

TEXAS SUPREME COURT NO. 08-0970

IN THE
SUPREME COURT OF TEXAS

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

PETITIONER.

GARY FAIR AND LINDA FAIR

RESPONDENTS.

On Petition for Review from the Third Court of Appeals

RESPONDENTS' RESPONSE TO
BRIEF OF PETITIONER

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TABLE OF CONTENTS

INDEX OF AUTHORITIES ii, iii, iv

STATEMENT OF JURISDICTION.....v

ISSUES PRESENTED FOR REVIEW vi

STATEMENT OF FACTS 1, 2

SUMMARY OF THE ARGUMENT 2, 3, 4, 5, 6

ARGUMENT6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

PRAYER.....21

INDEX OF AUTHORITIES

CASES

<i>Agnew v. Dillons, Inc.</i> , 822 P.2d 1049 (Kan. 1991).....	8
<i>Augusta Country Club, Inc. v. Blake</i> , 634 S.E.2d 656, 812, 817 (Ga. App. 2006, cert. denied).....	8, 10
<i>Bauer v. City of Garden City</i> , 362 N.W.2d 280 (Mich. 1985).....	8
<i>Carnes v. Weesner</i> , 428 N.W.2d 493 (Neb. 1988).....	8
<i>CMH Homes, Inc. v. Danae</i> , 15 S.W.3d 97, 99, 101 (Tex. 2000).....	6, 14, 15
<i>Cooper v. Valvoline Instant Oil Change</i> , 2007 WL 3257245, *5 (Ohio App. 10 Dist. 2007).....	12, 13, 18
<i>Cunningham v. Thacker Serv., Inc.</i> , 2006 Ohio 6065 (Ohio App. 2003).....	13
<i>Dawson v. Payless for Drugs</i> , 433 P.2d 1019 (Or. 1967).....	8
<i>Dumas v. Tripps of North Carolina, Inc.</i> , 495 S.E.2d 129, 131 (Ga. App. 1999).....	10
<i>Estep v. B.F. Saul Real Estate Investment Trust</i> , 843 S.W.2d 911, 912, 914, 915 (Ky. App. 1992).....	20
<i>Fincher v. Fox</i> , 131 S.E.2d 651 (Ga. 1963).....	10
<i>Fuller v. Housing Auth.</i> , 279 A.2d 438 (R.I. 1971).....	9
<i>Gagne v. Sears Roebuck & Co., Inc.</i> , 01 S.W.3d 856 (Tex. App.—Waco 2006, no pet.).....	5, 8
<i>Geise v. Lee</i> , 529 P.2d 1054, 1056-1057 (Wash. 1975).....	9

<i>Get-N-Go, Inc. v. Markins</i> , 544 N.E.2d 484 (Ind. 1989)	8
<i>Get-N-Go v. Markins</i> , 550 N.E.2d 748 (Ind. 1990)	8
<i>Goulart v. Canton Housing Authority</i> , 783 N.E.2d 864, 868 (Mass. App. 2003)	12
<i>Haney v. Jerry’s GM, Ltd.</i> , No. 08-07-00183-CV, 2009 WL 383761, (Tex. App.— El Paso February 12, 2009, no pet. h.) (not yet released for publication).	5
<i>Kremer v. Carr’s Food Center</i> , 462 P.2d 747 (Alaska 1969).....	8
<i>Kuykendall et. al v. Newgent</i> , 504 S.W.2d 344 (Ark. 1974).....	8
<i>M.O. Dental Lab v. Rape</i> , 139 S.W.3d 672, 673, 676 (Tex. 2004).....	10, 11
<i>Musci v. Graoch Associates Limited Partnership #12</i> , 31 P.3d 684, 688 (Wash. 2001).....	7, 8, 9
<i>Newsome v. Cservak</i> , 130 A.D.2d 637 (N.Y.A.D. 1987).....	8
<i>Proctor v. Waxler</i> , 503 P.2d 644 (N.M. 1972)	8
<i>Tzakis v. Dominick’s Finer Foods, Inc.</i> , 826 N.E.2d 987 (Ill. App. 2005)	13
<i>Thornton v. First Nat’l. Stores. Inc.</i> , 163 N.E.2d 223, 224, 264 (Mass. 1960)	12, 13
<i>Wal-Mart Stores, Inc. v. Surratt</i> , 102 S.W.3d 437, 442 (Tex. App.—Eastland 2003, pet. denied)	5, 6
<i>Woods v. Prices Corner Shopping Center Merchants Ass’n.</i> , 541 A.2d 574, 576 (Del. 1988)	7, 8
<i>Zielinski v. Szokola</i> , 423 N.W.2d 289 (Mich. App. 1988)	13

STATUTES

Texas Government Code §22.001(a)(6)v

T.R.A.P. 566

T.R.C.P. 116a(c)(f)16

SECONDARY AUTHORITIES

Restatement (Second) of Torts, §343.....7

Prosser & Keaton on Torts §61 at 4277

I. STATEMENT OF JURISDICTION

This Court lacks jurisdiction under Texas Government Code §22.001(a)(6), the only ground relied upon by Petitioner, because Respondents will demonstrate that the Third Court of Appeals has not committed an error of law that is of such importance to the jurisprudence of this state that it requires correction by this Court.

