

NO. 08-0970

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

REPLY BRIEF OF PETITIONER

STUART SMITH
STATE BAR NO. 18685885
NAMAN, HOWELL, SMITH & LEE, L.L.P.
900 WASHINGTON, 7TH FLOOR
P. O. BOX 1470
WACO, TEXAS 76703-1470
(254) 755-4100
FAX (254) 754-6331

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	i
INDEX OF AUTHORITIES.....	ii
ARGUMENT.....	1
CONCLUSION AND PRAYER.....	7
CERTIFICATE OF SERVICE.....	8

INDEX OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Cooper v. Valvoline Instant Oil Change</i> , 2007 Ohio App. LEXIS 5189 (2007)	3, 6
<i>Cunningham v. Thacker Serv., Inc.</i> , 2003 Ohio 6065 (Ohio App. 2003)	6
<i>Goulart v. Canton Housing Authority</i> , 783 N.E. 864 (Mass. App. 2003)	6
<i>M.O. Dental Lab v. Rape</i> , 139 S.W.3d 671 (Tex. 2004).....	2
<i>Thornton v. First Nat’l Stores, Inc.</i> , 163 N.E.2d 264 (Mass. 1960)	4
<i>Tzakis v. Dominick’s Finer Foods, Inc.</i> , 826 N.E. 2d 987 (Ill. App. 2005).....	6
<i>Zielinski v. Szokola</i> , 423 N.W. 2d 289 (Mich. App. 1988).....	6

NO. 08-0970

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

REPLY BRIEF OF PETITIONER

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner Scott and White Memorial Hospital and Scott, Sherwood and Brindley Foundation (“Scott and White”) submits this Reply Brief of Petitioner requesting that the Supreme Court grant Scott and White’s Petition for Review, reverse the court of appeals’ judgment, and affirm the trial court’s judgment in favor of Scott and White.

ARGUMENT

From the Briefs of the parties, it is clear that there are two competing rules to which the Supreme Court can look when establishing the standard for liability in slip-

and-fall on ice cases—the Massachusetts Rule and the Connecticut Rule. While Plaintiffs would like for the Court to adopt the Massachusetts Rule, the existing law in Texas and sound public policy favor adoption of the Massachusetts Rule. And while Plaintiffs argue that there are fact issues to their case even under the Massachusetts Rule, an examination of the evidence reveals that no fact issues exist and that the summary judgment in favor of Scott and White should be affirmed.

Scott and White will not reargue all of the points made in its Opening Brief; rather, Scott and White will focus on clarifying a few issues about which there could be some confusion after reading Plaintiffs' Brief. The Reply Brief will address the following issues: (1) current Texas law favors the Massachusetts Rule, (2) the exceptions to the Massachusetts Rule are inapplicable to this case, and (3) Plaintiffs raised no fact issues to defeat summary judgment.

Texas Law Favors the Massachusetts Rule

Plaintiffs argue that current Texas law is in essence the Massachusetts Rule. This is incorrect. Texas law concerning slips and falls on a naturally accumulating substance outside a business has recently and quite clearly been explained by the Supreme Court in *M.O. Dental Lab v. Rape*, 139 S.W.3d 671 (Tex. 2004). The rationale of and holding in *Rape* are identical to the Massachusetts Rule. While *Rape* involved mud rather than ice or snow, there is no logical reason to hold that mud does not present an unreasonable risk of harm whereas snow and ice do.

It is plain that Texas already follows the Massachusetts Rule in premises liability cases, and Plaintiffs' argument to the contrary is unavailing. The only distinction that Plaintiffs are able to offer between mud and ice is that mud is more common. Of course, this distinction should favor adoption of the Massachusetts Rule rather than the Connecticut Rule. The fact that ice is rare makes it more of a burden on landowners to try to eliminate the hazards associated with ice. While ice may be rare in Texas, it is not so rare that pedestrians are unaware that they need to be vigilant when walking on or near ice. Plaintiffs' reasoning would alleviate pedestrians from taking precautions for their own safety and instead make landowners strictly liable for any accidents on their property.

**No Exception to the Massachusetts
Rule Applies to this Case**

Plaintiffs argue that two exceptions to the Massachusetts Rule may apply to this case. The two exceptions asserted by Plaintiffs are: (1) a landowner may be liable when it has actual or implied notice that a natural accumulation of ice or snow created a condition substantially more dangerous than an invitee should have anticipated by reason of knowledge of the conditions generally prevailing in the area and (2) the landowner may be liable when the landowner is actively negligent in permitting or creating an unnatural accumulation of ice or snow. *Cooper v. Valvoline Instant Oil Change*, 2007 Ohio App. LEXIS 5189 (2007). Neither of the exceptions applies to Plaintiffs' case.

The first exception argued by Plaintiffs is that Scott and White had notice that the accumulation created a substantially more dangerous condition than usual. This

exception usually applies when an accumulation is allowed to linger for a long period of time. *See, e.g., Thornton v. First Nat'l Stores, Inc.*, 163 N.E.2d 264 (Mass. 1960). There is no evidence in this case that the ice existed for a long period of time or that it was substantially more dangerous than a typical accumulation of ice. Instead, it is undisputed that the ice only started accumulating the night prior to the accident. The testimony that Plaintiffs cite about sanding of the facility in support of this assertion does not establish any element of the exception.

