'Tis the Season: Defending Snow and Ice Claims in Pennsylvania and New Jersey

The Legal Intelligencer
By **Alex B. Norman, Brielle N. Kovalchek and Elyse N. Cohen**
February 6, 2018

It is generally well known that this time of year, snow and ice (#SNICE) is commonplace. Yet, despite the commonness of snow and ice in this area, people still get injured as a result. A little bit of snow, ice, black ice or freezing rain can turn the roughest paved surface into a skating rink. This article will outline various defenses available and some precautions and practice points that property owners can utilize to protect themselves against the claims and lawsuits that are a near certainty.

In the mid-Atlantic region, we find ourselves faced with the growing reality of severe weather patterns. On Jan. 12, as the Philadelphia Eagles prepared to kick off against the Atlanta Falcons in the second round of the NFL playoffs, the players and fans experienced a 40-degree drop in temperature in 24 hours. This latest weather change comes on the heels of record-setting low temperatures, and the seasonably cold temperatures left tristate residents to deal with inches of snow and ice-covered sidewalks and a record number of water main breaks.

Since then, a warm front has moved in melting away the snow and ice, but surely that wasn't the last we'll see of this winter's wrath. It is generally well known that this time of year, snow and ice (#SNICE) is commonplace. Yet, despite the commonness of snow and ice in this area, people still get injured as a result. A little bit of snow, ice, black ice or freezing rain can turn the roughest paved surface into a skating rink. This article outlines various defenses available and some precautions and practice points that property owners can utilize to protect themselves against the claims and lawsuits that are a near certainty.

In any negligence action, the plaintiff must prove a duty of care. In New Jersey, "whether a person owes a duty of reasonable care toward another turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy," as in *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 429 (1993). New Jersey courts will consider several factors, including "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care and the public interest in the proposed solution."

With regard to snow and ice removal, the inquiry first turns on whether the premises is a commercial or residential property. New Jersey courts have long held that residential owners owe no duty to clear snow and ice form public sidewalks abutting their land, as in *Luchejko v. City of Hoboken*, 207 N.J. 191, 201 (2011), citing *Davis v. Pecorino*, 69 N.J. 1, 4 (1975). Commercial owners, however, are

"liable for injuries on the sidewalks abutting their property that are caused by their negligent failure to maintain the sidewalks in a reasonably good condition," *Luchejko*, 207 N.J. at 202, citing *Stewart v. 104 Wallace Street*, 87 N.J. 146, 149-50 (1981).

In 2002, the New Jersey Superior Court held that residential property owners owed no duty to the plaintiff, a postal worker delivering mail, when she slipped and fell on ice on the defendant's property, as in *Jimenez v. Maisch*, 329 N.J. Super. 398 (App.Div. 2000). The court considered several factors to be determinative that no duty existed: nearly 30 inches of snow had fallen in the days before the plaintiff's accident; the governor had declared a state of emergency; and at least half of the defendant's neighborhood still had some snow on the residential sidewalks and driveways. The court considered the risk present "obvious" and felt it against the basic senses of fairness to impose a duty on the land owner.

Since 2002, the same principles of *Jimenez* have been applied in the commercial setting. Most recently, in *Holmes v. INCAA-Carroll St. Houses*, 2015 N.J. Super. Unpub. LEXIS 1280 (Super.Ct. App.Div. June 2, 2015), the court held that the defendants were not required to remove snow in the midst of an ongoing snow storm. There, the plaintiff fell on a snow accumulation outside of her apartment, which was managed by the defendants. The court held that, because there was a massive snow storm the day before, a winter storm watch was still in effect and the public roads were still not clear in the area surrounding the defendant's property, it would have been unfair in light of the circumstances and public policy to impose a duty on the landlord.

In 2010, the court distinguished *Jimenez* in *Richards v. Quality Automotive of Bloomingdale*, 2012 N.J. Super. Unpub. LEXIS 1484 (Super.Ct. App.Div. June 25, 2012). There, the plaintiff fell on a sidewalk abutting the defendant's commercial property. The court held this matter different than *Jimenez* as the size of the storm in comparison was vastly smaller.

