

NO. _____

**IN THE
SUPREME COURT OF TEXAS**

**SCOTT AND WHITE MEMORIAL HOSPITAL AND
SCOTT, SHERWOOD AND BRINDLEY FOUNDATION**
PETITIONER

VS.

GARY FAIR AND LINDA FAIR
RESPONDENTS

**ON PETITION FOR REVIEW
FROM THE THIRD COURT OF APPEALS**

PETITION FOR REVIEW

**STUART SMITH
STATE BAR NO. 18685885
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TABLE OF CONTENTS

	<u>PAGE</u>
IDENTITY OF PARTIES AND COUNSEL	i
TABLE OF CONTENTS	ii
INDEX OF AUTHORITIES	iii
STATEMENT OF THE CASE.....	v
STATEMENT OF JURISDICTION	vi
ISSUES PRESENTED	vi
STATEMENT OF FACTS	2
SUMMARY OF THE ARGUMENT	4
ARGUMENT	5
CONCLUSION AND PRAYER	14
CERTIFICATE OF SERVICE	15

INDEX OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Casey v. Amarillo Hospital Dist.</i> 947 S.W.2d 301 (Tex. App.— Amarillo 1997, pet. denied).....	12
<i>Cooper v. Valvoline Instant Oil Change</i> , 2007 Ohio App. LEXIS 5189 (2007).....	10
<i>Cunningham v. Thacker Serv., Inc.</i> , 2003 Ohio 6065 (Ohio App. 2003).....	10
<i>Fort Worth & D.C. Ry. Co. v. Hambright</i> , 130 S.W. 2d 436, 438 (Tex. Civ. App.— Amarillo 1939, writ dism'd judgm't cor.)	6
<i>Furr's Inc. v. Logan</i> , 893 S.W.2d 187 (Tex. App.—El Paso 1995, no writ)	6
<i>Gagne v. Sears, Roebuck and Co.</i> , 201 S.W.3d 856 (Tex. Civ. App.— Waco 2006, no pet.).....	6
<i>Goulart v. Canton Housing Authority</i> , 783 N.E.2d 864 (Mass. App. 2003).....	10, 11
<i>Hall v. Safeway Stores, Inc.</i> , 360 S.W.2d 536 (Tex. Civ. App.— Eastland 1962, writ ref'd n.r.e.).....	6
<i>Harkins v. System Parking, Inc.</i> , 542 N.E.2d 921 (Ill. App. 1989).....	10
<i>John County v. Endsley</i> , 926 S.W.2d 284 (Texas 1996)	8
<i>Kinkey v. Jewish Hospital Assn. of Cincinnati</i> , 242 N.E.2d 352 (Ohio App. 1968).....	10
<i>Leightner v. Cafaro Ross Partnership</i> , 2002 Ohio App. LEXIS 5256 (2002)	10
<i>M.O. Dental Lab v. Rape</i> , 139 S.W.3d 671 (Tex. 2004).....	7
<i>Musci v. Graoch Associates Limited Partnership #12</i> , 31 P.3d 684, 688 (Wash. 2001)....	6
<i>Perazzo v. Dayton Hasty-Tasty, Inc.</i> , 200 N.E.2d 706 (Ohio App. 1962)	9

Pope v. Holiday Inns, Inc., 464 F.2d 1303 (5th Cir. 1972) 6

Porter v. Miller, 468 N.E.2d 134 (Ohio App. 1983) 9

Railroad Commission of Texas v. Sample, 405 S.W.2d 338 (Tex. 1966) 12

Selby v. Conquistador Apartments, Ltd., 990 P.2d 491, 494 (Wyo. 1999) 7

Tzakis v. Dominick's Finer Foods, Inc., 826 N.E.2d 987, 993 (Ill. App. 2005)..... 10

Wal-Mart Stores, Inc. v. Surratt, 102 S.W.3d 437 (Tex Civ. App.—
Eastland 2003, pet. denied) 6

