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Premises Liability: Slip Sliding Away

In *Scott and White Memorial Hospital, et al. v. Gary and Linda Fair*, the Texas Supreme Court addressed the issue of whether ice that accumulates naturally outside a business due to a winter storm poses an unreasonable risk of harm.¹

Factual Background

Gary Fair drove his wife to a doctor's appointment at Scott and White Memorial Hospital ("Scott") the morning after a winter storm. There was ice in the parking lot, on the road, and on the steps leading to the hospital. The Fairs had walked through the parking lot, on the road, and on the steps. After the appointment, Gary Fair left the building to retrieve his car while his wife waited inside. He slipped and fell on the road that separated the hospital from the parking lot. This area was covered with ice from the recent storm.

Trial Court

The Fairs sued Scott for damages arising out of the injuries Mr. Fair sustained in the fall. Scott moved for summary judgment asserting that the accumulated ice did not pose an unreasonable risk of harm. The trial court granted Scott's motion and rendered judgment that the Fairs take nothing.

Court of Appeals

The court of appeals reversed the trial court's judgment. It held that Scott failed to conclusively establish that the ice accumulation was in its natural state and was not an unreasonably dangerous condition.

The Texas Supreme Court

The parties agreed that the Fairs were invitees. Thus, Scott owed a duty to exercise reasonable care to protect against danger from a condition on the land that created an unreasonable risk of harm of which the owner or occupier knew or by the exercise of reasonable care would discover.² Scott asserted that the naturally accumulated ice on its premises did not pose an unreasonable risk of harm to invitees.

The Texas Supreme Court agreed. It also noted that on several prior occasions it had addressed whether certain naturally occurring conditions created unreasonable risks of harm:

- ◇ The natural state of dirt, that it may be slippery when wet or may contain small rocks, can present a hazard under the right conditions, but not unreasonably so.³;
- ◇ Plain dirt which ordinarily becomes soft and muddy when wet is not a dangerous condition of property for which a landlord may be liable.⁴ ; and

¹ 2010 Tex. LEXIS 353, (Tex. May 7, 2010)

² *CMH Homes, Inc. v. Daenen*, 15 S.W. 3d 97, 101 (Tex. 2000)

³ *Johnson County Sheriff's Posse v. Endsley*, 15 S.W. 3d 97, 101 (Tex. 2000)

⁴ *Brownsville Navigation Dist. v. Izaguirre*, 926 S.W. 2d 284, 287 (Tex. 1996)

- ◇ Ordinary mud that accumulates naturally on an outdoor concrete slab without the assistance or involvement of unnatural contact is, in normal circumstances, nothing more than dirt in its natural state and, therefore, is not a condition posing an unreasonable risk of harm.⁵

The Texas Supreme Court also noted that numerous courts of appeals have applied *M.O. Dental's* holding to premises liability cases involving other naturally occurring conditions, including ice, and have consistently concluded that naturally formed ice is not an unreasonably dangerous condition for premises liability purposes.

The Fairs asserted that ice should be treated differently from mud because, unlike mud, icy conditions rarely occur in Texas. The Texas Supreme Court noted that both conditions pose the same risk of harm because ice, like mud, result from precipitation beyond a premises owner's control. Interestingly, the Texas Supreme Court also stressed that invitees are at least as aware as landowners of the existence of ice that has accumulated naturally outdoors and will often be in a better position to take immediate precautions against injury. *M.O. Dental Lab*.

It further noted that precipitation accompanied by near-freezing temperatures likely results in ice that is neither unexpected, nor unusual, but rather entirely predictable. In other words, an icy bridge is something motorists can and should anticipate when the weather is conducive to such a condition.

Scott was able to show that the accumulation of ice on the day in question was a result of an act of nature. It was *not* an "unnatural" accumulation. Scott provided summary judgment evidence which included affidavits from a local meteorologist and its grounds supervisor (along with deposition testimony from Fair), which showed that an ice storm hit the Temple area causing ice to accumulate on the Scott property, including the road where Fair fell. Furthermore, the Texas Supreme Court noted that the Fairs did not present any controverting evidence (or even suggest) that the ice resulted from something other than the winter storm. For example, it did not show that the ice accumulated based on known sub-freezing temperatures and negligent running of sprinkler systems in the area, despite the freezing temperatures.

First exception to the natural accumulation rule

The Fairs asserted that a premises owner should be liable when it has actual or implied notice that a natural accumulation of ice or snow on his property created a condition substantially more dangerous than a business invitee should have anticipated by reason of knowledge of the conditions generally prevailing in the area.⁶ The Texas Supreme Court rejected this argument. It did not agree that Scott's use of a deicer, "Meltz," made the ice slipperier, thereby creating a condition substantially more dangerous than a business invitee should have anticipated.

It noted that in *Cooper*, the court explained that exception applies to only situation where the ice or snow conceals the defect or hazard (such as a deep hole) that an invitee should not anticipate from his general knowledge of wintery conditions in the area. There was no evidence in the instant case that the ice concealed any dangerous condition beneath it. In fact, the hazard complained by the Fairs was the slipperiness of the ice itself. The Texas Supreme Court felt that such a danger is one that is normally associated with ice. More importantly, it is a danger that Fairs were clearly aware of, and not one substantially more dangerous than should be anticipated.

Second exception to the natural accumulation rule

The Fairs also argued that the natural accumulation of ice rule did not apply when a landowner is actively negligent and committing or creating an unnatural accumulation of snow. The Fairs asserted that Scott negligently applied the "Meltz," causing the ice to refreeze, and thereby creating an unnatural accumulation. The Texas Supreme Court noted that, after an examination of Ohio jurisprudence, which developed the exception on which the Fairs relied, revealed that salting or shoveling ice or snow does not turn a natural accumulation into an unnatural accumulation, and even the application of a chemical deicer to a natural accumulation of ice did not render the ice unnatural. It also noted other Ohio cases holding that ice that melts and later refreezes is still a natural accumulation.

⁵ *M.O. Dental Lab v. Rape*, 139 S.W. 3d 671, 676 (Tex. 2004)

⁶ *Cooper v. Valvoline Instant Oil Change*, No. 07 AP-392 Ohio App. (Ohio Ct. App. Nov. 6, 2007)

⁷ *Cunningham v. Thacker Servs., Inc.*, No. 03 AP-455 Ohio App. (Ohio Ct. App. Nov. 13, 2003)

The Fairs asserted that Scott's negligent deicing caused the ice to refreeze, rendering it unnatural. However, the Supreme Court noted that the mere fact that a premise owner salted the sidewalk and then allowed the sidewalk to freeze again does not determine the natural accumulation of snow and ice into an accumulation that is unnatural. In other words, salting, shoveling, or applying deicer to a natural ice accumulation does not transform it into an unnatural one. The Texas Supreme Court firmly noted that to find otherwise would punish business owners who, as a courtesy to invitees, attempt to make their premises safe.

What this means for you

The Texas Supreme Court has clearly acknowledged that requiring Texas property owners to guard against winter conditions would inflict a heavy burden because of limited resources landowners have on-hand to combat occasional ice accumulation.

The Texas Supreme Court is clearly supporting Texas business owners in the unusual (albeit natural) accumulation of ice. This holding supports the notion that invitees (1) should know better (just like when driving over an icy bridge) and (2) are in a better position to protect themselves than the property owner. In other words, responsibility for icy conditions may clearly be slip sliding away from business owners, thanks to the Texas Supreme Court.



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