LEGAL INSIGHTS
OF LITIGATION

OTTOSEN BRITZ KELLY COOPER GILBERT & DiNOLFO, LTD.

Volume 7, No. 1 -- Fall 2019

Visitors can't sue plow vendor

by Michael Castaldo, III

When a patron slips on ice in a parking lot, they cannot typically turn to the plow vendor for recovery even when the lot owner is not held liable.

In *Jordan v. Kroger Co.*, 2018 IL App (1st) 180582, plaintiff Sharon Jordan was injured when she slipped and fell on "black ice" when approaching a grocery store owned by defendant Food 4 Less. Food 4 Less had a contract with Cherry Logistics which in turn had a contract with Pete's Lawn Care to provide snow and ice removal on the premises. Jordan was not aware of either contract at the time of her fall and admitted that she had never heard of either company prior to the incident.

Food 4 Less's contract with Cherry Logistics provided that Cherry would monitor weather conditions and "act reasonably" in determining when to apply de-icer to the store's property. In turn, Cherry's contract with Pete's Lawn Care provided part that "[s]alting will commence once ice builds up or slippery conditions exist on pavement" and "[Pete's Lawn Care] shall monitor the location for any patches of ice, any thaw and re-freeze, and shall apply ice melting agent in sufficient quantities to keep all Areas clear and safe."

According to weather reports submitted by Jordan, there was light precipitation on the day before the accident. The morning of the accident it began to rain, which turned to a light snow as temperatures dropped. It was undisputed that Pete's Lawn Care did not actually perform any snow or ice removal services for Food 4 Less in the days prior to the event.

Jordan brought suit against both Food 4 Less and Pere's Lawn Care. In her amended complaint, she alleged that defendants were negligent in monitoring weather conditions to determine whether snow and ice removal services were required, and they were also negligent in removing snow and ice from access ramps on the property.

Defendants both moved for summary judgment, arguing that: (i) since Pete's Lawn Care provided no ice removal services prior to Jordan's fall, it could not have created or aggravated unnatural accumulation of ice; (ii) as a matter of law, defendants had no duty to remove natural accumulations of ice from the property; and (iii) defendants did not have actual or constructive notice of the ice prior to Jordan's fall.

In her response, Jordan argued that "the contract between the Defendants created a duty to remove *ALL* ice in the parking lot consistent with the language of the contract."

Continued on page 3

Owner not liable for danger it didn't know about

by W. Anthony Andrews and Chloe Cummings

Contrary to popular belief, a premise owner is not liable for all injuries to guest that occur on its premises, particularly when the owner is unaware of the claimed defect.

In *Milevski v. Ingalls Memorial Hospital*, 2018 IL App (1st) 172898, Tome Milevski sued Ingalls Hospital for negligence after Milevski was injured while working at Ingalls. At the time of the incident, Milevski was a telecommunications analyst employed by Siemens and was working in the telecommunication room at Ingalls. As he stopped on a raised floor designed to cover cables, the floor collapsed causing Milevski injury as he stepped on it.

Milevski admitted that he did not notice any defect with the flooring during his work at Ingalls. However, Milevski argued further that it did not matter whether he or Ingalls had notice of the defective condition because Ingalls could have found this defect upon a reasonable inspection of its premises.

At the trial court level, the judge granted judgment for the building owner because there was no evidence that the

Continued on page 4

Ambulance driver not immune

by Karl R. Ottosen and Amanda McDonough

Despite statutory limits benefitting first responders, an ambulance driver en route to pick up a patient for non-emergency transport may be held liable for negligence.

In *Hernandez v. Lifeline Ambulance, LLC*, 2019 IL App (1st) 180696, Plaintiff was hit by a vacant ambulance that was on its way to pick up a patient for non-emergency transport. Plaintiff alleged he sustained injuries from the crash and filed a negligence suit.

Defendants asserted an immunity defense under the EMS Act. The EMS Act provides immunity to authorized individuals from negligence when rendering "non-emergency medical services." 210 ILCS 50/3.150(a) (West 2016). The defendants interpreted the immunity provision to apply to the driver because the crash occurred while en route to a non-emergency transport. The trial court accepted the defendants' immunity argument and dismissed the claims. Plaintiff appealed the ruling. The Appellate Court of Illinois reversed and found that the immunity provision was not applicable in this case.

In this case, the court had to determine the scope of the EMS Act immunity provision. Specifically, whether the immunity applies to an ambulance driver en route to pick up a patient for non-emergency transport.

The EMS Act immunizes authorized individuals from negligence when rendering "non-emergency medical services." 210 ILCS 50/3.150 (a). The statute defines "non-emergency medical services" as services provided to patients "during the transportation of such patient to health care facilities." 210 ILCS 50/3.10(g).

The court looked to the Illinois Supreme Court decision in *Wilkins v. Williams*, 2013 IL 114310, to evaluate the issue. In *Wilkins*, the ambulance was involved in a crash while transporting a patient. The immunity provision was applicable there because the accident occurred while the ambulance driver was actively rendering "non-emergency medical services" to a patient. Whereas in *Hernandez*, the ambulance was involved in a crash without a patient which does not fall within the definition of providing "non-emergency medical services."

The court explained that the EMS Act immunity provision is limited in scope. The Act provides immunity to authorized individuals while transporting patients to health care facilities. The immunity does not apply to an ambulance driver who is in transit to pick up a patient for non-emergency transport. Thus, this ambulance driver was held liable for injuries he caused just as any other motorist would have been. ■

Recent Verdicts of Interest

- **$0 to Pedestrian Hit by Ambulance**
19-year-old male running across Sheridan Road at 1:30 a.m. was struck by an ambulance which was returning to the fire house. Plaintiff sustained a traumatic brain injury, skull fractures and rib fractures. Plaintiff sought $5,000,000.00 at trial. Jury found for the defendant since plaintiff crossed dark street mid-block.