Weems v. Waldock Investment Co., 1999 Ohio App. LEXIS 5037 (1999)..... 9

Zielinski v. Szokola, 423 N.W.2d 289 (Mich. App. 1988) 12

STATUTES

TEX. GOV'T CODE § 22.001(a)(6) vi

STATEMENT OF THE CASE

- Nature of the Case and Parties:* Plaintiff Gary Fair slipped and fell on ice outside of Scott and White Hospital in Temple, Texas. Mr. Fair sued for negligence, and Mrs. Fair asserted a loss of consortium claim. The Fairs brought suit against Scott and White Memorial Hospital and Scott, Sherwood and Brindley Foundation, Scott and White Memorial Hospital, and Scott and White Properties, Inc.
- Trial Court:* The Honorable Rick Morris, 146th District Court, Bell County.
- Trial Court's Disposition:* The trial court granted Defendants' Motion for Summary Judgment which contended that they could not be held liable under the facts of the case.
- Court of Appeals:* Third Court of Appeals; Justices Patterson, Pemberton, and Waldrop. *Gary Fair and Linda Fair v. Scott and White Memorial Hospital and Scott, Sherwood and Brindley Foundation, Scott and White Memorial Hospital, and Scott and White Properties, Inc.*, ___ S.W.3d ___ (Tex. App.—Austin 2008, pet. filed) (Opinion attached, Appendix, Tab A.)
- Court of Appeals' Disposition:* Judgment affirmed as to Defendants Scott and White Memorial Hospital and Scott and White Properties, Inc.; Judgment reversed and remanded as to Scott and White Memorial Hospital and Scott, Sherwood and Brindley Foundation.

STATEMENT OF JURISDICTION

The Texas Supreme Court has jurisdiction of this appeal under Texas Government Code § 22.001(a)(6) which grants the Court jurisdiction when the court of appeals has committed an error of law that is of significant importance to the jurisprudence of the state and requires correction.

ISSUES PRESENTED

- 1. Whether, in this case of first impression, the Texas Supreme Court should adopt the “Massachusetts Rule” in cases involving slips and falls on ice?**
- 2. Whether, under the Massachusetts Rule, the landowner has to provide further evidence that the ice was in its “natural state” in order to obtain summary judgment even though the plaintiff has admitted the ice was in its natural state when the accident occurred.**

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PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner Scott and White Memorial Hospital and Scott, Sherwood and Brindley Foundation¹ (“Scott and White”) submits this Petition for Review requesting that the Supreme Court grant this Petition, reverse in part the court of appeals’ judgment, and affirm the trial court’s judgment. This case presents an issue of first impression regarding the standard for liability in an area of reoccurring litigation—slip-and-fall accidents on ice following ice storms.

¹ While the name of the Petitioner gives the appearance that it is two entities, it is actually a single entity.

STATEMENT OF FACTS

This lawsuit arises out of a slip-and-fall accident which occurred on February 25, 2003 at Scott and White Memorial Hospital in Temple, Texas. A severe ice storm hit the Central Texas area the evening before Gary Fair's fall, and the storm blanketed the area with ice. An arctic cold front arrived in the Temple, Texas area on Monday afternoon, February 24, 2003. (CR 109). The temperature fell below freezing (32° Fahrenheit) at 5:30 p.m. and rain began to freeze on contact with exposed surfaces. (CR 109). Ice pellets fell in the area, creating a glaze on sidewalks and roads. (CR 109). By midnight, a half inch of snow was on the ground, and the temperature had fallen to 25°. (CR 109). Winter precipitation continued until the early morning of Tuesday, February 25, 2003. (CR 110). An additional trace of snow was measured that day, while periods of ice pellets and ice fog occurred. (CR 110). Secondary roads were impassable across most of Bell County, Texas (including Temple) due to accumulations of 1.50 inches of ice. (CR 110). The temperature fell to 22° shortly after dawn on February 25, and warmed only to 26° by the afternoon. (CR 110).