The principles of *Jimenez* were also upheld in *DeLucca v. Givaudan Roure*, 2010 N.J. Super. Unpub. LEXIS 1711 (Super.Ct. App.Div. July 23, 2010). There, plaintiff was a truck driver who originally pulled his truck into the loading dock area of the defendant's property at 4 a.m. without incident. When the plaintiff returned to the dock at 2:30 p.m., he slipped and fell on ice on the dock. Citing *Jimenez,* the court held that, while the owner of the property had a nondelegable duty to provide safe conditions for those individuals entering the site and utilizing its property, because it was not their contractual duty to remove snow at the time of the incident, no liability could be found.

In all, New Jersey's courts have held this balancing test regarding duty to be "highly fact specific" and, thus, a determination that should be made by the court, *Jimenez v. Maisch*, 329 N.J. Super. 398, 403, (Super.Ct. App.Div. 2000), citing *Hopkins*, 132 N.J. at 439.

In Pennsylvania, to establish a premises liability claim against a defendant, the plaintiff must prove that: the defendant owed a duty to the plaintiff; the defendant breached that duty; there was a causal connection between the breach and the resulting harm; and the plaintiff sustained actual damages, see *Estate of Swift v.*

Northeastern Hospital of Philadelphia, 690 A.2d 719, 722 (Pa.Super. 1997).

Although possessors of land are typically responsible for keeping their property free from dangerous conditions, Pennsylvania law does not impose a duty on possessors to protect against "general slippery conditions" that occur during wintertime in the northeast. *Rinaldi v. Levine*, 406 Pa. 74, 176 A.2d 623 (1962). Rather, the Hills and Ridges Doctrine is frequently applied and bars a plaintiff's claim of injury resulting from slipping and falling on snow or ice.

Under Pennsylvania's Hills and Ridges Doctrine, a plaintiff must establish that: the snow and ice accumulated on the sidewalk in ridges or elevations that unreasonably obstruct travel and constitute a danger to pedestrians; the property owner had actual or constructive notice of the condition; and the dangerous accumulation of snow and ice caused the plaintiff's fall. This doctrine places a higher burden on plaintiffs.

The rationale behind the Hills and Ridges Doctrine is founded in the realistic understanding that snowy, icy conditions are endemic to the region during the winter season. See also *Tonik v. Apex Garages*, 442 Pa. 373, 275 A.2d 296 (Pa. 1971); *Morin v. Traveler's Rest Motel,* 704 A.2d 1085 (Pa.Super. 1997) (citing *Wentz v. Pennswood Apartments*, 359 Pa. Super. 1, 518 A.2d 14 (1991). Thus, "to require that one's walks be always free of ice and snow would be to impose an impossible burden in view of the climactic conditions in this hemisphere," as in *Gilligan v. Villanova University*, 401 Pa. Super. 113, 115, 583 A.2d 1005, 1007 (Pa.Super. 1991). Under the doctrine, possessors are only obligated to act within a reasonable time to remove the snow and ice, as in *Morin v. Traveler's Rest Motel*, 704 A.2d 1085 (Pa.Super. 1997).

Pennsylvania case law has established several conditions precedent before the Hills and Ridges Doctrine can be invoked. For example, the doctrine only applies when "general slippery conditions prevail in the community," as held in *Tonik v. Apex Garages*, supra, 442 Pa. at 376. See also *Morin v. Traveler's Rest Motel*, supra, 704 A.2d 1085 (Pa.Super. 1997) (citing *Harmotta v. Bender,* 411 Pa. Super. 371, 601 A.2d 837 (Pa.Super. 1987)). Where a plaintiff claims to have slipped on a "localized patch of ice," or on a condition created by a defendant's negligence—such as a defective water pipe, hydrant or spigot—courts have declined to apply the doctrine to shield possessors of land from liability.