II. ISSUES PRESENTED FOR REVIEW

(1) Whether this Court should change the standard of liability and adopt a special standard of liability, known as the Massachusetts Rule, for premises defect cases in Texas involving accumulations of ice rather than apply the well established standards of liability for premises defect cases in Texas.

(2) Whether the Third Court of Appeals' holding that Petitioner presented insufficient evidence to conclusively establish that the ice upon which Mr. Fair slipped and fell was in its natural state and therefore did not pose an unreasonable risk of harm constitutes an error of law of such importance to the jurisprudence of this State that it should be corrected by this Court.

III. STATEMENT OF FACTS

Respondents, Gary Fair and Linda Fair are husband and wife, who traveled together on the morning of February 25, 2003 to Scott & White Memorial Hospital (hereinafter “Scott & White”) to seek medical treatment for Mrs. Fair. C.R. 78. Mr. Fair was present to assist his wife both before and after her medical treatment. *Id.* The night before, a winter storm enveloped the Temple area, blanketing much of the roadways, sidewalks and parking lots with snow and ice. C.R. 81. Scott & White had adopted a written ice storm plan which required that Scott & White have sufficient sand on hand to deploy for safe access to the facility and apply the material Meltz to sidewalks and steps in certain locations including the entrance to the Special Treatment Center (“STC”) where the Fairs entered the hospital. C.R. 180-186. Scott & White’s grounds supervisor testified that certain areas of the hospital premises were sanded and/or a commercial deicer was applied. C.R. 202-203 (sanded entrances and pathways to parking lots); C.R. 204-205 (sanding entrances); and C.R. 206-207. However the security officer for Scott & White testified that no attempt was made to determine whether the steps at the hospital’s STC entrance were icy on the morning of the accident. C.R. 194-195. Further, the grounds supervisor’s testimony establishes that a commercial deicer was applied incorrectly resulting in a slipperier condition. C.R. 206-207 (applying Meltz to ice aggravated conditions and made surfaces more slippery).

Prior to leaving for the hospital on the morning of the accident, Ms. Fair called to see if the doctor was still taking patients. C.R. 79. A representative of Scott & White answered that they were in fact open and her appointment remained scheduled. *Id.* When Mr. and Mrs. Fair arrived at the hospital’s STC entrance for her appointment, the streets, crosswalks and stair steps leading to the entryway were covered in ice. C.R. 87-90. After Mrs. Fair’s appointment, Mr.

Fair exited the hospital through the same STC entrance as he and his wife had previously entered to retrieve their vehicle. C.R. 94-95. Mr. Fair noticed that the steps leading to the crosswalk were still icy and elected to proceed down a grassy slope *immediately adjacent* to the steps to avoid the ice on the stairs. *Id.* Once Mr. Fair proceeded down the grassy slope and took a step or two on the crosswalk, he slipped and fell. *Id.* As a consequence of his fall, Mr. Fair suffered injuries.

At the trial court, Petitioner moved for summary judgment on Respondents' claims and the court granted Petitioner's Motion for Summary Judgment. Respondent appealed the trial court's ruling to the Third Court of Appeals, which reversed and remanded the case against Petitioner to the trial court, holding that Petitioner failed to conclusively establish that the ice upon which Mr. Fair slipped and fell remained in its natural state and therefore did not constitute an unreasonably dangerous condition. Petitioner filed a Motion for Rehearing in the court of appeals, which was overruled. Petitioner then filed its Petition for Review with this Court.

IV. SUMMARY OF THE ARGUMENT

The court of appeals held that Petitioner failed to conclusively establish that the ice upon which Mr. Fair slipped and fell was in its natural condition at the time of the fall and was not an unreasonably dangerous condition. Based upon this language in the court of appeals' opinion, it appears that the court of appeals, without expressly stating so, followed the Massachusetts Rule as urged by Petitioner, but found that even under the Massachusetts Rule, Petitioner failed to meet its burden of proof to conclusively establish that the ice upon which Mr. Fair slipped and fell was in its natural state and, therefore, did not constitute an unreasonably dangerous conditions. The Massachusetts Rule is a departure from the current standard of liability in Texas for premises defects and grants landowners and occupiers an exemption from liability simply

because the premises defect is a natural accumulation of ice. However, a growing number of states have adopted a reasonableness test known as the Connecticut Rule or the Modern or Restatement Rule, which is akin to the current standard of liability in Texas for premises defects.

It is clear that courts across the United States have split on the duty of a landowner to a business invitee to remove natural accumulations of ice or snow from passageways that a landowner knows will be utilized by invited guests. Petitioner urges this Court to adopt the Massachusetts Rule, a black and white rule that absolves it from any duty to make its premises safe to those it invites to its premises.

The obvious result of the Massachusetts Rule is that landowners have no incentive to remove “natural” accumulations of ice and snow that create an unreasonable risk of harm to those invited to their premises. Nonetheless, either because some landowners do not know about the Massachusetts Rule or such landowners intuitively recognize their obligation to customers and patients to maintain a safe premises, many landowners will make efforts to clear, sand or de-ice natural accumulations of ice and snow. Because the Massachusetts Rule speaks to “natural” accumulations of ice and snow, those courts that have adopted the Massachusetts Rule have been faced with the dilemma of penalizing landowners for their clean up efforts. Such efforts disturb the “natural” accumulation, thereby making the Massachusetts Rule inapplicable. To avoid this result, some courts have stretched to construe the phrase “natural accumulations of snow and ice” to include accumulations that have been disturbed by the landowner’s clean up efforts. This “unnatural” interpretation is just one example of the reasons the Massachusetts Rule should not be adopted. Further, the harshness and inflexibility of the Massachusetts Rule has resulted in some states crafting exceptions to the Massachusetts Rule. For example, Ohio courts have adopted two exceptions to the Massachusetts Rule, a landowner may be liable (i) 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 and (ii) when the landowner is actively negligent in permitting or creating an unnatural accumulation of ice or snow.

