A Concrete Decision: 'Qian' and the Evolution of Sidewalk Liability

By Gregory D. Speier, Esq.
New Jersey Law Journal
December 15, 2015

In the past 20 years, the number of common-interest communities in New Jersey has grown exponentially. Today, we all seem to know someone living in such a community, whether it be an active adult senior community, a condominium building or a development of detached single-family homes.

But what duty does a common-interest community association owe with respect to keeping its private sidewalks and walkways reasonably safe? This question was recently addressed by the New Jersey Supreme Court in the decision of *Qian v. Toll Brothers*, 223 N.J. 124 (2015).

N.J. Sidewalk Jurisprudence

Nearly 40 years ago, the law was that a property owner could not be held liable for a condition on an abutting sidewalk which caused injury to a pedestrian that was the result of the elements or ordinary wear and tear. *Yanhko v. Fane*, 70 N.J. 528, 532 (1976); overruled in part by *Stewart v. 104 Wallace Street,* 87 N.J. 146 (1981). The decision in *Stewart* carved out an exception for commercial property owners only, which remains the law today. As per *Stewart*, a commercial landowner has a duty to maintain abutting public sidewalks in a reasonably good condition. The *Stewart* court held that such reasoning is consistent with public policy, as commercial landowners are better situated to protect against injury caused by a dangerous or defective sidewalk. Following *Stewart*, the New Jersey Supreme Court imposed a duty on commercial landowners to remove or reduce the hazard of ice and/or snow from abutting public sidewalks, dependent upon what a reasonably prudent person would do under similar circumstances. *Mirza v. Filmore Corp.,* 92 N.J. 390 (1983).

On the other hand, residential property owners do not owe a duty to pedestrians to keep the public sidewalk adjoining their premises free of ice and snow. *Luchejko v. City of Hoboken,* 207 N.J. 191, 211 (2011); *Dupree v. City of Clifton,* 175 N.J. 449 (2003); *Norris v. Borough of Leonia*, 160 N.J. 427 (1999). Even if a municipal ordinance requires a residential landowner to clear abutting public sidewalks, common-law tort liability will not attach. The caveat is that should a residential landowner undertake efforts to remove ice or snow from a public sidewalk, and negligently adds a new danger or hazard which increases the natural hazard already present, liability may attach. *Saco v. Hall*, 1 N.J. 377, 381 (1949).

Since *Stewart*, our courts have rendered many decisions relating to public sidewalk liability. In these cases, the analyses focused on whether the property abutting the sidewalk at issue was commercial or residential. However, New Jersey's courts have often been presented with facts where the nature of the abutting property cannot

easily be identified. For example, what if the property abutting the sidewalk has both commercial *and* residential uses, or is owned for charitable, religious or non-profit purposes? Or, what if the abutting property is a condominium building?

The Decision in *Luchejko*

Against this backdrop, in *Luchejko*, a pedestrian slipped on ice on a sidewalk that abutted both a public roadway and a residential high-rise condominium building. Suit was filed against the municipality, the homeowner's association, the property manager and the landscaper. The New Jersey Supreme Court, for the first time, considered whether a condominium building is to be considered commercial or residential for the purpose of applying public sidewalk jurisprudence. In short, the Supreme Court rejected the plaintiff's assertion that the condominium homeowner's association was more of a commercial/nonprofit organizational property. Rather, the court concluded that the association was not subject to tort liability because *the use* of the property was *residential* in nature.

Due to the fact that the condominium in *Luchejko* was deemed to be residential, the decision was interpreted by some, including our trial courts, to mean that community associations were immune from tort liability with respect to injuries occurring on sidewalks abutting, or even within, community property. The *Luchejko* decision, however, was silent on the issue of a community association's tort duty to maintain a sidewalk owned by, or under the control of, the association. The Supreme Court in *Qian* addressed this issue head on and provided much needed clarity.

Relevant Facts of *Qian*

The Villas at Cranbury Brook (VCB) is a common-interest, over-55 community, owned and controlled by the VCB Homeowner's Association. Homeowners at VCB take title to their individual dwelling units, while the common areas, including the sidewalks, are owned by the association. The association charges homeowners monthly assessments for the purpose of maintaining the common areas, including the removal of ice and snow from the sidewalks.

The VCB Association hired a landscaper for the purpose of maintaining community property. Pursuant to the applicable contract, the landscaper was to remove ice and snow in accumulations of two inches or more from the community's roadways, parking areas, driveways and sidewalks. If less than two inches of ice or snow fell, the landscaper was required to remove the ice or snow only if directed by the association.

On Dec. 19, 2008, approximately 1.5 inches of ice accumulated on the sidewalks and streets of VCB. At the association's request, the landscaper salted the roadways of the community. The association did not make a similar request for salting the common sidewalks and walkways. Two days later, less than two inches of additional freezing rain accumulated. The landscaper did not apply any salt to the roadways or the sidewalks of the community, as no request was made by the association. It was on this date, Dec. 21, 2008, that the plaintiff slipped and fell on ice located upon a sidewalk within VCB's common property, sustaining injuries. The sidewalk upon which the plaintiff allegedly sustained injuries abutted a private roadway within VCB.