Linda Fair had a doctor's appointment scheduled for February 25, 2003 at Scott and White Memorial Hospital in Temple. (CR 78). Gary Fair did not have a doctor's appointment that day, but he accompanied his wife to the hospital. (CR 79). Linda Fair made a telephone call to Scott and White before leaving their home in Hewitt, which is approximately thirty miles north of Temple, to see if the hospital was open and if the doctor was still keeping his appointments. (CR 106). She was told that he was and that she should be careful. (CR 107).

The Fairs knew that it was icy that day and that there was heavy ice. (CR 79). The roads were covered with ice and the temperatures were below freezing, with intermittent precipitation. (CR 109-110). The ice accumulation was a natural consequence of forces of nature. (CR 110). It took the Fairs almost an hour and a half to travel the thirty miles from their home to Scott and White. (CR 81). There was no question in Mr. Fair's mind that the ice posed a dangerous condition. (CR 82). He had to be careful walking from his house to his car because of the ice. (CR 82).

At Scott and White, the Fairs parked in the parking lot and walked across to the Special Treatment Center entrance at the southwest end of the hospital complex. (CR 85). A road separated the parking lot from the entrance. (CR 85-86). Several steps led up to a covered driveway or portico, beyond which was the actual entrance to that part of the hospital. (CR 85-86).

On the day in question, there was ice on the parking lot, on the road, and on the steps leading up to the entrance. (CR 87-88). In order to gain access to the hospital, the Fairs walked on the grass to the side of the steps instead of using the steps. (CR 89). The alternate path they took was not immediately adjacent to the steps, but was instead some distance from it. (CR 89). Gary Fair entered the hospital with his wife for her appointment, and afterward he exited the hospital to retrieve the car. (CR 91-93). He did not ask for assistance in returning to his car. (CR 93-94). He walked back down the grass, as he had when he entered the hospital. (CR 95). Mr. Fair took one or two steps on the road and slipped. (CR 95-96). He did not slip on the grass or on the steps, but rather he slipped on the road. (CR 95). Mr. Fair stepped over the curb, and both his feet were

on the road when he slipped. (CR 96). He testified that ice on the road, not the steps, grass, or curb, caused his fall. (CR 98-99). Having already come from the parking lot into the hospital, he knew that the road itself was slippery. (CR 100). Mr. Fair did not need anyone to warn him that the road was slippery, as he knew it was slippery. (CR 100). No one at Scott and White directed him to take this route back to his car. (CR 100). The ice that had accumulated on the road and parking lot in this area due to the ice storm remained in its natural state until after Mr. Fair fell. (CR 111).

SUMMARY OF THE ARGUMENT

There are at least six reported cases in Texas addressing slip and falls on ice; however, the Texas Supreme Court has yet to address the standard for liability in a slip-and-fall on ice case. Despite the frequency with which such cases occur, no liability standard in these cases has been established in Texas. Most states where snow and ice occur follow either the “Massachusetts Rule” or the “Connecticut Rule.” The Massachusetts Rule generally requires the pedestrian to look out for his own safety while walking on ice whereas the Connecticut Rule places the burden on the premises owner to clear ice and snow from the property. Scott and White submits that the Massachusetts Rule is the better reasoned of the two Rules and that the Court should adopt the Massachusetts Rule for Texas.