Current Texas law on the liability of a landowner or occupier to a business invitee, which is in essence the Connecticut Rule, is that a landowner or occupier owes a duty to its invitees to exercise reasonable care to protect its invitees from a condition on the land that creates an unreasonable risk of harm of which the owner or occupier knew or by the exercise of reasonable care would discover. The rationale for this approach as stated by Professor Prosser is that, even though the invitee had knowledge of or had been warned by the landowner of the hazardous nature or condition, the landowner should reasonably anticipate unreasonable risk of harm to the invitee. This rule does not impose an absolute duty to make safe the business premises from the hazards of natural accumulations of ice and snow in the nature of strict liability. What is required is that the owner or occupier of the business premises must take reasonable steps to make the premises safe from conditions on the land that create an unreasonable risk of harm for its invitees. The landowner or occupier may relieve himself from liability even though an invitee may be injured on his premises, by taking such steps. Petitioner has presented no compelling reason why this Court should depart from the general rules concerning premises liability in Texas.

However, even if the Massachusetts Rule is followed, as urged by Petitioner, Petitioner fails to conclusively establish that the ice upon which Mr. Fair slipped and fell was in its natural state. Petitioner argues that Mr. Fair's testimony that he did not notice sand on the road or steps at the time of his fall conclusively establishes that the ice was in its natural state. Petitioner

failed to offer any other credible summary judgment evidence to support its summary judgment and this testimony was contradicted by the testimony of Petitioner's grounds keeper. As correctly noted by the court of appeals, Mr. Fair's testimony alone is insufficient to conclusively establish that the ice was in its natural state. Further, Respondents offered evidence of two recognized exceptions to the Massachusetts Rule, including evidence that a melting agent was improperly applied by Petitioner the night before and that this application aggravated an already dangerous condition. Clearly, a fact issue remains whether the ice was in its natural condition and, therefore, did not pose an unreasonable risk of harm. Therefore, the court of appeals did not commit an error of law in holding that Petitioner failed to conclusively establish that the ice was in its natural condition and, therefore, did not pose an unreasonable risk of harm.

Accordingly, this petition for review could be denied without further inquiry. Nonetheless, Respondents recognize that there currently exist several recent opinions originating from Texas appellate courts which have applied the Massachusetts Rule to premises defect cases involving ice¹. If the petition for review is denied and this case is remanded to the trial court, it will remain unclear as to which standard of liability should apply and could result in a repeat journey through the appellate courts. For these reasons and in the interest of judicial economy, Respondents acknowledge the benefits that could result from a pronouncement of the law by this Court. Should this Court grant Petitioner's Petition for Review on this basis, public policy supports the application of the general rules that already govern a landowner's duty to invitees in Texas rather than the adoption of a new and different standard for cases involving accumulations of ice.

¹ For example, *Wal-Mart Stores, Inc. v. Surratt*, 102 S.W.3d 437 (Tex. App.—Eastland 2003, pet. denied); *Gagne v. Sears Roebuck & Co., Inc.*, 201 S.W.3d 856 (Tex. App.—Waco 2006, no pet.); and *Haney v. Jerry's GM, Ltd.*, No. 08-07-00183-CV, 2009 WL 383761, (Tex. App.— El Paso February 12, 2009, no pet. h.) (not yet released for publication).

V. ARGUMENT

Whether to grant Petitioner's Petition for Review is a matter of judicial discretion.

T.R.A.P. 56.

A. **There is No Reason for this Court to Carve Out a Special Rule for Premises Liability Cases in Texas Involving Ice**

Petitioner argues there is no established standard for premises liability cases in Texas involving ice and snow. However, as discussed by the court of appeals, Texas has a standard for premises defects liability and that standard provides that an owner or occupier owes a duty to its invitees to exercise reasonable care to protect them from a condition on the land that creates an unreasonable risk of harm of which the owner or occupier knew or by the exercise of reasonable care would discover. *CMH Homes, Inc., et al. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000). Petitioner seeks to eliminate the duty owed by a landowner or occupier to its invitees by asking this Court to adopt the Massachusetts Rule and hold that a natural accumulation of ice and snow is not a condition that poses an unreasonable risk of harm to invitees. Petitioner relies upon several Texas appellate court cases which have applied the "natural accumulation" or "Massachusetts" rule to premises liability cases involving ice. The Massachusetts Rule is at odds with the general premises liability standard in Texas in that it relieves a premises owner of liability for an injury resulting from *any* accumulation of ice on its premises as long as the ice remains in its natural state. *Wal-Mart Stores, Inc.*, 102 S.W.3d at 442. The court of appeals seems to have followed, without expressly stating, the reasoning behind the Massachusetts Rule. As stated previously, the Massachusetts Rule is a departure from the current standard of liability in Texas for premises defects.

