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Feature Article

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We Volunteered to What? Liability for Snow and Ice After *Mickens v. CPS Chicago Parking, LLC*

In 2017, the *IDC Quarterly* published a feature article titled *The Times They are a' Changin': Snow and Ice Cases Following Murphy-Hylton and the Snow Removal Service Liability Limitation Act. See IDC Quarterly*, Vol. 27, No. 1, at 21-25 (2017). That article addressed Illinois' application of natural accumulation rule in snow and ice removal cases.

In June 2019, the Illinois Appellate Court First District issued a published opinion, *Mickens v. CPS Chicago Parking, LLC*, 2019 IL App (1st) 180156, and a Rule 23 Order, *Gray v. Lewis Properties*, 2019 IL App (1st) 180590-U, that also addressed the application of the natural accumulation rule. These separate decisions, issued by the same panel, signify an express change to the well-established rules regarding whether a non-landowner or snow removal contractor has liability for personal injuries due to the natural accumulation of snow or ice. This article will discuss these decisions and the potential that they may upend established precedent, which could undermine established Illinois public policy and prior common law.

The Natural Accumulation Rule Before *Mickens* and *Gray*

In Illinois, the general rule is that property owners do not have a duty to remove natural accumulations of ice and snow from their property. *Krywin v. Chicago Transit Auth.*, 238 Ill. 2d 215, 227 (2010). Applying this general rule, Illinois courts have held that property owners generally have no liability for a plaintiff's injuries which stem from natural accumulations of snow and ice on the landowner's property, *i.e.*, "the natural accumulation rule." *Krywin*, 238 Ill. 2d at 226. Therefore, for a plaintiff to hold a landowner liable for injuries sustained as a result from fall on snow and/or ice, a plaintiff must establish that something other than a natural accumulation of snow and/or ice caused her fall and injuries. *Id*. at 232. The policy reason for this natural accumulation rule stems from the fact that it would be unreasonable to require a property owner to expend funds and perform the labor necessary to keep walks reasonably free from ice and snow during the winter months. *Id.* at 230 (citing *Graham v. City of Chicago*, 346 Ill. 638, 643 (1931)).

In the absence of a contractual obligation, a non-landowner generally does not have a duty to remove a natural accumulation of snow and ice. *McBride v. Taxman Corp.*, 327 Ill. App. 3d 992, 996 (1st Dist. 2002). If a non-landowner does have a contractual obligation, the scope of that obligation is determined by the contract. *Flight v. Am. Cmty. Mgmt.*, 384 Ill. App. 3d 540, 544 (1st Dist. 2008).

Prior to the recent decision in *Mickens v. CPS Chicago Parking, LLC*, 2019 IL App (1st) 180156, the First District generally held that the natural accumulation rule extends to snow removal companies to bar liability for injuries due to the natural accumulation of snow and ice. *Jordan v. Kroger Co.*, 2018 IL App (1st) 180582, ¶ 35; *Flight*, 384 Ill. App. 3d at 544; *Williams v. Sebert Landscape Co.*, 407 Ill. App. 3d 753, 757 (1st Dist. 2011); *McBride*, 327 Ill. App. 3d at 997-998.

In *Jordan*, the court considered whether the existence of a contract between a property owner and a snow removal contractor to plow and salt natural accumulations of snow and ice created a duty to third parties. *Jordan*, 2018 IL App (1st) 180582, ¶ 2. In that case, the plaintiff asserted that the contract between the property owner and a snow removal contractor demonstrated that the defendants voluntarily assumed a contractual duty to remove natural accumulations of ice, and that a snow removal contractor could be held liable in tort to third parties for negligently failing to fulfill that duty. *Id.* ¶ 19. The court noted that any tort liability is governed by section 324A of the Restatement (Second) of Torts. *Id.* ¶ 20. Section 324A 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 or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if:
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> * * *
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> (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 plaintiff did not claim that she personally relied on the contracts at issue, but asserted that as a matter of law, the contract imposed a duty on the snow removal contractor. *Jordan*, 2018 IL App (1st) 180582, ¶ 22. In analyzing the *Jordan* plaintiff's argument, the court noted that in *Eichler v. Plitt Theatres, Inc.*, 167 Ill. App. 3d 685, 691-92 (2d Dist. 1988), it held that a plaintiff could use section 324A(c) to hold a snow removal contractor liable for injuries sustained by natural accumulations. *Jordan*, 2018 IL App (1st) 180582, ¶ 23. Nevertheless, the court further noted that several other cases invoked the natural accumulation rule to preclude recovery in such situations. *Id.* (citing *McBride*, 327 Ill. App. 3d 992; *Wells v. Great Atlantic & Pacific Tea Co.*, 171 Ill. App. 3d 1012 (1st Dist. 1988)).