Further, the doctrine only applies to private and public outdoor premises, such as parking lots and walkways, as in *Heasley v. Carter Lumber*, 2004 Pa. Super. 44, 843 A.2d 1274 (Pa.Super. 2004). In *Heasley*, for example, the Pennsylvania Superior Court considered whether the doctrine should be extended to include circumstances where a plaintiff slips and falls in a structure partially open to the elements. The Superior Court declined to extend the scope of the doctrine, ruling that doing so would be "unnecessary and unwarranted."

The Hills and Ridges Doctrine is not applied where the accumulation is not natural, such as when snow is plowed or deposited into a bank that obstructs a walkway. For example, in *Basick v. Barnes*, 234 Pa. Super. 616, 341 A.2d 157 (Pa.Super. 1975), the Superior Court declined to apply the Hills and Ridges Doctrine when a woman was forced to walk in the street due to a snow bank blocking the

sidewalk and berm of the road, created when the road was cleared. Decades later, the Superior Court again declined to apply the doctrine when improper snow removal or salting procedures created unnatural accumulations of ice, as held in *Harvey v. Rouse Chamberlin*, 2006 Pa. Super. 130, 901 A.2d 523 (Pa.Super. 2006); *Liggett v. Pennsylvania's Northern Lights Shoppers City,* 75 Pa. D. & C. 4th 322, 327-28 (2005).

Despite the limitations, Pennsylvania's courts still widely employ the Hills and Ridges Doctrine to hold plaintiffs to a higher burden of proof or entirely bar recovery in slip-and-fall cases arising from wintertime accidents.

In *Alexander v. City of Meadville*, 61 A.3d 218, 225 (Pa.Super. 2012), the Superior Court affirmed the trial court's decision to grant summary judgment in favor of the business owner where a plaintiff alleged that he slipped and fell on an icy ramp. The plaintiff alleged that, while he was walking home at 1:20 a.m. on a weekend, he slipped and fell on a smooth patch of ice covered by one to two inches of snow in a dip in a ramp. The Superior Court upheld the trial court's determination that the property owner did not owe a duty of care to the plaintiff since the plaintiff did not prove that the property owner had actual or constructive notice of the conditions because no employees worked outside of business hours. Moreover, the plaintiff's testimony that he fell on a smooth patch of ice was insufficient to establish that the snow and ice were unnavigable lumps and mounds.

The Superior Court affirmed its stance in 2014 when it decided the *O'Donnell v. CoGo's*, 116 A.3d 678 (Pa.Super. 2014), matter. Applying the Hills and Ridges Doctrine, the *O'Donnell* court affirmed the Allegheny County Court of Common Pleas decision granting summary judgment in favor of the defendants. Despite the plaintiff's allegation that she fell on an isolated patch of ice due to the defendant's failure to properly salt the entire lot, the court acknowledged that icy conditions prevailed in the community at the time of the accident and ruled that the plaintiff failed to adduce sufficient evidence that the natural accumulation causing her fall was of such a nature as to unreasonably obstruct her travel.

In 2015, the Superior Court affirmed the Berks County Court of Common Pleas' entry of summary judgment in favor of the defendants-property owners when the plaintiff fell on icy remnants from a prior storm in the midst of a current snowfall in *Lockman v. Berkshire Hills Associates*, 131 A.3d 86 (Pa.Super. 2015). Relying on a meteorologist's report that described an initial "significant snowfall event," followed by continued snow, sleet and freezing rain, rain, and additional snow events over the next few days, the Superior Court agreed with the trial court that generally slippery conditions prevailed throughout the community. At deposition, the plaintiff denied being able to see any bumps and hills and ridges in the ice as the ice was flat. The Superior Court concluded that there was a sufficient basis for the trial court to determine that the plaintiff failed to meet his burden under the Hills and Ridges Doctrine and, thus, summary judgment was appropriate.

In a 2017 unpublished opinion, the Superior Court again affirmed a trial court's decision to grant summary judgment in favor of a property owner and against a plaintiff under the Hills and Ridges Doctrine because the

plaintiff fell when the general community experienced icy conditions and did not demonstrate that the accumulations were in elevations that unreasonably obstructed his travel, as in *Neifert v. Speedway,* 2017 Pa. Super. Unpub. LEXIS 3412 (Pa.Super. 2017) (Sept. 14, 2017).