1. **Public Policy Supports Application of the Well-Established Standards of Liability for Premises Defect Cases in Texas**

The application of the well-established standards of liability for premises defect cases that have already developed in Texas is consistent with the numerous states that have adopted the Connecticut Rule. Under the Connecticut Rule, a landowner/occupier has a duty to exercise reasonable care to keep all common areas reasonably safe from hazards likely to cause injury, including the removal of ice and snow. *Musci v. Graoch Associates Limited Partnership #12*, 31 P.3d 684, 691 (Wash. 2001). The distinction between natural or unnatural accumulations of snow or ice is irrelevant under the Connecticut Rule, rather, the courts analyze premises defects involving an accumulation of ice under the same general standard of liability as any other type of premises defect. *See Wal-Mart Stores, Inc.*, 102 S.W.3d at 442. The Connecticut Rule is often referred to as the “Modern” or “Restatement” rule because the rule follows the Restatement (Second) of Torts, §343, and has been described as the “growing view”. *Wal-Mart Stores, Inc.*, 102 S.W.3d at 442; *Woods v. Prices Corner Shopping Center Merchants Ass’n*, 541 A.2d 574, 576 (Del. 1988) (quoting *Prosser & Keaton on Torts* §61 at 427). As discussed by Professor Prosser, the rationale for the Connecticut Rule “is that, even though the invitee had knowledge of or had been warned by the landowner or occupier of the hazardous nature of the condition, the landowner or occupier should reasonably anticipate an unreasonable risk of harm to the invitee. This is true ‘where the condition is one, such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, when, because the premises are held open to him for his use, it is to be expected that he will nevertheless proceed to encounter it’.” *Woods*, 541 A.2d at 576 (quoting *Prosser & Keaton on Torts* §61 at 427).

As with the Connecticut Rule, the well-established standards of liability for premises defects in Texas do not make an owner or occupier an insurer of the safety of its invitees. Rather, the application of the general premises defect rules require that the owner or occupier of

a business premises exercise reasonable care to protect its invitees, those persons whose presence serves the economic interests of the owner or occupier, from accumulations of ice and snow on the land that create an unreasonable risk of harm. This rule is advocated by Justice Vance of the Tenth Court of Appeals in his dissenting opinion to the court's opinion rendered in *Gagne v. Sears, Roebuck & Co., Inc.* and has been adopted by a significant number of states throughout the country. 01 S.W.3d 856 (Tex. App.—Waco 2006, no pet.); *Augusta Country Club, Inc. v. Blake*, 634 S.E.2d 812, 817 (Ga. App. 2006, cert. denied); *Woods*, 541 A.2d at 574. While certain northern states follow the natural accumulation rule, particularly those cited by Petitioner, there are a significant number of northern and southern states which have chosen to follow the Connecticut Rule.²

Washington is one such state which has adopted the Connecticut Rule. In *Musci v. Graoch Associates Limited Partnership #12*, the Supreme Court of Washington considered whether a landlord was liable for injuries sustained by a tenant when he slipped and fell on ice on the landlord's premises. 31 P.3d 648, 688 (Wash. 2001). The court held that an owner/operator has a general duty to remove or eliminate dangerous conditions, regardless of their source. *Id.* The Washington courts' adoption of the Connecticut Rule, was based, at least in part, upon the principle that there is no sound distinction between dangerous conditions brought about by the natural accumulations of ice, whose cause is no more natural than those causes which, more slowly, bring about the natural decay of wood or the rusting of iron, for which landowners are

² While Respondents do not attempt to summarize the law in every state, Respondents search revealed that the following states (excluding those already discussed herein) have also followed the Connecticut Rule: **Delaware** (*see Woods v. Prices Corner Shopping Center Merchants Ass'n*, 541 A.2d 574 (Del. 1988)); **Arkansas** (*see Kuykendall et. al v. Newgent*, 504 S.W.2d 344 (Ark. 1974)); **New Mexico** (*see Proctor v. Waxler*, 503 P.2d 644 (N.M. 1972)); **Alaska** (*see Kremer v. Carr's Food Center*, 462 P.2d 747 (Alaska 1969)); **Oregon** (*see Dawson v. Payless for Drugs*, 433 P.2d 1019 (Or. 1967)); **Nebraska** (*see Carnes v. Weesner*, 428 N.W.2d 493 (Neb. 1988)); **Indiana** (*see Get-N-Go, Inc. v. Markins*, 544 N.E.2d 484 (Ind. 1989) and on rehearing at *Get-N-Go v. Markins*, 550 N.E.2d 748 (Ind. 1990)); **Michigan** (*see Bauer v. City of Garden City*, 362 N.W.2d 280 (Mich. 1985)); **Kansas** (*see Agnew v. Dillons, Inc.*, 822 P.2d 1049 (Kan. 1991)); **New York** (*see Newsome v. Cservak*, 130 A.D.2d 637 (N.Y.A.D. 1987).

held liable. *Id.* In *Musci*, the court relied heavily upon its decision in *Geise v. Lee*, wherein the Court stated:

We believe that today a landlord, armed with an ample supply of salt, sand, scrapers, shovels and even perhaps a snow blower, can acquit himself quite admirably as he takes to the common passageways to do battle with the fallen snow, the sun-melted snow turned to ice, or the frozen rain. We fail to see the rationale for a rule which grants a seasonal exemption from liability to a landlord because he has failed to take adequate precautions against the hazards that can arise from the presence of unshoveled snow or unsanded or salt-free ice found in the areas of his responsibility but yet hold him liable on a year-round basis for other types of defects attributable to the workings of mother nature in the very same portions of his property . . . To draw such a distinction . . . ‘create[s] in the law another of those strange anomalies which, once created, live on to haunt successive legal generations.’ 529 P.2d 1054, 1056-1057 (Wash. 1975) (quoting *Fuller v. Housing Auth.*, 279 A.2d 438 (R.I. 1971)).