Thereafter, the *Jordan* court held 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." *Jordan*, 2018 IL App (1st) 180583, ¶ 35. Correspondingly, the court stated that as the *Jordan* plaintiff was not advised by any of the defendants that they would engage in snow and ice removal for her benefit, the plaintiff could not establish the necessary element of reliance under section 324A(c), which meant that the trial court properly dismissed the plaintiff's claims. *Id.* ¶ 37.

The *Jordan* court further noted that strong policy considerations underlined its result. *Id.* ¶ 38. In particular, the court noted that such liability pursuant to contracts would discourage landowners from arranging for the removal of natural accumulations of snow and ice and discourage snow removal contractors from agreeing to provide such services. *Id.*

The *Mickens* Decision

Roughly seven months after *Jordan*, the court again considered whether a circuit court erred in granting summary judgment in a slip and fall dispute involving an accumulation of ice, whether naturally or unnaturally, in *Mickens v. CPS Chicago Parking, LLC*, 2019 IL App (1st) 180156, ¶¶ 1-2. In rendering the decision in *Mickens*, the appellate court first

held that the circuit court improperly granted summary judgment against the property owner, as there was a question of fact as to whether the ice that had formed was natural or unnatural. *Id.* ¶ 52.

Next, however, the court considered whether the circuit court properly granted summary judgment in favor of the entities that had contractually promised to remove snow from the property, *i.e.*, the property manager and its snow removal contractor. *Id.* ¶ 54. On the contractual issue, the court stated that a party may be liable in tort for a duty that does not arise from common law if the duty was voluntarily assumed, like a "voluntary undertaking." *Id.* ¶ 58. The court further stated that the "duty of care imposed on a defendant in that instance is limited to the scope of its undertaking." *Id.* (citing *Pippin v. Chicago Housing Auth.*, 78 Ill. 2d 204, 210 (1979)). Consequently, if the duty stems from a promise made in a contract, then the duty is limited to the scope of the contractual language. *Mickens*, 2019 IL App (1st) 180156, ¶ 58.

The *Mickens* court noted that the Illinois Supreme Court had previously adopted section 324A of the Restatement (Second) of Torts. *Id.* ¶¶ 60-61. Correspondingly, the *Mickens* court stated that, pursuant to the specific facts of that case and section 324A, the property management company and the snow removal contractor could only be held liable if (1) they made a contractual promise to perform snow-removal services at the property; (2) for the protection of the property's customers; (3) a customer is injured as a result of (4) their failure to perform that service with reasonable care; and (5) either that customer or the landowner specifically relied on their promise to remove the snow or ice. *Id.* ¶ 62.

Thereafter, the *Mickens* court held that circuit court improperly granted summary judgment for the property management company and the snow removal contract. *Id.* ¶ 72. In making that finding, the court noted that the landowner contracted with the property management company who in turn contracted with the snow removal contractor to remove snow and ice from the property and that the snow removal contracts would be reasonably understood as being for the protection of third parties, like the plaintiff. *Id.* ¶ 66. The court also held that whether the property management company and snow removal company exercised reasonable care is typically a question of fact, as is reliance. *Id.* ¶¶ 69-71.

After holding that summary judgment was improperly granted to every defendant, the court did not simply remand the matter back to the circuit court to allow for the resolution of the factual questions. Instead, the court noted that the plaintiff argued that the property management company and the snow removal contractor should be liable even for a natural accumulation of snow or ice, claiming that those entities contractually promised to remove snow and ice. *Id.* ¶ 74. In particular, the court stated that it should answer that question, "because a factfinder could ultimately conclude at trial that the ice on which Mickens fell was a natural accumulation, and we should give guidance to the trial court in that event." *Id.*

The court's decision to provide such "guidance" seems contrary to the long-held principle that "Illinois courts 'do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided.'" *Wright Dev. Group, LLC v. Walsh*, 238 Ill. 2d 620, 632 (2010) (citing *In re Alfred H.H.*, 223 Ill. 2d 345, 351 (2009)). Specifically, Illinois law states that a reviewing court should not review cases "merely to establish a precedent or guide future litigation." *In re Marriage of Donald B.*, 2014 IL 115463, ¶ 23 (citing *Madison Park Bank v. Zagel*, 91 Ill. 2d 231, 235 (1982)).