The second exception that Plaintiff asserts is that Scott and White was allegedly actively negligent in not scraping away melting ice after applying a salt compound called Meltz. In making this argument, Plaintiffs attempt to confuse the areas where Meltz was applied with the area where Mr. Fair actually slipped. Meltz was applied only the evening before the accident and in limited locations. Plaintiffs offered absolutely no evidence to prove that Meltz was applied to the area where Mr. Fair slipped; therefore, there is no basis for Plaintiffs' assertion that Scott and White was "actively negligent" regarding the area where Mr. Fair actually slipped. Accordingly, there is no basis for reversing the summary judgment on the basis of this purported exception.

**Plaintiffs Raised No Fact Issues
To Defeat Summary Judgment**

Plaintiffs argue that there is a fact issue regarding whether the ice on the roadway where Mr. Fair fell was in a natural condition. In making this argument, Plaintiffs set up a straw man and then proceed to knock him (actually a her in this case) down. Plaintiffs point out that they were able in a deposition to show that Scott and White witness Melissa

Frei did not actually have personal knowledge as to the condition of the ice where Mr. Fair fell as she had stated in an affidavit. Whether Ms. Frei had actual knowledge of the condition of the ice at the location of the fall is irrelevant. Scott and White does not have to prove the condition of the ice through its own employees; rather, Scott and White may prove the condition of the ice through Mr. Fair, and that is exactly what Scott and White did. Mr. Fair's testimony established that the ice on the road (or perhaps curb) where he slipped was in a natural state.

Q. What are you claiming in this case that Scott & White did wrong?

A. I just feel like they should have had things sanded. It should have been to where I didn't have to use those—the grassy slope. I should have been able to use the steps. I know the road was slick, and I was trying to be very careful. But I felt like they should have been sanded or should have been—Since they told us that they were open, I just felt like they should have had some sand there so I wouldn't have slipped.

Q. Where should they have had the sand?

A. Especially on the road and on the sidewalks and on the steps. The parking lots.

Q. Okay. Anything else?

A. No, sir.

(CR 100-01). Mr. Fair clearly states they should have had some sand where he slipped which obviously means that there was no sand there and that the ice was in a natural state when he slipped.

Even if Plaintiffs could show that sand had been applied to the area where Mr. Fair fell, that would not change the liability analysis. Efforts by a landlord to deal with

accumulated snow and ice do not create liability unless the snow is transformed into an unnatural and hazardous state. *See, e.g., Cooper v. Valvoline Instant Oil Change*, 2007 Ohio App. LEXIS 5189 (2007); *Tzakis v. Dominick's Finer Foods, Inc.*, 826 N.E. 2d 987, 993 (Ill. App. 2005); *Goulart v. Canton Housing Authority*, 783 N.E. 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). A landlord cannot be held liable for simply attempting to mitigate conditions which is the most that Scott and White did if it applied sand to the roadway. Holding a landlord liable for spreading sand would encourage landlords not to spread sand and thereby reduce the hazards associated with ice. Plaintiffs have offered no evidence to show that Scott and White aggravated the condition of the ice or that the ice was transferred into a hazardous state. Thus, there is no fact issue regarding the condition of the ice.

Plaintiffs' final line of attack on the trial court's judgment is to argue that there is a fact issue regarding whether Meltz was applied properly. Plaintiffs make much of the offhand statement of Ms. Frei that the Meltz made the ice "slipperier" than it was before; however, the statement is simply irrelevant.¹ Ms. Frei testified that Scott and White only used Meltz on a limited basis the evening before the accident and that Scott and White quit using Meltz that evening because it did not work. Thus, no Meltz had been used the morning of the accident or even during the night prior to the accident; therefore, any Meltz which was used did not have any causal relationship to the accident. Further,

¹ Even if the statement described in the area of ice in question, it is still a meaningless statement. Ice is slippery to begin with and ice does not become more slippery by melting into water and then refreezing into ice.

Plaintiffs have offered no proof that Meltz was used in the roadway where Mr. Fair fell. While Plaintiffs have seized on the statement that the Meltz supposedly made conditions “slipperier,” they have failed to show how any “slipperier” ice caused Mr. Fair’s fall. In light of Plaintiffs’ failure to offer such proof, there is no fact issue for a jury. Under Plaintiffs’ analysis, Scott and White could have used Meltz at only a single location far removed from the site of the accident, and yet a jury would be allowed to hold Scott and White liable for negligence. Such an analysis, of course, makes no sense and should be rejected. Such an argument simply demonstrates why summary judgment is called for in this case.

CONCLUSION AND PRAYER

Petitioner Scott and White respectfully requests that the Court (1) grant Scott and White’s Petition for Review, (2) reverse the judgment of the court of appeals which reversed the judgment in favor of Scott and White, (3) render judgment in favor of Scott and White, and (4) grant such other and further relief to which Scott and White is justly entitled.

Respectfully submitted,

NAMAN, HOWELL, SMITH & LEE, L.L.P.
900 Washington, 7th Floor
P. O. Box 1470
Waco, Texas 76703-1470
(254) 755-4100
FAX (254) 754-6331

BY:



Stuart Smith

State Bar No. 18685885

ATTORNEYS FOR PETITIONER SCOTT
AND WHITE MEMORIAL HOSPITAL AND
SCOTT, SHERWOOD AND BRINDLEY
FOUNDATION

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Reply Brief of Petitioner has been mailed by certified mail, return receipt requested, to the following counsel of record for Respondents on the 29th day of June, 2009:

Julia B. Jurgensen
BEARD KULTGEN BROPHY BOSTWICK
DICKSON & SQUIRES, LLP
Central Tower
5400 Bosque Blvd., Suite 301
Waco, Texas 76710



Stuart Smith