Petitioner cites the discussion from *Musci* quoted above as an indication that the current premises liability rules in Texas are unfair to Texas landowners and occupiers dealing with ice because they might have to acquire sand and shovels and use those in snowstorms to avoid liability. Petitioner complains that such a requirement will place a “heavy burden” on Texas landowners should any rule other than the Massachusetts Rule be adopted. Such an argument seems absurd in light of the fact that Petitioner had such tools and a written ice storm policy, albeit one Petitioner failed to properly follow, for dealing with ice. CR 180-186. Petitioner’s ice storm policy required that Petitioner have “sufficient sand on hand to deploy for safe access to the facility”. CR 182. If, as Petitioner claims, the acquisition of sand and shovels and their use is overwhelmingly burdensome on landowners, then the application of the Massachusetts Rule will remove all incentive for Texas landowners to take steps to remove ice and snow for those invited to their premises.

In fact, Georgia, a state with similar climate patterns as Texas, has rejected such an argument and adopted the Connecticut Rule. In *Augusta Country Club, Inc.*, the Court of Appeals of Georgia stated that Georgia had “expressly rejected the *minority* ‘Massachusetts Rule’ (owner has no duty to remove temporary accumulations caused by nature) in favor of the ‘Connecticut Rule’ (question is whether owner was negligent in failing to take remedial action to remove accumulation).” 634 S.E.2d at 817 (emphasis added). In an earlier Georgia case, *Dumas v. Tripps of North Carolina, Inc.*, the same court stated, “Moreover, the accumulation of naturally occurring ice does not negate an owner’s duty to exercise ordinary care in inspecting the premises in every circumstance. Ice forming due to inevitable natural forces unaffected by human agency ‘does not preclude examination into the question of whether or not the defendant was negligent in failing to take remedial action.’” 495 S.E.2d 129, 131 (Ga. App. 1999) (quoting *Fincher v. Fox*, 131 S.E.2d 651 (Ga. 1963)).

Petitioner argues that the Massachusetts Rule is merely an extension of the existing law in Texas regarding premises liability, citing this Court’s decision in *M.O. Dental Lab v. Rape*. 139 S.W.3d 672 (Tex. 2004). Petitioner contends that this Court’s rationale in *M.O. Dental Lab* supports application of the Massachusetts Rule. In *M.O. Dental Lab*, the plaintiff slipped on a muddy substance that had accumulated on the sidewalk adjacent to the defendant’s place of business. 139 S.W.3d at 672. The evidence indicated that the mud had naturally accumulated on the sidewalk from runoff. *Id.* at 673. Because Texans regularly encounter dirt and mud and are thus keenly aware of the hazards presented by accumulations of dirt and mud, this Court held that the ordinary mud which accumulated due to rain and remained in its natural state did not pose an unreasonable risk of harm as a matter of law. *Id.* However, this same logic does not hold true when applied to accumulations of ice in Texas. First, ice occurs in Central Texas one

to two days per year, if at all, therefore, residents of Central Texas do not encounter accumulations of ice except on these rare occasions, and are not accustomed to traversing the hazards associated with ice. Unlike in northern states such as Ohio where ice develops and accumulates for long periods of time on a seasonal basis, on the rare occasions that ice develops in Central Texas, most places of business and schools shut down in order to avoid placing residents in danger. Further, as pointed out in *M.O. Dental Lab*, in the case of an accumulation of mud, to hold landowners accountable for naturally occurring mud that remains in its natural state would be a heavy burden because rain is beyond the control of landowners and there is an abundance of dirt in Texas. *Id.* at 676. Following the same logic, the opposite is true when it comes to ice in Texas. While Texas residents are unaccustomed to traversing icy ground, the burden upon the landowner to make his premises safe is slight given the infrequency of icy weather in Texas.

It follows then that the Massachusetts Rule is not, as Petitioner argues, merely an extension of the existing law in Texas regarding premises liability. Rather, the Massachusetts Rule wholly destroys the law regarding premises liability as applied to ice and snow as it exists in Texas, eliminating any duty on Texas landowners and occupiers to remove ice that creates an unreasonable risk of harm to those persons invited to its premises, persons who do not ordinarily regularly encounter such conditions. Application of the well-established standards of premises liability in Texas provides an incentive for landowners and occupiers to remove or make reasonably safe accumulations of ice and snow on their land that create an unreasonable risk of harm to invitees.

2. The Massachusetts Rule is an Inflexible Rule of Law

The Massachusetts Rule has proven to be so inflexible that even in the states where the rule has been expressly adopted, such as Ohio, the courts have crafted unnatural exceptions to the rule to avoid the unfair consequences of such an inflexible rule of law.

In *Cooper v. Valvoline Instant Oil Change*, a case cited by Petitioner, the Ohio court of appeals enumerated two established exceptions to the natural accumulation rule: (1) when an owner or occupier had actual or implied notice that a natural accumulation of ice or snow created a condition substantially more dangerous than what should have been anticipated by the invitee and (2) when an owner or occupier is actively negligent in permitting or creating an unnatural accumulation of ice or snow. 2007 WL 3257245, *5 (Ohio App. 10 Dist. 2007).

