 853 (2 Dept. 2003); Cupo v. Karfunkel, 767 N.Y.S.2d 40 (2 Dept., 2003); Tulovic v. Chase Manhattan Bank, 767 N.Y.S.2d 44 (2 Dept., 2003).

5. Abutting Sidewalks

The majority of snow and ice cases in New York involve a situation where an abutting landowner has undertaken to clear the snow and/or ice from the sidewalk adjacent to his property. Public sidewalks are, absent a contrary agreement, the responsibility of the municipality. An abutting landowner owes no duty to pedestrians to remove natural accumulations of snow and ice from the sidewalk. Roark v. Hunting, 248 N.E.2d 896 (NY, 1969). However, if the landowner does undertake to shovel the public sidewalk, he must use reasonable care when doing so and will be held liable for snow removal that increased the hazard on the sidewalk.

Liability for snow and ice on the abutting sidewalk can also be found against the landowner where: (1) a municipal code specifically requires the abutting landowner to remove snow and ice; **and** (2) the code provides for civil liability (not merely issuance of a summons) in the event of failure to do so. **New York City does have such a provision**. N.Y.C. Administrative Code §7-210.

In the case of a municipal statute that requires clearing the sidewalk, similar standards apply as to the landowner's own property. Clearing of snow and ice must be undertaken within a reasonable time after the storm abates; and must be done with due care.

6. Contractor Liability

In general, an independent contractor, including a snow removal contractor, does not have any independent duty to a patron at the property even despite the existence of a contract between the contractor and the property owner. Eaves Brooks Costume Company v. YBH Realty Corp., 556 N.E.2d 1093 (NY, 1990). This is because duty of care owed directly to the injured party is an indispensable element of a negligence claim. Pulka v. Edelman, 358 N.E.2d 1019 (NY, 1976); Gaeta v. City of New York, 624 N.Y.S.2d 47 (2 Dept., 1995). The contractor can be liable to the plaintiff only if the contractor's snow removal efforts made conditions worse. Espinal v. Melville Snow Contractors, 773 N.E.2d 485 (NY, 2002); Eaves Brooks Costume Company, supra.

The landowner may be liable to plaintiff for an injury caused by a defect on the property. The contractor **may** then be liable to the landowner for indemnity, if the contract contains such provisions. Espinal, supra.

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D. MARYLAND

1. Background

In Maryland, the greatest duty owed by an owner or occupier of land is to persons entering as business invitees. Tennant v. Shoppers Food Warehouse MD. Corp. 115 Md.App. 381 (1997). The duty is to exercise reasonable care to protect invitees from injury caused by unreasonable risk that the invitee would be unlikely to perceive in the exercise of ordinary care for his or her own safety, and about which the owner/occupier knows or could have discovered in the exercise of reasonable care. Id. Generally speaking, the possessor of land is subject to liability for bodily harm caused to business invitees caused by a natural or artificial condition on the property if, but only if,

> 1) he knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to invitees, and
>
> 2) has no reason to believe they will discover the condition or realize the risk involved therein, and
>
> 3) invites or permits them to enter or remain upon the land without exercising reasonable care to make the condition reasonably safe, or to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to received, if the possession is a public utility.

Rawls v. Hochschild Kohn & Co., 207 Md. 113, 117 (1955). Thus, the owner/occupier owes a duty to warn invitees of known or hidden dangers, a duty to inspect for such dangers, and the duty to take reasonable precautions against foreseeable dangers.

Tennant, supra. This being said, a business owner is not an insurer of the invitee's safety. Id. at 389. The invitee also has a duty to exercise due care for his own safety, which includes a duty to look and see what is around him. Thus, the owner does not have a duty to warn of open and obvious present dangers. Id. at 389. The burden is on the customer to show that the proprietor created the dangerous condition or had actual or constructive knowledge of its existence. Lexington Market Authority v. Zappala, 233 Md. 444, 446. The customer must also show that the dangerous condition "existed for a length of time sufficient to permit a person under a duty to discover it if he had exercised reasonable care." Dudley v. Target Corp., 2012 WL 52577789 (D. Md. Jul. 3, 2012) (quoting Rawls, 207 Md. At 120). How long a property owner may fail to discover or correct a dangerous condition depends on the facts and circumstances of a particular case.