- **$15,000,000.00 to Released Inmates**
In 1996, three males were convicted of murder based on eyewitness identification the police Sergeant received. In 2015 the convictions were overturned, and they were released. The three released sued four police officers for hiding exculpatory evidence that had never been turned over and allegedly was only in the possession of these four officers, not disclosed to prosecutors.

* * *

Above are sample verdicts taken from the Cook County Verdict Reporter. Valuation of injuries and exposure to a defendant vary greatly based on the specific factors of a case. To assess the value or cost of a specific injury, contact one of our litigators.

Plow vendor

Continued from page 1

The trial court granted defendants' motion for summary judgment, finding that defendants had no actual or constructive notice of snow or ice; nor had they breached any contractual duty.

Jordan then appealed, arguing that the trial court erred in granting summary judgment to defendants because defendants voluntarily undertook a duty to remove natural accumulations of ice outside the Food 4 Less store.

On appeal, the reviewing court reiterated that a defendant who undertakes to remove natural accumulations of snow and ice is subject to the reasonable care standard. The court noted that in such a case, the defendant's tort liability to third parties is governed by Section 324A of the Restatement (Second) of Torts, which provides:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> a) His failure to exercise reasonable care increases the risk of such harm, or
> b) He has undertaken to perform a duty owed by the other to the third person, or
> c) The harm is suffered because of reliance of the other or the third person upon the undertaking." Restatement (Second) of Torts §324A (1965).).

The appellate court found that subsection (a) did not apply because Jordan did not claim that defendants increased the risk of harm from slip-and-fall accidents; nor did subsection (b) apply because there is no general duty to remove natural accumulations of snow. This left only subsection (c): reliance; but Jordan did not claim that she personally relied on the set of snow removal contracts. On the contrary, she admitted in her deposition that she had never heard of either Cherry Logistics or Pete's Lawn Care.

The court then wrestled with the question of whether a party who contracts to remove snow and ice, and then fails to do so, could be held liable under Section 324A(c) to third parties who are injured by natural accumulations of snow and ice.

When looking to other cases for guidance, the court noted that Illinois courts are split as to whether the natural accumulation rule should preclude recovery. However, despite a few distinct instances, Illinois courts typically reject the argument that the existence of a snow removal contract overrides the natural accumulation rule. In fact, the Illinois Supreme Court reaffirmed the importance of the natural accumulation rule in a recent case, *Krywin v. Chicago Transit Authority*, 238 Ill.2d 215, 233 (2010) (imposing an obligation to remove natural accumulations of snow and ice would be "unreasonable and impractical").

In light of this, the court was persuaded by the previous rulings which found that merely entering into a snow removal contract does not create in the contracting parties a duty to protect third parties from natural accumulations of snow and ice, at least where the third parties did not personally rely on the contract.

In this case, Jordan did not present evidence that the ice on which she fell was an unnatural accumulation which would be required to recover under her theory of negligence. Jordan also did not present any evidence that she relied upon snow removal contracts. As such, the court found the trial court properly granted summary judgement to defendants.

In conclusion, the court stressed that allowing injured visitors to sue third-party snow removal contractors would serve to discourage: (i) landowners from arranging for the removal of natural accumulations of snow and ice; and (ii) contractors from agreeing to provide such services. Neither are desirable. ■

Owner not liable

Continued from page 1

owner was aware of any danger. Plaintiff appealed.

To evaluate the issue of whether Ingalls had adequate notice of the defect, the appellate court first looked to the obligations of a business, such as Ingalls Memorial Hospital, to maintain its property. Property owners have a duty to exercise ordinary care in maintaining their property in a reasonably safe condition. A business owner breaches duty to an invitee who is injured by a condition if: (1) the defect was caused by the negligence of the proprietor; (2) its servant knew of its presence or; (3) the defecte was there for a sufficient length of time so that, in the exercise of ordinary care, its presence should have been discovered.

The third prong of this test, discovering the hazard in the exercise of ordinary business, is called constructive notice. In order to establish constructive notice, Milevski must establish that the defect was present for a sufficiently long time to constitute constructive notice. In *Milevski*, the raised flooring had been in place without issue for a period of 30 years. During this 30-year period, no one had reported a defect in the condition of the flooring, disclosed injuries, or notified Ingalls hospital that the floor could be hazardous. Plaintiff himself also testified to walking on the floor immediately before his injury without any incident.

Property owners only have a duty to exercise ordinary care in maintaining their property in a reasonable safe condition

Therefore, the floor was in working order immediately before the incident and it would have been impossible for Ingalls to have constructive notice. Therefore, the court found that Ingalls had no constructive notice because one cannot find constructive notice without evidence of how long the defect existed. Therefore, the appellate court affirmed the judgment in favor of the building owner.

Milevski clarifies that a building owner must have adequate knowledge of a defect in order to be found negligent. Where a building owner does did not know of the defect that caused a plaintiff's injury nor caused the defect itself, it is likely that the entity would not be found negligent. ■

Ottosen Britz Kelly Cooper Gilbert & DiNolfo, Ltd.'s newsletter, ***Legal Insights of Litigation,*** is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.

1804 North Naper Boulevard, Suite 350
Naperville, Illinois 60563
(630) 682-0085
www.ottosenbritz.com

W. Anthony Andrews, Editor wandrews@ottosenbritz.com

Copyright 2019 by
OTTOSEN BRITZ KELLY COOPER GILBERT & DINOLFO, LTD.

All rights reserved.
Pursuant to Rules 7.2-7.4 of the Illinois Rules of Professional Conduct, this publication may constitute advertising material.

Printed on recycled paper.