Even in Massachusetts, the state from which the natural accumulation rule originated, the Massachusetts Supreme Court has found that in some instances, a landowner may be held liable when the evidence indicates that the ice had been present for so long that, in the exercise of due care, the defendant should have discovered and removed it. Petitioner cites *Goulart v. Canton Housing Authority*, a Massachusetts court of appeals case, for the proposition that the application of salt and the subsequent refreezing of the ice does not result in liability to the landowner. 783 N.E.2d 864 (Mass. App. 2003). However, the court in *Goulart* cited and distinguished *Thornton v. First Nat'l. Stores. Inc.*, a Massachusetts Supreme Court case, where the court found that a “jury could have reasonably inferred that ice-one and one-half to two and one-half inches thick, dirty and frozen solid to the step-had been present at the defendant store owner’s front entrance for so long that, in the exercise of due care, the defendant should have discovered and removed it.” 163 N.E.2d 264 (Mass. 1960). *Thornton* demonstrates that even in states which apply the

natural accumulation rule, the decisions are factually intense and results vary depending on the particular facts of each case.

3. The Connecticut Rule is the Better Reasoned Approach

Petitioner argues that the Massachusetts Rule is the more logical and practical rule for premises liability cases involving ice. As discussed above, the Massachusetts Rule is an inflexible rule of law requiring numerous exceptions to avoid its unfair consequences. Further, because the Massachusetts Rule speaks to “natural” accumulations of ice and snow, those courts that have adopted the Massachusetts Rule have been faced with the dilemma of penalizing landowners for their clean up efforts, which efforts disturb the “natural” accumulation, thereby making the Massachusetts Rule inapplicable. To avoid this result, some courts have stretched to construe the phrase “natural accumulations” of snow and ice to include accumulations that have been disturbed by the landowner’s efforts to plow or salt ice. *See Cooper*, 2007 WL 3257245; *Goulart*, 783 N.E.2d 864; *Cunningham v. Thacker Serv., Inc.*, 2006 Ohio 6065 (Ohio App. 2003); *Zielinski v. Szokola*, 423 N.W.2d 289 (Mich. App. 1988); *Tzakis v. Dominick’s Finer Foods, Inc.*, 826 N.E.2d 987 (Ill. App. 2005). Petitioner cites at length to these interpretations to support Petitioner’s argument. These unnatural interpretations of the term “natural” are an example of the reason the Massachusetts Rule should not be adopted. Petitioner does not ask that this Court simply adopt the Massachusetts Rule. Petitioner asks that this Court adopt the Massachusetts Rule and the ad hoc, unnatural interpretations that go along with such a rule. Respondents believe that the better reasoned approach is to apply the well-established standards of liability for premises defect cases that have already developed in Texas. Such an approach requires that Texas courts look into the facts of each case to determine whether the landowner or occupier exercised reasonable care to protect its invitees against accumulations of ice and snow,

whether natural or unnatural, that created an unreasonable risk of harm. The application of these standards is consistent with the numerous states that have adopted the Connecticut Rule.

For these reasons, should this Court grant Petitioner's Petition for Review, this Court should continue to apply the well-established standard of liability in Texas for premises defects.

The principles underlying the Connecticut Rule, as explained by courts interpreting the rule, comport not only with the modern notions of premises liability law in Texas but also fairly apportion the risk between landowners and invitees. As explained in the above-mentioned cases, there is no compelling reason to carve out an exception to the general rule in Texas for naturally accumulating ice, which would grant landowners an arbitrary exemption from liability based *solely* on the season within which the accident occurs.

B. The Court of Appeals Did Not Commit an Error of Law

Petitioner erroneously contends in its Brief that the court of appeals committed an error of law of such importance to the state's jurisprudence that it must be corrected. Examination of the record in this case and the opinion of the court of appeals reveals that the court of appeals did not commit an error of law, but rather, appropriately held that Petitioner failed to carry its burden and conclusively establish that the ice upon which Mr. Fair slipped and fell was in its natural state and therefore did not pose an unreasonable risk of harm.

As discussed above, under Texas law, landowners owe a duty to invitees to exercise reasonable care to protect them against dangerous conditions on the premises known or discoverable to it. *CMH Homes*, 15 S.W.3d at 101. In the present case, the court of appeals correctly noted that there is no dispute that Respondents enjoyed the status of invitees. In order for an invitee to establish liability against an owner or occupier of land for a condition existing on the premises, the invitee must prove: (1) the owner or occupier had actual or constructive

knowledge of the condition; (2) the condition posed an unreasonable risk of harm; (3) the owner or occupier of the premises failed to exercise reasonable care to reduce or eliminate the risk and (4) the owner or occupier's failure to exercise ordinary care proximately caused the invitee's injury. *Id.* at 99.

Petitioner's Motion for Summary Judgment focused on the second element, whether the accumulation of ice posed an unreasonable risk of harm. Petitioner argued that the ice was in its natural state when Mr. Fair slipped and fell and therefore, as a matter of law, did not pose an unreasonable risk of harm. Petitioner relies upon several Texas appellate court cases which have applied the "natural accumulation" or Massachusetts Rule to premises liability cases involving ice. As detailed above, the Massachusetts Rule differs from the general premises liability standard in Texas in that it relieves a premises owner of liability for an injury resulting from an accumulation of ice on its premises as long as the ice remains in its natural state. The court of appeals appears to have followed this rule.

