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Natural accumulation rule abolished

Bar: will change way snow-ice cases argued

BY DAVID E. FRANK

Lawyers say a ruling issued by the Supreme Judicial Court last week will dramatically alter the way snow and ice liability cases are litigated in Massachusetts.

In Papadopoulos, et al. v. Target Corporation, et al., the SJC held that property owners can now be found liable for failing to keep their land free of dangerous snow and ice, regardless of whether the condition resulted from natural or unnatural causes.

"What the court has done is reconcile this area of the law with the entire landscape of premises liability law," said **Marc L. Breakstone of Breakstone, White & Gluck**. "This is one of the greatest public safety decisions to come down in the last 25 years, because now property owners' liability will be judged according to whether or not they exercised reasonable care."

Under the "natural accumulation rule," which had been recognized in Massachusetts since 1883, plaintiffs were prohibited from suing defendants for injuries caused by untouched snow and ice on their property.

Howard S. Goldman of Goldman & Pease in Needham called Papadopoulos "a huge change. One of the most important and difficult factors for plaintiffs in these cases, which usually required the testimony of expert witnesses, has been eliminated."

Goldman, who represents condominium associations and property managers in Massachusetts, said the SJC's decision will make it easier for plaintiffs to establish the existence of an unsafe condition.

"That's always been the key issue in these cases," he said. "Liability is no longer going to be contingent on whether a condition resulted from a man-made alteration."

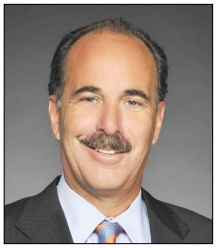
The 30-page decision is Lawyers Weekly No. 10-137-10.

'PARADIGM SHIFT'

Breakstone said the decision is a clear mandate for defendants to use reasonable care in the maintenance of their property.

The Boston plaintiffs' lawyer called the natural accumulation rule an "anachronism in the law" that finally has been set right. The reasonableness standard articulated by the SJC is the same one used in all other premises liability cases, he added.

"This is a paradigm shift in the law with respect to the duty of a landowner to maintain their property in a reasonably safe condition," he said. "The prior law incentivized property owners to do nothing with respect to clearing snow and ice because the 'unnatural accumulation' rule did not apply if the landowner left the snow alone. That is simply no longer the case."



MARC BREAKSTONE

John Egan, a defense lawyer who practices at Boston's Rubin & Rudman, downplayed the impact of the decision. He said every other New England state has operated under a rule similar to the one the SJC laid out in Papadopoulos without having any major problems.

Egan, who estimates he has defended between 100 and 200 snow and ice cases in his career, said the scope of the natural accumulation rule accounts for more caselaw than any other issue in snow and ice cases.

"Trying to apply this natural versus artificial distinction to any given set of facts was always easier said than done," he stated. "There are probably two dozen reported decisions out there, and if you could tell me after reading them all where the bright line was, you would be a better lawyer than I am. It was a difficult concept to apply in the real world."

But Emmanuel N. Papanickolas of Peabody, who represented the plaintiffs, said the court's elimination of the

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accumulation standard will prevent defendants from succeeding at summary judgment. When lawyers now assess the viability of a snow and ice case, he said, they will simply focus on whether a defendant used reasonable efforts to keep the property safe.

"The question of what is reasonable and what is not reasonable is going to be an issue left up to the fact-finder, and because of that, claims that otherwise would have been rejected by lawyers will now be brought to court," he said. "These cases will now be able to get beyond summary judgment and will be decided at trial."

James T. Scamby of Tucker, Heifetz & Saltzman in Boston represented the defendants. He could not be reached for comment prior to deadline.

SLIP AND FALL

In December 2002, plaintiff Emanuel Papadopoulos drove to the Liberty Tree Mall in Danvers to shop at the Target store. When he arrived, it was below freezing, but it was not snowing or raining. Although the lot had been plowed, the plaintiff noticed scattered snow and some areas of ice.

The plaintiff parked his car in a handicapped spot next to a raised median strip that separated the parking area from the traffic lane running between the lot and the store.

A plow, which had deposited a pile of snow on the median, left some remaining snow on the ground.

As the plaintiff returned to his car after leaving the store, he slipped on a patch of ice covered with dirt and sand. The patch was either the result of fallen snow from the median or melted snow that ran off the pile.

The plaintiff fractured his hip and required surgery.

In 2005, the plaintiff filed a negligence complaint against defendants Target and Weiss Landscaping Co., which had cleared the snow.

When the defendants moved for summary judgment, Superior Court Judge Merita A. Hopkins granted their motions. Relying on caselaw that held a property owner does not violate the duty of reasonable care by failing to remove natural accumulations of snow and ice, Hopkins found the plaintiff could not prevail on his negligence claims.

DID YOU KNOW?

In reversing Hopkins, Gants said the SJC had decided to do away with the natural and unnatural accumulation analysis of snow and ice in premises liability cases.

"We now abolish the distinction between natural and unnatural accumulations of snow and ice, and apply to all hazards arising from snow and ice the same obligation of reasonable care that a property owner owes to lawful visitors regarding all other hazards," he wrote.

Contrary to concerns expressed by members of the defense bar, Gants said the ruling does not place any special burdens on property owners.

"If a property owner knows or reasonably should know of a dangerous condition on its property, whether arising from an accumulation of snow or ice, or rust on a railing, or a discarded banana peel, the property owner owes a duty to lawful visitors to make reasonable efforts to protect lawful visitors against the danger," he said.

Gants also said the SJC's ruling would not impose unreasonable maintenance burdens on landowners, but instead would clarify an area of the law that had spawned confusion and conflict.

"The snow removal reasonably expected of a property owner will depend on the amount of foot traffic to be anticipated on the property, the magnitude of the risk reasonably feared, and the burden and expense of snow and ice removal," he said. "Therefore, while an owner of a single-family home, an apartment house owner, a store owner, and a nursing home operator each owe lawful visitors to their property a duty of reasonable care, what constitutes reasonable snow removal may vary among them."

The SJC went on to decline a defense request to apply its new rule only prospectively.

"We conclude that the circumstances do not warrant an exception from the normal rule of retroactivity," Gants said.

For more information about the judges mentioned in this story, visit the Judge Center at www.judgecenter.com.

Marc Breakstone is a member of the law firm Breakstone, White & Gluck PC. He focuses his practice on complex personal injury and medical malpractice claims on behalf of plaintiffs. He has been a member of the Board of Governors of the Massachusetts Academy of Trial Attorneys for the past 15 years and is actively leading campaigns to reform the jury selection system in Massachusetts. He can be reached at (617) 723-7676 or via e-mail at breakstone@bwglaw.com.