Trial and Appellate Court Decisions

At the trial level, summary judgment was granted to the VCB Association based upon the *Luchejko* decision. The Appellate Division, in an unpublished decision, affirmed the dismissal based also upon *Luchejko*. The panel determined that the interior sidewalks of VCB were similar to the public sidewalks of any residential development; and therefore, as applied, *Luchejko* was precedential and dispositive. Further, because the Supreme Court in *Luchejko* did not differentiate between sidewalks located upon public or private property, the Appellate Division declined to draw such a distinction. In fact, the Appellate Division commented that, if a private residential common-interest community is to be treated differently with respect to ice and snow removal from interior sidewalks than from abutting public sidewalks, it was the Supreme Court's function to make such a distinction. A concurring opinion similarly noted that it was not the Appellate Division's function to interfere with the commercial versus residential "dichotomy."

New Jersey Supreme Court Decision

The Supreme Court in *Qian* found "stark factual differences" between *Luchejko* and the case before it:

- In *Luchejko,* the fall occurred on a sidewalk that abutted both a condominium building and a roadway owned and under the control of the municipality; while in *Qian*, the accident occurred on a sidewalk owned and under the control of the VCB Association (the roadway abutting the sidewalk had not been dedicated to the municipality);

- In *Luchejko*, the bylaws of the association did not impose a duty to clear the incident sidewalk of ice and snow; while in *Qian*, the Public Offering Statement, Certificate of Incorporation, master deed, bylaws and the Condominium Act, N.J.S.A. 46:8B-14(a), placed the responsibility upon the association to maintain the common sidewalks of the community, including the one upon which the plaintiff fell.

- In *Luchejko,* the sidewalk at issue was not part of the "common elements" of the homeowner's association; while in *Qian*, VCB's governing documents specifically deemed the private sidewalk where the plaintiff fell to be a "common element."

- In *Luchejko*, the association did not collect fees from condominium owners for the purpose of maintaining the sidewalk in a safe condition; while in *Qian*, the association collected maintenance fees to ensure that all common property, including the sidewalk at issue, were reasonably safe.

- In *Luchejko*, the association was not required to carry liability insurance covering the incident sidewalk; while in *Qian*, the association was required by its bylaws and by the Condominium Act, N.J.S.A. 46:8B-14(e), to secure liability insurance covering the common sidewalks of the community, including the one upon which the plaintiff fell.

- In *Luchejko*, the public had the right of way on the sidewalk; while in *Qian*, the general public did not have an easement to use the sidewalks of the community.

In its analysis, the court first looked to whether the sidewalk at issue was private or public. The court held that the key determining factor between a private and public sidewalk is who *owns* or *controls* the sidewalk, not who uses it. According to the court, the sidewalk at issue was private, as the record clearly showed that the sidewalk was common property, owned by and under

the control of the association. As such, the court viewed the *Qian* case as one similar to a plaintiff suffering injury on a private walkway leading to the front door of a house that is controlled by the property owner, rather than a case which would invoke sidewalk liability jurisprudence. After determining that the sidewalk was private, the court found it unnecessary to apply the commercial versus residential analysis, as was the case in *Luchejko*.

The Supreme Court in *Qian* also looked to N.J.S.A. 2A:62A-13 in further support of its holding that community associations may be held liable for injuries occurring upon sidewalks located on common property. This statute provides that a homeowner's association may, through its bylaws, immunize itself from lawsuits brought by unit owners where the cause of action sounds in ordinary negligence. The statute goes on to state that a homeowner's association may not pass a bylaw which immunizes itself from willful, wanton or grossly negligent acts or omissions. In *Qian*, the VCB Association did, in fact, promulgate a bylaw that exculpated it from liability where the injured party is a unit owner. According to the court, the legislature conferred this limited immunity because it believed that the private sidewalks of a common-interest community are, in fact, subject to tort liability. In other words, there would be no need for the grant of this limited immunity, but for the potential of liability.

Of note, however, is the residency status of the plaintiff, Cuiyun Qian. Although she resided within a unit at VCB, she was not the owner of the unit. Rather, the plaintiff's son was listed as the owner on the deed. The Supreme Court in *Qian* chose not to address whether the plaintiff should be deemed a unit owner for purposes of the immunity provisions noted above and ruled that this issue must be explored further on remand.

Overall, the Supreme Court in *Qian* made clear that a community association owes a duty to exercise reasonable care to protect against injuries occurring on its private property, just as any other owner of private property would. This duty would extend not just to sidewalks, but to all portions of privately owned, common property. The *Qian* decision provided clarity; that residential sidewalk immunity is not implicated in a case involving private sidewalks or walkways that fall within the common elements of common-interest community property.

Looking Ahead

It will, of course, be interesting to see how the trial court, on remand, grapples with the residency issue of the plaintiff. In the meantime, and going forward, now that *Luchejko* has been distinguished by *Qian*, litigation against community associations arising from slip and falls occurring upon their private sidewalks will recommence. The *Qian* decision should encourage associations to take greater measures to prevent injuries from occurring on their private sidewalks and walkways, as well as to perfect indemnification clauses within contracts with snow contractors, landscapers and other third parties.

Speier is an associate in the Roseland office of Marshall Dennehey Warner Coleman & Goggin. A member of the firm's Casualty Department, he focuses his practice on a wide variety of general liability matters.

Reprinted with permission from the December 21, 2015 issue of the New Jersey Law Journal©. 2015 ALM Media properties, LLC.
Further duplication without permission is prohibited. All rights reserved.