1. Defendant Failed to Prove that the Ice Upon which Mr. Fair Slipped and Fell was the Result of a Natural Accumulation

As the court of appeals correctly noted, Petitioner failed to establish as a matter of law that the ice was in its natural state at the time of the accident. Petitioner offered no credible summary judgment evidence regarding the source or condition of the ice upon which Mr. Fair fell and therefore, has not established as a matter of law that the ice was a natural accumulation of ice. Petitioner now attempts to circumvent such failure by characterizing deposition testimony of Mr. Fair as admissions that the ice upon which he fell was not sanded and, therefore, in its natural state. As detailed below, Respondents offered the deposition testimony of Melissa Frei, Grounds Supervisor for Scott and White Hospital at the time of Mr. Fair's fall.

In support of its Motion for Summary Judgment, Petitioner offered the affidavit of Andy Andersen, a meteorologist and Melissa Frei. C.R. 109-112. Andy Andersen testified only as to the weather conditions in the general area and had no personal knowledge of the condition of the ice at Scott & White or more specifically, the ice upon which Mr. Fair fell. C.R. 109-110. Melissa Frei testified that she “personally observed” that “an ice storm hit the Temple, Texas area, and caused accumulations of ice in the area.” C.R. 111. She further testified that ice had accumulated on the parking lot, road and steps in front of the STC at Scott & White Hospital. *Id.* She then stated, “The accumulations of ice on the parking lot and road remained in their natural state until Gary Fair is reported to have fallen in this location.” C.R. 111. Ms. Frei did not state the basis of her personal knowledge of the condition of the ice at the exact location where Mr. Fair slipped and fell. As correctly noted by the court of appeals, Ms. Frei’s affidavit is in direct contradiction to her previous deposition testimony, excerpts of which were attached to Respondents’ Response to Petitioner’s Motion for Summary Judgment and is therefore not credible summary judgment evidence and cannot be considered as evidence in support of Petitioner’s Motion for Summary Judgment. *See* T.R.C.P. 116a(c)(f). In her deposition, Ms. Frei testified as follows:

Q. Do you keep records of -- Do you have any familiarity with the particular incident where Mr. Fair slipped and fell and was injured?

A. I have no idea.

Q. You weren't at the scene or called to the scene?

A. No, sir.

Q. You never met Mr. Fair?

A. No, sir.

Q. Did you go to the scene -- Or did you hear about the accident during the day?

A. No, sir.

C.R. 208-209.

Clearly, Ms. Frei had no personal knowledge of the condition of the ice upon which Mr. Fair slipped and fell considering the fact that she was never present at the scene of the accident and in fact, did not even hear about the accident the day it happened. Therefore, her affidavit is not evidence regarding the condition of the ice.

The only other evidence offered by Petitioner regarding the condition of the ice was Mr. Fair's testimony that the ice had not been sanded. C.R. 95. As held by the court of appeals, this testimony by itself is plainly insufficient to conclusively establish as a matter of law that the ice remained in its natural state. Petitioner attempts to circumvent this holding by claiming that no further proof is needed because Mr. Fair's statements were uncontradicted in the trial court. This argument ignores the evidence of Petitioner's own witness, Ms. Frei, who testified that Scott and White applied a deicer called Meltz and also sanded entrances and pathways out to parking lots. C.R. 203, 206-207. Mr. Fair fell in a crosswalk leading out to the parking lot as evidenced by the testimony of Thomas Suhling, Petitioner's own security supervisor who was present with Mr. Fair after he slipped at the STC entrance. C.R. 193. Accordingly, Mr. Fair's testimony regarding sanding has not remained uncontradicted as Petitioner would like this Court to believe. Ms. Frei's testimony, *at the very least*, raises a clear fact issue related to the sanding of the crosswalk where Mr. Fair fell.

Nothing cited or argued in Petitioner's Brief, including Petitioner's failed attempt to argue that Mr. Fair has admitted that the ice was in its natural state, changes the insufficiency of Petitioner's proof at trial. Further, the court of appeals did not require that Petitioner be held to a higher burden of proof as Petitioner argues. Rather, the court of appeals held that on the record

before it, a record that included the deposition testimony of Ms. Frei regarding the sanding of entrances and pathways and application of Meltz, Petitioner did not conclusively establish that the ice accumulation was in its natural state and was not an unreasonably dangerous condition. Even if the facts and evidence are analyzed under the foreign authorities cited by Petitioner, Petitioner has still failed to carry its burden and proffer any proof that the ice in the specific location where Mr. Fair fell was a natural accumulation of ice.

2. Respondents Offered Evidence In Support of At Least One of Two Established Exceptions to Natural Accumulation Rule

In the states following the Massachusetts Rule, at least two exceptions have emerged. In *Cooper*, a case cited by Petitioner, the Ohio court of appeals stated, “Ohio courts have recognized two exceptions to the general rule that an owner or occupier of premises owes no duty to business invitees regarding accumulations of ice and snow . . .”. 2007 WL 3257245, *5. First, a landowner may 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.” *Id.* Second, the natural accumulation rule does not apply when a landowner is actively negligent in permitting or creating an unnatural accumulation of ice or snow.” *Id.*

In the present case, Respondents raised a fact issue as to both of these established exceptions. First, Petitioner’s witness, Melissa Frei, testified that Petitioner sanded the entrances and *pathways* to the parking lots, including the crosswalk from the entrance to the parking lot where Mr. Fair parked his car:

- Q. So there was no general sanding of the facility?
- A. Not of the facility. We did entrances and pathways out to parking lots.