2. Liability for Snow and Ice

In the case of exterior snow and ice, Maryland courts have found that the business owner may be held liable for negligence when the snow or ice fell and/or accumulated over several days, or accumulated and remained for several days where the temperatures over that time were freezing or when there had been freeze thaw cycles that created the risk that melt/runoff might re-freeze. Honolulu Limited v. Cain, 244 Md. 590 (1966); Reff v. Acme Markets, Inc., 247 Md. 590 (1967). In Cain, the court took particular notice of the fact that the store owners were aware that all drains for water on their parking lot were in the SE corner but nevertheless plowed accumulated snow to the NW corner of the lot, resulting in water from melting snow snaking a diagonal path across the lot. The court also found a jury could have found the property owners negligent for failing to salt the wet spots before dismissing their maintenance person for the day based on the knowledge that wet spots were likely to freeze once the temperatures dropped.

The Court was not impressed by the fact that the ice on which plaintiff fell formed, at most, 15-20 minutes before her accident. Similarly, if a condition is or should have been observed by the owner's employees and is not rectified, that can be grounds for negligence. For example, where ice or snow existed on a sidewalk when employees arrived in the morning and was still present when the plaintiff fell later in the day, a finding of negligence on the owner can be imposed. Reff, 247 Md. 590. While a property owner is not under a duty to constantly patrol its property for potentially dangerous conditions, where there is known accumulation of snow or ice, or where the existing conditions indicate that freezing is a reasonable possibility, it behooves a property owner to err on the side of increased diligence.

In ice and snow slip and fall cases, the courts are generally called on to consider not only the owner's negligence, but also the injured person's contributory negligence and assumption of risk. Maryland is a pure contributory negligence jurisdiction. Thus, any finding of negligence by the plaintiff will serve as a total bar to her claims. The contributory negligence analysis takes into consideration whether the plaintiff exercised reasonable care in deciding to traverse and in traversing the icy/snowy area. Whether a plaintiff was negligent is almost always a question of fact for the jury.

The reasonableness of the plaintiff's actions does not play a role in an assumption of the risk analysis. A plaintiff assumes the risk of being injured by the negligence of another if the plaintiff had knowledge of the risk of danger, appreciated the risk, and voluntarily encountered it. ADM P'ship v. Martin, 348 Md. 84 (1997). In determining whether a plaintiff had knowledge and appreciation of a danger, "a plaintiff will not be heard to say he did not comprehend a risk which must have been obvious to him," and

thus, "there are certain risks which anyone of adult age must be taken to appreciate," including "the danger of slipping on ice . . ." Gillum v. Pilot Travel Centers, *LLC,* 2015 WL 3887610 (D.Md. Jun. 22, 2015) (slip op.) (*quoting* Gibson v. Beaver, 245 Md. 418). Maryland courts have found plaintiffs to have assumed the risk of traversing a visibly icy/snowy area even if they were required to do so in the course of their employment and exercised the highest degree of care in attempting to do so. ADM P'shp, 348 Md. 84 (plaintiff slipped on visibly icy walkway making delivery to defendant's building); see also Schroyer v. McNeal, 323 Md. 275 (1991) (plaintiff assumed the risk by choosing to cross an ice and snow covered parking lot of a Hotel); Humphreys v. Hess Develop. Assocs., 2009 WL 6527389 (Cir. Ct. Harford Co., Md. Aug. 6, 2009) (plaintiff assumed the risk of falling on portion of sidewalk where water discharged from drain pipe was known by plaintiff to create icy conditions). In cases where the ice was not visible – such as ice covered by a light dusting of snow or black ice – Courts have found that assumption of the risk could not be established because the evidence did not establish that plaintiff had actual knowledge of the risk. Raff, 247 Md. 591; Poole v. Coakley & Williams Constr., Inc., 423 Md. 91 (2011).