Arguably the resolution of whether the property management company and snow removal contractor could be held liable for a natural accumulation of snow or ice pursuant to a contract was premature, as the court had already held that summary judgment was improper. The court thus, *in dicta*, issued an advisory opinion as to that potential issue, which

could only arise *if* the trier of fact determined that the accumulation was natural. Resolution of that issue could only be to guide future litigation, which our supreme court has stated is inappropriate. Accordingly, counsel facing citation to the *Mickens* decision should point out that this aspect of the court's opinion is improper *dictum* and an advisory opinion.

The Alleged Voluntary Undertaking to Remove Snow and Ice

The *Mickens* court, however, did consider and opine as to the issue, holding that the common-law natural accumulation rule is inapplicable to a situation in which an entity has a contractual obligation to remove snow and ice. *Mickens*, 2019 IL App (1st) 180156, ¶ 127.

The court first noted that the Illinois Supreme Court adopted section 324A and that the restatement says nothing about the natural accumulation rule. *Id.* ¶ 76. The court then stated it would have to "import into this restatement an exception for contractual promises regarding snow and ice removal." *Id.* ¶ 78.

The court's analysis seems to ignore precedent that the natural accumulation rule does, in fact, extend to third party entities to bar liability for physical injuries caused by the natural accumulation of snow and ice. *See Jordan*, 2018 IL App (1st) 180582, ¶ 35. The court treated section 324A akin to a new statute, rendering all precedent subservient to the restatement, even after recognizing that section 324A "is a general restatement of the law, applicable to any number of situations *not* involving snow." *Mickens*, 2019 IL App (1st) 180156, ¶ 77 (emphasis in original).

Prior precedent which considered section 324A should not be disregarded. Rather, a court should consider the restatement, while also considering any other applicable judicial doctrines. Such a framework is not inconsistent with the adoption of a restatement, but rather works in tandem to apply the restatement to established precedent, especially where, as here, there are unique issues which a general restatement would not consider on its face, such as Illinois weather conditions and liability associated with the natural accumulation of snow and ice.

The court then noted that the natural accumulation rule is "a sensible, well-grounded rule, but it is undeniably a special rule for snow and ice, contrary to the normal duty of any landowner to use reasonable care in tending to its premises." *Id.* ¶ 80. The court noted that the reason behind the rule is because it would be unreasonable to require landowners to remove natural accumulation of snow and ice, because:

> [I]n Illinois, snow can fall unpredictably and heavily, and temperatures can fluctuate quickly and widely. Snow could fall during the day, while a landowner is at work, unable to remove it and perhaps even unaware of its existence. It could fall on property owned by someone who is elderly or infirm and thus physically unable to remove it. A landowner might not have the financial resources to pay someone else to shovel it. It could fall in such tremendous blankets, in so short a time, that even the most diligent landowner might not have the time, resources, or ability to fully and promptly remove what could be multiple inches or even feet of snow. And the next day, the temperatures could rise 15 degrees, and suddenly all this snow is melting, only to refreeze into sheets of ice when the temperatures drop later that night.

Id. ¶ 81.

The court then attempted to distinguish snow removal contractors and the application of the natural accumulation rule to them. *Id.* ¶ 83. The court noted that the accumulation of snow or ice is not a burden or a distraction to them, and

it is what they are paid to do and trained to do. *Id.* The court stated that section 324A only "kicks in if there is reliance by the landowner on the contractor's promise to remove the snow. *Id*. ¶ 84. The reliance element is key, because the contractor's promise has induced the landowner not to take *other* steps to remove the snow." *Id.*

In opposing a plaintiff seeking to apply *Mickens*, it is necessary point out that the court erred in its initial application of section 324A. The court simply held that there was no reason to import the natural accumulation rule into section 324A and did not even attempt to distinguish prior precedent which expressly extended the rule to situations involving a contract between a property owner and a snow removal company. In *Jordan*, the court specifically considered whether the natural accumulation rule extended in the same factual setting, including how the rule could apply with section 324A. Illinois courts have held that the natural accumulation rule did extend to such situations. *Jordan*, 2018 IL App (1st) 180582, ¶ 35. The court in *Jordan* recognized that, absent evidence that a third party was aware of a contract between a property owner and a snow removal company, there could be no evidence of reliance by the third party for snow and ice removal services. *Id. Mickens* ignores prior precedent and fails to explain why it disregarded prior opinions.