When the Massachusetts Rule is applied to the facts of this case, it is clear that the court of appeals erred in reversing the summary judgment in favor of Scott and White. Under the Massachusetts Rule, a premises owner is not liable when an invitee slips and falls on a natural accumulation of ice. In this case, Mr. Fair slipped and fell on a natural

accumulation of ice on the road. Plaintiffs argue that there can be potential liability because Scott and White used a melting agent on the steps some distance from where Mr. Fair fell. Apparently influenced by Plaintiffs' argument about the melting agent (more commonly known as salt) on the steps, the court of appeals held that Scott and White did not conclusively establish that the ice was in its natural state. The court of appeals' position is wrong for several reasons: (1) Mr. Fair did not fall on the steps where the melting agent was used so the use of salt on the steps is irrelevant, (2) he testified the ice on the road was in its natural state, and (3) even if Mr. Fair had slipped on refrozen ice, ice which melts and refreezes is considered to be in a natural state. Had the court of appeals applied the correct law to the facts of this case, the court of appeals should have affirmed the judgment of the trial court. If the holding of the court of appeals in this case is allowed to stand, then premises owners will be subject to liability for weather conditions beyond their control.

ARGUMENT

While ice storms and resulting slip and fall accidents occur in Texas on a fairly regular basis, no Texas Supreme Court case has yet addressed the standard of liability for premises owners in such cases. This case presents an opportunity for the Court to adopt an appropriate standard for liability so that premises owners will know the duty to which they are held. Clarification of the law in this area will also provide the lower courts with the guidance they need to resolve slip-and-fall cases. Further, the current lack of clear standards in this area of the law in Texas could lead premises owners to take actions to avoid liability which are not in the best public interest; therefore, a clarification of the law

in this area should result in the public policy behind the liability standards being implemented. For all of the foregoing reasons, Scott and White requests that the Supreme Court grant this Petition for Review and address the issues raised in the Petition.

As would be expected, the northern states have developed a significant body of case law which applies to slip-and-fall cases involving ice and snow. Most states follow either what is known as the “Massachusetts Rule” or a standard known as the “Connecticut Rule.” Depending on which rule is adopted, there are bodies of case law which specify how the rule is applied in various situations. While there have been some Texas court of appeals cases² which address slip-and-fall accidents on ice, the Texas Supreme Court has not yet decided which liability standard applies in Texas. Scott and White suggests that this Court should adopt the Massachusetts Rule and the additional rules of law which implement the Massachusetts Rule.

The Massachusetts Rule provides that there is no liability against the premises owner for natural accumulations of snow and ice. *Musci v. Graoch Associates Limited Partnership #12*, 31 P.3d 684, 688 (Wash. 2001). Under the Connecticut Rule, a premises owner has a general duty to remove or eliminate all dangerous conditions including snow and ice. *Id.*

² See *Gagne v. Sears, Roebuck and Co.*, 201 S.W.3d 856 (Tex. Civ. App.—Waco 2006, no pet.) (followed Massachusetts Rule); *Wal-Mart Stores, Inc. v. Surratt*, 102 S.W.3d 437 (Tex Civ. App.—Eastland 2003, pet. denied) (followed Massachusetts Rule); *Furr’s Inc. v. Logan*, 893 S.W.2d 187 (Tex. App.—El Paso 1995, no writ); *Hall v. Safeway Stores, Inc.*, 360 S.W.2d 536 (Tex. Civ. App.—Eastland 1962, writ ref’d n.r.e.); *Fort Worth & D.C. Ry. Co. v. Hambright*, 130 S.W. 2d 436, 438 (Tex. Civ. App.—Amarillo 1939, writ dismiss’d judgment cor.); see also *Pope v. Holiday Inns, Inc.* 464 F.2d 1303, 1304 (5th Cir. 1972) (applying Texas law).

The Massachusetts Rule is the more logical and practical rule for a number of reasons, and the Rule makes particular sense in Texas where ice storms are less frequent than in the north. The rationale for the Massachusetts Rule, which is also known as the “natural accumulation” rule, has repeatedly been described as follows:

The justification for the natural-accumulation rule comports with the factors to be considered in determining the existence of a duty. The magnitude of the burden on the defendant to prevent injuries from snow or ice is great. As noted above, natural winter conditions make it impossible to prevent all accidents. The plaintiff is in a much better position to prevent injuries from ice or snow because the plaintiff can take precautions at the very moment the conditions are encountered. Even if the plaintiff is unaware of the ice or snow he happens to slip on, he may be charged with knowledge that ice or snow is a common hazard in winter, one which he must consistently guard against No justification exists for imposing on a property owner a duty to protect invitees from hazards which are naturally occurring and identical to those encountered off of the premises.