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E. DELAWARE

1. General Rule

In Delaware the general rule is that landowners have a duty to exercise reasonable care to keep its premises in safe condition for the benefit of business invitees. Elder v. Dover Downs, Inc., 2012 WL 2553091, at *2 (Del. Super., July 2, 2012); See Young v. Saroukos, 55 Del. 149, 165, 185 A.2d 274, 282 (Super. Ct. 1962). This includes remedying dangerous conditions of which the landowner is aware or, through reasonable inspection, should discover. Elder, at *2. It is well-settled Delaware law that a landowner has an affirmative duty to its business invitees to keep its premises "reasonably safe" from the dangers posed by the natural accumulation of snow and ice. Id. A caveat to this general duty is the "Continuous Storm Doctrine" (discussed infra). The Continuous Storm Doctrine does not absolve a landowner of its duty to exercise reasonable care in removing snow and ice, but instead it provides, as a matter of law, that a landowner engages in "reasonable conduct" by waiting until the end of the storm before commencing snow removal operations. Id.

In order to sustain a claim for negligence against the landowner/occupier of land, the plaintiff must prove: (1) the presence of a duty owed by Defendants to Plaintiff, (2) a breach of that duty, (3) which breach is the proximate and legal cause of , (4) Plaintiff's injuries. Morris v. Theta Vest, Inc., 2009 WL 693253, at *1 (Del. Super., Mar. 10, 2009).

The rules concerning negligence are determined by the status of the party who is entering the premises.

a. Business Invitees

The snow and ice removal laws discussed below are applicable to business invitees. Business invitees are owed the highest duty of care. It is well-settled Delaware law that liability can be imposed upon a possessor of land for physical harm caused to a

business invitee by a condition on the land if he knows of it, or if by the exercise of reasonable care he would discover the condition and, realizing that it involves an unreasonable risk of harm to the business invitee, give him warning. Hamm v. Ramunno, 281 A.2d 601, 603 (Del. 1971).

Invitees can be classified as either business visitor or public invitee. Kovach v. Brandywine Innkeepers Ltd. P'ship, 2000 WL 703343, at *2 (Del. Super., Apr. 20, 2000), on reargument, 2001 WL 1198944 (Del. Super., Oct. 1, 2001). A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. Id. A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public. Id.

b. Licensees

In Delaware, if one uses the premises for his own benefit, he is a licensee and not an invitee. Id., at 3. Delaware law provides that a possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if:

> (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and
>
> (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and
>
> (c) the licensees do not know or have reason to know of the condition and the risk involved.

Kovach v. Brandywine Innkeepers Ltd. P'ship, 2000 WL 703343, at *3 (Del. Super., Apr. 20, 2000), on reargument, 2001 WL 1198944 (Del. Super., Oct. 1, 2001).

A landowner is in breach of his duty to licenses if, and only if, all three of the above conditions are met.

c. Trespassers

Trespassers are owed the lowest duty of care in Delaware. A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise. Id., at 2. A landowner simply owes a trespasser or guest without payment only the duty to refrain from willful or wanton conduct. Hoesch v. Nat'l R.R. Passenger Corp. (Amtrak), 677 A.2d 29, 32 (Del. 1996). There is no Delaware case law that indicates failure to remove snow and ice within a reasonable time constitutes willful or wanton conduct.

2. The "Continuous Storm" Doctrine

Delaware's law concerning Snow/Ice Slip and Fall claims is fairly straightforward. In what is well-settled Delaware law, the "Continuous Storm Doctrine" states that a "business establishment, landlord, carrier, or other invitee, in the absence of unusual circumstances, is permitted to await the end of the storm and a reasonable time thereafter to remove ice and snow from an outdoor entrance walk, platform, or steps." Young v. Saroukos, 185 A.2d 274, 282 (Super. Ct. 1962) aff'd, 189 A.2d 437 (1963). The general controlling principle is that changing conditions due to the pending storm render it inexpedient and impracticable to take earlier effective action, and that ordinary care does not require it. Id. The reasonableness of any delay in the landowner or occupier's actions should be treated as would any question of fact. Woods v. Prices Corner Shopping Ctr. Merchants Ass'n, 541 A.2d 574, 578 (Del. Super. 1988). Lulls in a storm do not "disrupt" the application of the Continuous Storm doctrine's presumption of

reasonable conduct. Elder v. Dover Downs, Inc., 2012 WL 2553091, at *4 (Del. Super., July 2, 2012).