The *Mickens* court also provided a second justification for concluding that the natural accumulation rule does not extend to entities who have contracts to remove snow and ice. The court stated that the common law doctrine of the natural accumulation rule does not apply, as the duty here was voluntarily assumed. *Mickens*, 2019 IL App (1st) 180156, ¶ 89. The court cited authority that when a duty is voluntarily undertaken, doctrines related to a common law duty of care fall by the wayside. *Id.* ¶¶ 90-94.

Defense practitioners should maintain that the *Mickens* court's reasoning in finding that the natural accumulation rule does not apply simply because there is a contract is flawed. Well-established law does provide that the contract provides the scope of duties. However, established precedent also provides that an entity which contracts with a property owner to remove snow and ice can only be liable to third parties when creating an unnatural accumulation of snow and ice, negligently removing naturally accumulated snow and ice, *or* by aggravating conditions as to natural accumulation of snow and ice. See *Allen v. Cam Girls, LLC*, 2017 IL App (1st) 163340, ¶ 36 (listing prior authority holding that the duty to exercise reasonable care in snow and ice removal is coextensive with the common law duty not to create an unnatural accumulation of snow and ice). In other words, an entity may be liable for injures due to unnatural accumulation or if the entity took affirmative steps and aggravated the existing natural accumulation. The natural accumulation rule bars liability, and the voluntarily undertaking doctrine provides for liability in certain situations but does not extend to remove the protection of the natural accumulation rule.

The *Mickens* court claims that that the natural accumulation rule's rationale is absent when applied as to a contractor who is being paid to remove snow and ice. *Mickens*, 2019 IL App (1st) 180156, ¶ 108. The court added that if "a landowner contracts with a snow-removal contractor to remove natural snow and ice accumulations, isn't the clear and obvious expectation that the snow-removal contractor will do just that?" *Id.*

Defense counsel should be prepared to assert that there is an inherent flaw in the logic expressed by the court. The expectations of the property owner are irrelevant as to the injured party. As *Jordan* recognized, if the injured party has no reason to know of the contract between the property owner and the snow removal company, the injured party never relied on that contract and section 324A does not apply. *Jordan*, 2018 IL App (1st) 180582, ¶ 35. Furthermore, as to the expectations of the property owner, if a snow removal company fails to remove snow and ice, that entity may be liable to the property owner for breach of contract. Yet, in that situation, the landowner may not be liable to a third party for injury due to a natural accumulation of snow or ice, and therefore such an injury cannot be damages for breach of the

contract. There is no reason to limit the natural accumulation rule to fulfill the expectations of the property owner when the property owner cannot be liable for an injury to a third party due to natural accumulation of snow and ice.

The *Mickens* court next held that public policy favors holding a snow removal company liable for failing to exercise reasonable care in the performance of its snow-removal service, noting that tort law does that all the time. *Mickens*, 2019 IL App (1st) 180156, ¶ 111. Again, this argument fails to consider that the property owner may bring a breach of contract claim against the snow removal company for failure to adhere to the contract.

In fact, under well-established Illinois law, the economic loss doctrine, also known as the *Moorman* doctrine, denies a remedy in tort to a party whose complaint is rooted in disappointed contractual or commercial expectations. *Sienna Court Condo. Ass'n v. Champion Aluminum Corp.*, 2018 IL 122022, ¶ 21. Any failure of a snow removal company to fulfill its contractual obligations is a commercial expectation and neither the tort plaintiff nor the property owner could recover in tort. A property owner may not be liable for damage caused by the natural accumulation of snow and ice. Thus, a contracting party should not be liable to the property owner for such damages in contract.

Finally, the *Mickens* court attempts to distinguish all prior precedent holding that the natural accumulation rule applies to bar liability to contracting parties. *Mickens*, 2019 IL App (1st) 180156, ¶¶ 112-125. The *Mickens* court states that the previous authority erred by pivoting from focusing on the contract as the source of duty to impose a bright-line rule barring liability, limiting the duty of the contracting party to terms not within the contract. *Id.* ¶ 122. However, this argument fails to consider how the natural accumulation rule works in tandem with a contract for snow and ice removal. A contractual duty should not extend liability beyond what is permissible pursuant to public policy, similar to how insurance contracts cannot provide insurance for punitive damages as it would be in violation of public policy. See *Beaver v. Country Mut. Ins. Co.*, 95 Ill. App. 3d 1122, 1125 (5th Dist. 1981).