Whether a Philadelphia Court of Common Pleas will rely on the heightened standard of the Hills and Ridges Doctrine to preclude a plaintiff's recovery is undetermined. The Superior Court's recent stance, demonstrated by its published and unpublished decisions such as *Neifert* and *Lockman*, suggests that the doctrine is still in full effect and has not been limited since the seminal cases such as *Rinaldi* and *Tonik* decisions.

Risk transfer is most commonly effectuated through indemnification provisions in snow removal contracts. Courts will look to the plain language of the clause to determine the clear intent of the parties.

New Jersey's courts will look at the contract to determine if the language is clear and unambiguous. The contract language will be strictly construed against the indemnitee as they are generally the party with the greater bargaining power and, therefore, have the greater interest in the indemnification provision. The law is clear that language must be included in the contract in order to be indemnified for negligent acts or omissions.

It is very common for snow removal companies to reserve a right to hire a snow removal subcontractor. Therefore, it is very important for snow removal companies in New Jersey that have indemnification provisions in their contracts with landowners have as close to the same indemnification provisions in their subcontracts. If they do not have the same provisions, they may be faced with a situation where they are forced to defend and indemnify the landowner for negligent acts, but are precluded from seeking reimbursement from the subcontractor because the subcontract contained a more narrow indemnification.

Much like in New Jersey, Pennsylvania's courts look to the contract to determine the clear intent of the parties and require that the indemnified act be unambiguously stated in the indemnification provision. Next, the courts will look at the type of negligent act that is being indemnified (i.e., was the negligence active or passive?). If the indemnitee's negligence was active, the court will have to make the indemnitor the insurer of the indemnitee, and the courts are reluctant to do that. If the negligence was passive, the indemnitor is not an insurer, and the courts are more likely to enforce the contract.

As an example, imagine that a landowner is responsible for clearing snow and ice from the sidewalk. They hire a snow removal company to clear snow and ice from the parking areas. The snow removal contract contains an indemnification provision whereby the snow removal company agrees to indemnify the landowner for any and all negligent acts. On the date of loss, the plaintiff slips and falls on snow and ice that is in the parking lot. Through discovery it is learned that the snow removal company cleared the area of the fall before the incident occurred. After it was cleared, the landowner cleared the sidewalk and threw snow on the parking area, creating the dangerous condition. The landowner's negligence is active. To cause the snow removal company to indemnify the landowner would be to make them the

insurer. Therefore, the indemnification provision will not be enforced against the snow removal company.

Many snow removal contracts require that the indemnitor name the indemnitee as an additional insured on a general liability policy. As a practice point, the snow removal contract should be evaluated immediately after a loss is reported to determine if there is an additional insured requirement. If there is one, the full policy, including the additional insured endorsements, should be requested from the snow removal contractor. Given the sophistication of the contract drafters, there can be a complex interplay between the insurance requirements of the contract and the indemnification provisions of the contract. Having the full policy at the outset of the litigation will allow the defense team to fully evaluate risk transfer. For instance, in some policies, there has to be a finding that the indemnitor is negligent before coverage is provided to the indemnitee. In this example, the case would have to be adjudicated before a coverage determination could be made.

With proper evaluation and planning, property owners can take the necessary steps to maximize risk transfer through clear and intentional drafting of snow removal contracts. When suits are filed, the available defenses should be used to protect property owners from unreasonable results. Snow, ice and the resultant claims are inevitable. Plan and prepare, then you will learn to stop worrying and love the winter weather.

***Alex Norman**, **Brielle Kovalchek** and **Elyse Cohen** are members of the casualty department at Marshall Dennehey Warner Coleman & Goggin. Norman, a shareholder, and Cohen, an associate, work in the Philadelphia office. Kovalchek, an associate, works in the Mount Laurel, New Jersey, office.*