Despite Delaware law permitting landowners to await the end of a storm to begin snow removal efforts, Delaware public-policy encourages landowners to take earlier action if possible. See Kovach v. Brandywine Innkeepers Ltd. P'ship, 2001 WL 1198944, at 2 (Del. Super., Oct. 1, 2001). Delaware does not hold landowners responsible for failed clearing efforts made during an all-day snow event. The basic premise is that landowners who attempt to clear some areas of their property while it is still snowing should not be penalized for doing so, nor should they lose the benefit of being able to wait out the end of the snowstorm before they must take steps to make their entire premises reasonably safe from snow and ice. Id. Even if a landowner has policies to remove snow or ice during a snow or ice event, the policy by itself, without more, does not constitute the voluntary assumption of a legal duty. Cash v. E. Coast Prop. Management, Inc., 7 A.3d 484, (Del. 2010). Therefore, the absence of a legal duty to remove the icy conditions renders moot the question of whether the landowner exercised reasonable care. Id.

3. Unusual Circumstances Exception

Delaware Courts have not had many matters where the "unusual circumstances" exception is examined. In Morris v. Theta Vest, Inc., Plaintiffs contended that Defendant's "calling" Plaintiff to his place of business to pay rent was sufficient enough unusual circumstances to be found as an exception to the Continuous Snow doctrine. The Court rejected this argument, by finding that the need to pay rent in a reasonable prompt time, pales in comparison to the need to get home during a snow storm. Morris v. Theta Vest, Inc., 2009 WL 693253, at *2 (Del. Super., Mar. 10, 2009) aff'd, 977 A.2d 899 (Del. 2009).

4. Open and Obvious Defense

As discussed above, Delaware law provides that a landowner owes a business invitee a duty to provide safe ingress and egress. See also Wilmington Country Club v. Cowee, 747 A.2d 1087, 1092 (Del. 2000). Landowners oftentimes assert the "open and obvious" defense, which claims that a landowner does not have any duty to warn Plaintiff of an open and obvious danger because it is assumed that a reasonable person would have discovered the dangerous condition or realized the danger. If there is a reasonable disputed fact that the snow or ice condition was "open and obvious" danger, Delaware Courts leave the issue as a genuine issue of material fact that should be decided by the fact finder. Id.; See also Kovach v. Brandywine Innkeepers Ltd. P'ship, 2000 WL 703343, at *6 (Del. Super., Apr. 20, 2000) on reargument, 2001 WL 1198944 (Del. Super., Oct. 1, 2001).

5. "Reasonable Time"

Delaware Courts do not state what a "reasonable time" is after a snow or an ice event for a landowner to perform snow and ice removal. The courts leave this as a question of fact to be determined by the fact-finder. However, some Delaware municipalities have specific ordinances which require snow removal within a specific amount of time after the snow or ice event. For example, the City of Wilmington places a duty upon landowners to remove snow and ice from an abutting sidewalk "within 24-hours after such snow may cease to fall or after the formation of such ice." Section 42-418 Wilmington City Code. The local ordinances may assist fact finders in determining what is a "reasonable time" at trial.

6. Continuous Storm Doctrine Applicable to all Business Invitees

The Continuous Storm doctrine applies to parties outside a landlord-tenant relationship too. The Continuous Storm doctrine applies to all parties who fall within the term "business invitee." Thus, an owner or occupier of land which is held open with an implied invitation to the public to come upon the land for the mutual benefit of the public and the landowner or occupier has an affirmative duty to keep the premises reasonably safe from the hazards associated with natural accumulations of ice and snow. Woods v. Prices Corner Shopping Ctr. Merchants Ass'n, 541 A.2d 574, 577 (Del. Super. 1988). Merely warning the invitee of the hazardous condition is not enough to discharge the duty to keep the premises reasonably safe from ice and snow accumulation.