Q. How much area do you think you're trying to cover on the facility, on the grounds?

A. Well, on the main campus we had six entrances that we sanded, with pathways out to parking lots. Then we've got outlying buildings where we've got a pathway out of the building towards parking lots.

C.R. 203.

Furthermore, evidence was introduced that Petitioner failed to follow the instructions on the deicer that was utilized to melt the ice. Ms. Frei testified that the ice “refroze” after applying the ice-melting compound. C.R. 206-207. However, as the instructions to the deicer indicate, as soon as the ice begins to melt, the user is to scrape the ice away as “refreezing” could occur. C.R. 188-189. Because Petitioner failed to follow the instructions on the deicer by scraping the melted ice away after application, the water refroze just as the Petitioner had been warned and, if they had read the instructions, should have expected. *Id.* Ms. Frei testified that the application of a deicer called Meltz made the sidewalks and other surfaces to which it was applied become more slippery than they were before its application:

Q. Now, do you know of a material called Meltz?

A. Yes, sir.

Q. What is that?

A. It's basically a salt compound that's put out to melt ice.

Q. Did you have any Meltz?

A. We had that on hand. We tried it. Because the conditions were so cold, it did not work. It promptly refroze as quick as you put it out, **and made it slipperier than it was before.**

C.R. 206-207 (emphasis added).

Petitioner's negligent application of Meltz exacerbated an already unreasonably dangerous condition, thereby creating an unnatural accumulation. Even if this Court were to find that the refrozen ice following the application of Meltz remained a natural accumulation, Petitioner breached its duty owed to Mr. Fair because it had actual notice that such accumulation created a condition substantially more dangerous than Mr. Fair would have anticipated by reason of his knowledge of the conditions generally prevailing in the area. As Ms. Frei testified, Petitioner's negligent application of Meltz made the ice "slipperier than it was before." *Id.*

In *Estep v. B.F. Saul Real Estate Investment Trust*, a Kentucky case, the plaintiff slipped and fell on an accumulation of ice found on a sidewalk leading to a mall. 843 S.W.2d 911, 912 (Ky. App. 1992). The trial court applied the natural accumulation rule and granted summary judgment in favor of the defendants. *Id.* There was evidence at trial that the landowners undertook a duty to clear, and perhaps salt, the parking lot and sidewalk. *Id.* at 914. On appeal, the court reversed the summary judgment based upon the "well-known rule of law that a duty voluntarily assumed cannot be carelessly undertaken without incurring liability therefore." *Id.* at 914-15. The court held that the question of whether the defendants acted reasonably in attempting to clear the ice was a "classic jury question," which precluded summary judgment. *Id.* Similarly, in the present case, evidence exists that Petitioner attempted to apply a deicer and/or sand the area and acted negligently in doing so.

Petitioner failed to offer sufficient summary judgment evidence regarding the condition of the ice at the time of the fall. Respondents, *at the very least*, raised a clear fact issue related to (i) the sanding and negligent application of Meltz to the crosswalk where Mr. Fair slipped and fell, (ii) whether Petitioner had actual notice that an arguably natural accumulation of ice on its property 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 (iii) by whether Petitioner was actively negligent in aggravating a dangerous condition, thereby creating an unnatural accumulation.

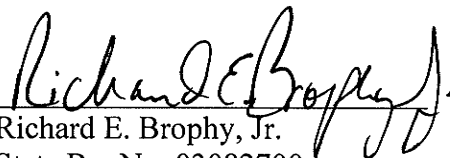
For the foregoing reasons, this Court must deny Petitioner's Petition for Review based upon the fact that the court of appeals did not commit an error law.

VI. PRAYER

WHEREFORE PREMISES CONSIDERED, Respondents respectfully request that this Court (1) deny Petition for Review on the basis that the court of appeals did not commit an error of law of such importance to the jurisprudence of this state that it requires correction by this Court; (2) or, alternatively, in the interest of judicial economy, grant Petition for Review and apply the well established standards for premises liability law in Texas to premises defect cases involving accumulations of ice rather than adopting the Massachusetts Rule; (3) affirm the judgment of the court of appeals; and (4) grant such other and further relief to which Respondents are entitled.

Respectfully submitted,

**BEARD KULTGEN BROPHY BOSTWICK
DICKSON & SQUIRES, LLP**

A handwritten signature in black ink that reads "Richard E. Brophy, Jr." The signature is written in a cursive style with a horizontal line underneath the name.

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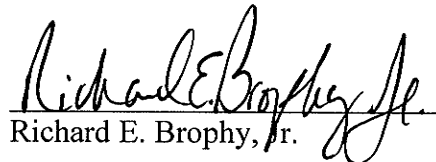
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

This certifies that the undersigned served this RESPONDENTS' RESPONSE TO BRIEF OF PETITIONER by sending it to the following individuals by facsimile, first class mail, hand delivery and/or certified mail, return receipt requested on this 11th day of June, 2009.

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