Selby v. Conquistador Apartments, Ltd., 990 P.2d 491, 494 (Wyo. 1999).

While this Court has not addressed slips and falls on ice, it has addressed a similar situation and adopted a rule similar to the Massachusetts Rule for slip and falls due to an accumulation of mud. *See M.O. Dental Lab v. Rape*, 139 S.W.3d 671 (Tex. 2004). In *Rape*, the plaintiff slipped and fell on mud, which had accumulated as a result of rain, on a concrete slab outside of a business. The premises owner made no efforts to remove the mud. The Supreme Court held that the accumulation of mud did not pose an unreasonable risk of harm and reasoned as follows:

Holding a landowner accountable for naturally accumulating mud that remains in its natural state would be a heavy burden because rain is beyond the control of landowners. Most invitees in Texas will encounter natural conditions involving ordinary mud regularly, and accidents involving naturally accumulating mud and dirt are bound to happen, regardless of the precautions taken by landowners. Generally, invitees like

Rape are at least as aware as landowners of the existence of visible mud that has accumulated naturally outdoors and will often be in a better position to take immediate precautions against injury. Finally, following the rationale of *John County [v. Endsley]*, 926 S.W.2d 284 (Texas 1996)] to hold otherwise would make the landowner strictly liable for injuries resulting from ordinary mud or dirt in its natural state. The ordinary mud found on the concrete slab outside of the M.O. Dental Lab accumulated due to rain and remained in its natural state; thus, as a matter of law, it was not a condition that posed an unreasonable risk of harm to Rape necessary to sustain her premises liability action.

Id. at 676. The Court's reasoning in *Rape* is very similar to the reasoning underlying the Massachusetts Rule. For the same reasons that the Court found no liability in *Rape*, the Court should hold that there is no liability for slips and falls on natural accumulations of ice.

Should this Court adopt the Massachusetts Rule, then it becomes apparent that the judgment of the court of appeals in this case should be reversed. While the court of appeals purported to follow the Massachusetts Rule, the court did not delve into the additional rules which should be applied once the Massachusetts Rule is adopted. An application of these rules to this case should result in an affirmance of the summary judgment in favor of Scott and White.

In this case, the Court of Appeals held that: "On this record, appellees did not conclusively establish that the ice accumulation was in its natural state and was not an unreasonably dangerous condition." Slip opinion at 8. Scott and White submits that, once one reviews the case law from other states as to what amounts to a "natural state" and then applies the law to the evidence in this case, Scott and White did meet its burden of establishing that the ice was in its natural state.

Based on the usual meaning of the term, one might expect that the term "natural state" as it refers to ice would mean that the ice could not have suffered any disturbance such as shoveling, melting, salting, or sanding. While that is what one might expect, that is not how the term has been interpreted and applied by the states in which there is a developed body of law dealing with slips and falls on ice. And, it makes sense that the "Massachusetts Rule" also applies to ice which may not be in a totally "natural" state; otherwise, premises owners could be held liable when ice had been subject to some disturbance whereas other premises owners would not be subject to liability because the ice was undisturbed. Such a distinction in liability based simply on the condition of the ice would undercut the reason for the rule which is that liability for slips and falls on ice is limited because the pedestrian can appreciate the risk and take action to protect himself. Such a distinction would also lead to undesirable consequences including encouraging premises owners not to take any actions to clear accumulations of ice for fear of liability.