7. Duties to Adjoining Landowners

In Delaware it is a generally accepted rule that an owner or occupant of property owes no common law duty to keep the abutting sidewalks free from natural accumulations of ice and snow. Del Collo v. MMC Corp., 1986 WL 5869, at *2 (Del. Super., Apr. 30, 1986), citing Burns v. Boudwin, Del. Supr., 282 A.2d 620 (1971); Timmons v. Turski, Ill. App., 430 N.E.2d 1135 (1981); Prosser and Keeton on Torts, § 56 at 390 (5th ed. 1984). However, where it is shown that an accumulation of ice and snow on a sidewalk is the result of some artificial act or condition created by the abutting owner or occupant, liability may be imposed upon that person. Del Collo, at *2, citing DiPatre v. McLaughlin, C.A. No. 78C-JL-55, O'Hara, J. (March 10, 1980); MacDonald v. Howard, N.Y. App., 458 N.Y.S.2d 331 (1983); 39 Am.Jur.2d, Highways, Streets and Bridges § 517 (1968).

The basic rule is that one may be possessed of a duty to pedestrians when he has undertaken to remove snow and ice from his sidewalk. Del Collo, at *2. This view recognizes the law's significant interest in protecting the public from veiled dangers, such

as that created by the similarity in appearance between a dry sidewalk and one that is covered with frozen 'run-off.' Id.

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F. WEST VIRGINIA

West Virginia does not have a particularly extensive or well-established body of case law addressing premises liability for slips and falls on snow and ice.

In West Virginia, the Supreme Court of Appeals for West Virginia abolished the legal distinction between "invitees," "licensees" and "trespassers. In Mallet v. Pickens, 206 W. Va. 145, 522 S.E.2d 436 (1999), the Court recognized only two categories: trespassers or non-trespassers. Accordingly, in West Virginia, a landowner owes any non-trespassing entrant a duty of reasonable care under the circumstances. With regard to a trespasser, a landowner only has a duty to refrain from willful or wanton injury. Another relevant development in West Virginia premises liability law applicable to ice/snow is W.Va. Code 55-7-28, which codifies the "open and obvious" doctrine. Specifically, it states that:

> [a] possessor of real property, including an owner, lessee or other lawful occupant, owes no duty of care to protect others against dangers that are open, obvious, reasonably apparent or as well known to the person injured as they are to the owner or occupant, and shall not be held liable for civil damages for any injuries sustained as a result of such dangers.
> Id.

This code section was enacted for the purpose of superseding Hersh v. E-T Enterprise, Ltd., 752 S.E.2d 336 (2013), which abolished the defense of open and obvious. Thus, is no explicit homeowner duty pertaining to snow/ice removal. It is governed by Mallet and questions of reasonableness and foreseeability. In terms of public

sidewalks, municipalities are absolutely immune from liability for this and cases are dismissed outright all the time here based on the immunity.

To prevail against a private landowner, plaintiff must prove that failing to remove snow/ice equates to failure to use reasonable care with a discussion of foreseeability, circumstances, expected use, and magnitude of burden placed upon defendant. This same standard is applied to businesses, landlords, etc...

In terms of defenses open and obvious is the primary defense, but Defendants can also argue that plaintiff was a trespasser in attempt to insulate themselves from Liability under the Mallet standard.

For more information, please contact our author, Joshua K. Boggs, who can be reached by telephone at (304) 241-2976 or by email at jboggs@defensecounsel.com.

III. CONCLUDING REMARKS

We intend this to be a guide to assist you in analyzing, investigation and adjusting snow and ice slip and fall claims. Should you have any additional questions regarding the standards for a particular state, please contact the authors of this manual. For any other questions, please also feel free to contact our managing partners:

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