The Public Policy of the Natural Accumulation Rule

The public policy in Illinois encourages landowners to attempt to limit or remove dangerous conditions on their land. This includes the natural accumulation of snow and ice. Illinois public policy also provides that landowners should not bear the burden of liability for the natural accumulation of snow and ice. Thus, public policy in Illinois should encourage landowners to remove or attempt to remove any dangerous conditions involving the natural accumulation of snow and ice while limiting liability for such conditions. This supports either the landowner addressing the issue themselves, or the landowners contracting with third party entities to handle removal of snow and ice.

Under the appellate court's ruling in *Mickens*, there is now a distinction between when a landowner attempts to remove or clear snow and ice versus when a third-party entity does so. *Mickens* will result in an impediment to contracting for snow and ice removal services, as the landowner cannot be liable for natural accumulation, while any contracting entity can be liable. *Jordan* recognized these negative public policy implications. *Jordan*, 2018 IL App (1st) 180582, ¶ 38. The natural accumulation rule should apply to bar liability to snow removal companies, as public policy in Illinois favors the attempt to remove potentially dangerous snow and ice.

Mickens construes section 324A essentially as a statute, rather than a guiding principle of law. True, the Illinois Supreme Court has adopted section 324A, but the legislature creates public policy in Illinois, not the courts. *See Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 65 (2011) ("Because it is primarily the function of the legislature, not the courts, to construct public policy, when the legislature has declared, by law, the public policy of the State, the judicial department

must remain silent, and if a modification or change in such policy is desired the law-making department must be applied to, and not the judiciary, whose function is to declare law but not to make it").

Mickens will likely lead to direct conflict between a property owner and any contracting entity accused of negligence due to an injury caused by snow or ice on the premises. That is, pursuant to the natural accumulation rule, a landowner will not be liable for a natural accumulation of ice or snow, but a contracting entity may be liable for a natural accumulation. It is now in the property owner's best interest to attempt to shift liability to any contracting entity by demonstrating that the accumulation was natural, thereby insulating the property owner. However, in the Snow Removal Service Liability Limitation Act (Act) (815 ILCS 675, *et. seq.*), the legislature expressly barred enforcement of indemnity agreements between a snow and ice removal company and any landowner. Pursuant to the Act, neither a landowner nor a contracting entity may shift liability onto the other. Yet, *Mickens* allows landowners to attempt to shift such liability onto contracting third-party entities. *Mickens* is contrary to the public policy expressed by the Act and is an overreach.

The *Gray* Decision

The same panel who decided *Mickens* also issued an unpublished Rule 23 Order roughly one week prior to *Mickens*. In *Gray v. Lewis Properties, Inc.*, the court considered whether there was evidence of an unnatural accumulation, as well as whether the contract terms as to a snow removal company's obligation barred it from a finding of liability. *Gray*, 2019 IL App (1st) 180590-U, ¶ 21.

The court noted that the contract terms as to the snow removal company provided that the company would monitor snow conditions and dispatch plows as necessary. *Id.* ¶ 28. The court noted that an allegation of slipping on ice, alone, was not covered by the terms of the contract as the company had no duty to prevent or remove ice buildup. *Id.* Therefore, the snow removal company had no duty to remove ice and could not be liable for a natural accumulation of ice.

Conclusion

Following *Mickens*, and suggested by *Gray* (which, as an unpublished Rule 23 Order, has no precedential value and cannot be cited by litigants except for specific exceptions), the current state of whether a contracting third-party entity may be liable for damages caused by the natural accumulation of snow and ice comes down to the provisions within the contract. If the contract requires that the contracting entity remove ice buildup as well as snow, *Mickens* and *Gray* suggest that the snow removal company may be liable for any injury caused by snow or ice, regardless of whether the accumulation was natural or unnatural. However, if the contract is limited to snow, then any allegation of injury due to the presence of ice will likely not impose liability on the snow removal company.

Mickens will act as an impediment to contract formation and lead to disputes between property owners and snow removal companies, as well as raise rates and costs associated with such contracts. These challenges may ultimately end up limiting property owners from finding suitable snow removal companies to remove dangerous conditions. As landowners are still protected from liability pursuant to the natural accumulation rule, *Mickens* will circumvent the public policy in Illinois as more landowners may take no action to remove natural accumulation of snow and ice. By ignoring prior precedent, the *Mickens* decision may lead to untenable results.

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