A natural accumulation of ice is one that accumulates as a result of an act of nature. *Perazzo v. Dayton Hasty-Tasty, Inc.*, 200 N.E.2d 706 (Ohio App. 1962). An unnatural accumulation of ice is one that has been created by causes and factors other than the inclement weather conditions of low temperature, strong winds, and drifting snow. *Porter v. Miller*, 468 N.E.2d 134 (Ohio App. 1983). For example, a water pipe which leaks and results in a layer of ice on the sidewalk would be an unnatural accumulation of ice. *See Weems v. Waldock Investment Co.*, 1999 Ohio App. LEXIS 5037 (1999) (water draining from downspout which had no place to go due to piled bank of

snow was unnatural accumulation). Likewise, a plowed mound of snow and ice could be an unnatural accumulation under certain circumstances. Significantly, however, snow which melts and later freezes into ice is considered a natural accumulation of ice caused by forces of nature. *Kinkey v. Jewish Hospital Assn. of Cincinnati*, 242 N.E.2d 352 (Ohio App. 1968). Furthermore, salting or shoveling of snow and ice does not turn a natural accumulation of snow and ice into an unnatural accumulation. *Cooper v. Valvoline Instant Oil Change*, 2007 Ohio App. LEXIS 5189 (2007); *Goulart v. Canton Housing Authority*, 783 N.E.2d 864 (Mass. App. 2003); *Cunningham v. Thacker Serv., Inc.*, 2003 Ohio 6065 (Ohio App. 2003); *Zielinski v. Szokola*, 423 N.W.2d 289 (Mich. App. 1988). "The 'mere sprinkling of salt, causing ice to melt, although it may later refreeze, does not aggravate a natural condition so as to form a basis for liability on the part of the property owner.'" *Tzakis v. Dominick's Finer Foods, Inc.*, 826 N.E.2d 987, 993 (Ill. App. 2005) (quoting *Harkins v. System Parking, Inc.*, 542 N.E.2d 921 (Ill. App. 1989)). In reaching these conclusions, the deciding courts remind us that the conditions on icy days were already hazardous. To hold landowners liable for attempting to clear snow and ice would only discourage them from attempting to clear snow and ice which may accumulate on the property. *Leightner v. Cafaro Ross Partnership*, 2002 Ohio App. LEXIS 5256 (2002).³

³ In Massachusetts, where much of the law regarding falls on ice has developed, an unnatural accumulation will generally only be found under three circumstances: (1) where the plaintiff sustained injuries from a fall on an unnatural accumulation of ice or snow that formed as a result of water flowing from a defective roof, (2) where the plaintiff sustained injuries from a fall on an unnatural accumulation of ice or snow that formed from an artificially created condition that confined melt water into a definite channel or accelerated its flow to a certain

The reason that these rules are important in the present case is because they make it clear that, whatever state the ice was in on the day that Plaintiff fell, the ice was in what the courts consider to be a natural state and therefore not unreasonably dangerous. The summary judgment evidence shows that the ice in the roadway where Plaintiff fell was in a completely natural state; in other words, it had not been shoveled, sanded, melted, or otherwise disturbed.⁴ Nevertheless, even if the ice was the result of ice melting following the application of salt and then refreezing as Plaintiffs speculated in the courts below (but are unable to prove), then there would still be no basis for liability as the ice would still be in its natural state. Thus, because Scott and White cannot be held liable under either scenario, there is no genuine issue of material fact, and the summary judgment in favor of Scott and White should be affirmed.

The argument made by Plaintiff regarding the melting of ice with salt and then allowing the ice to freeze has been repeatedly rejected by other courts. For example, in *Goulart v. Canton Housing Authority*, the Massachusetts Appeals Court held that the application of salt and the subsequent refreezing of the ice did not result in liability for the landowner. 783 N.W.2d at 867. "Salting does not create a hazard, instead it only alleviates, albeit temporarily, a hazard that already existed. For this reason, liability should not attach merely because the powerful forces of nature reassert themselves and a

locale, and (3) where the plaintiff sustained injuries from a fall on ice or snow that accumulated in a natural state and was then physically transformed into an unnatural and subsequently hazardous state.

⁴ The only eyewitness testimony regarding the condition of the ice is that of Mr. Fair who testified that it was the ice on the road that caused his fall and that the road had not been sanded. (CR 99-101).

salted surface refreezes." *Zielinski*, 423 N.W.2d at 293-94. Thus, even if Plaintiff could show that Meltz was applied to the roadway where Plaintiff fell, which he has not shown, there would still be no basis for liability.

The court of appeals indicated in its opinion that it thought that Scott and White had not proved that the ice accumulation was in its natural state and was not an unreasonably dangerous condition. Scott and White submits that, in light of the applicable case law, it has shown that the ice was in what is considered to be a natural state and therefore not unreasonably dangerous. The only evidence regarding the condition of the ice is Plaintiff's statement that the ice was not sanded. "[W]here a movant's evidence is uncontradicted, it will be taken as true." *Casey v. Amarillo Hospital Dist.* 947 S.W.2d 301, 304 (Tex. App.—Amarillo 1997, pet. denied) (citing *Railroad Commission of Texas v. Sample*, 405 S.W.2d 338 (Tex. 1966)). While Plaintiff offered evidence regarding the alleged condition of the ice on the *steps*, Plaintiff offered no evidence to contradict his own testimony that the ice in the *roadway* where he fell was unsanded. (CR 99-101). And there was absolutely no evidence introduced to try to show that the ice on the roadway was in anything but a natural state. Thus, the uncontroverted evidence is that the ice was in a natural state.⁵ Therefore, Scott and White met its summary judgment burden, and the summary judgment should be affirmed.

To the extent that the court of appeals believed that Scott and White must provide evidence from its own witnesses that the ice was in a natural state, that is simply not

⁵ And even if the area where Plaintiff had fallen had been sanded or melted and refrozen, the ice would still not have been in an unreasonably dangerous condition under the case law discussed above.

possible. Scott and White did not have a witness watching as Plaintiff fell. And, in most cases, the premises owner will not have evidence of the condition of the ice from the owner's witnesses. Rather, that evidence is likely to come from the plaintiff as it did in this case. To hold the premises owner to a higher standard of proof than the proof offered in this case would place a nearly impossible burden on landowners and lead to unnecessary trials, thereby undermining the reason for the Massachusetts Rule.

While this may appear to be a run-of-the-mill slip-and-fall case, the principles involved in the case are of significant importance to landowners. The states which have adopted the Massachusetts Rule have made a public policy decision that pedestrians are responsible for their own safety when they walk on ice (just as Plaintiff was when he walked on his own driveway) in most circumstances and that it would unfairly burden landowners to make them responsible for ensuring pedestrians' safety. In order to achieve the public policy considerations underlying the Massachusetts Rule, it is important that cases such as this be disposed of by way of motions for summary judgment. A review of the cases in other states which follow the Massachusetts Rule demonstrates that nearly all cases similar to this one result in summary judgment for the premises owner.

To adopt any rule other than the Massachusetts Rule would significantly burden premises owners including hospitals and clinics. To effectively serve the public, such institutions need to remain open during times of inclement weather. To hold them liable for the results of severe weather conditions which are outside their control, and which are identical to conditions encountered by the general public in a wide area, would be unjust

and poor public policy. Therefore, this Court should adopt the Massachusetts Rule and reverse the court of appeals' ruling in favor of Plaintiffs.

CONCLUSION AND PRAYER

Petitioner Scott and White Memorial Hospital and Scott, Sherwood and Brindley Foundation respectfully requests that the Court (1) grant this Petition for Review, (2) reverse the judgment of the court of appeals as it applied to Scott and White, (3) affirm the judgment of the trial court, and (4) grant such other and further relief to which Petitioner is entitled.

Respectfully submitted,

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FOUNDATION

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Petition for Review has been mailed by certified mail, return receipt requested, to the following counsel of record for Respondents on the 17th day of November, 2008:

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1. Opinion of the Court of Appeals Tab A
2. Summary Judgment Tab B