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Supreme Court of Texas
Scott and White Memorial Hospital and Scott, Sherwood and Brindley
Foundation, Petitioner,
v.
Gary Fair and Linda Fair, Respondents.
No. 08-0970
December 15, 2009

Oral Argument

Appearances: Stuart Smith, Naman, Howell, Smith & Lee, Waco, TX, for
Petitioner.

Frederick Bostwick, Beard Kultgen Brophy Bostwick Dickson & Squires,
Waco, TX, for Respondents.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice
Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina,
Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett,
Justice Eva Guzman.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear
argument in 08-0970, Scott and White Memorial Hospital versus Fair.

MARSHALL: May it please the Court, Mr. Smith will present argument for
the Petitioners. The Petitioners have reserved five minutes for
rebuttal.

ORAL ARGUMENT OF STUART SMITH ON BEHALF OF THE PETITIONER

ATTORNEY STUART SMITH: May it please the Court, this case involves a
slip-and-fall on ice near the entrance to the Scott and White Hospital
in Temple, Texas that occurred after and during an ice storm in
February of 2003. The case presents an issue of first impression for
this Court in the sense that this Court has not yet decided a case that
involved a slip-and-fall on ice. In another sense, it is not really a

case of first impressions because this Court has previously, of course, decided other premises liability cases and has decided a case that we submit is closely analogous, which is the case that involved a slip-and-fall on mud.

JUSTICE HARRIET O'NEILL: If we did apply the Massachusetts rule, the summary judgment record's a little unclear to me. I know that this was a traditional motion for summary judgment and where's the evidence that Mr. Fair slipped on naturally accumulated ice?

ATTORNEY STUART SMITH: You're correct. It is the traditional motion for summary judgment and I would like to spend as much of my time as the Court would like discussing the record because I think the Court is familiar with the two rules. It's familiar with its jurisprudence and I think can make that decision without me adding a lot to it and I think the record is what I would like to clarify today because I don't think the briefs make that as clear as it could and the evidence on that is Mr. Fair stepped off of the curb and as one or both feet hit the roadway, which had a crosswalk on it, that is where he slipped. We have submitted that the evidence based on what he said is that there was no sand there because he faulted us for not sanding. So we submit, the evidence shows that there was an ice storm, that there was natural ice everywhere, and that nothing had happened to disturb it, but he says, well, there was some general sanding, so it could have been sanded there and for summary judgment purposes, we have to assume that is true and we are happy to accept that because under the definition of what is natural, if a landowner or premise owner does something to try to make the property safer and does not aggravate it, then it is still considered to be in its natural state and I think when the Court reviews the record, the Court will see that is exactly what the record is. Now where some of the confusion arises is in the use of the salt, the substance called melts, where our witness testified that the melts was not helping and that they quit using the melts, but all of the evidence shows that the melts was only used on the steps and he did not go down the steps.

JUSTICE DALE WAINWRIGHT: Actually, your witness testified not only that the melt was not helping, but it made it slipperier.

ATTORNEY STUART SMITH: She did testify to that. She absolutely testified to that. I will submit that is an offhand comment and that it is not correct, but, obviously, that's in the record and I have to live with that.

JUSTICE DALE WAINWRIGHT: But your position is the melt was not in the street where he fell.

ATTORNEY STUART SMITH: It was not. It was on the steps. There is absolutely no evidence that it was in the street so the Court does not have to address that issue. If the Court did have to address that issue, I would still submit that ice cannot become slipperier and even under the definition of what is natural, if salt is put out the day before and it refreezes, you still just have an icy surface.

JUSTICE HARRIET O'NEILL: But if the, and here's where I get bogged down. There's no evidence that it was there, but your burden on traditional motion for summary judgment is supposedly to conclusively

prove it wasn't. So, I mean, there are a lot of inferences based on your argument. Would it be more appropriate for a no-evidence summary judgment?

ATTORNEY STUART SMITH: I think in hindsight, a no-evidence motion would also have worked, but I submit that there was evidence sufficient even under the definition of a traditional motion to uphold the summary judgment that was granted for Scott and White. And I know the court of appeals used the term "conclusively proved", but when you think about how can you offer conclusive proof other than what we offered, you cannot prove a negative.

JUSTICE HARRIET O'NEILL: Well that's why it would seem to be more appropriate to a no-evidence review that then the plaintiff has to come forward with evidence as to the condition.

ATTORNEY STUART SMITH: That's true and I submit that they could not here come up with that evidence at all from any of the witnesses, but even on a traditional motion, which is what we have, we have submitted evidence sufficient to affirm the trial court because we have come forward and shown that it was natural under any definition. We initially showed that it's natural by showing that the ice fell out of the sky and that's really all that we can show because we don't have witnesses there. The plaintiff then can come forward with evidence to try to show that there was some unnatural accumulation and there's just absolutely no evidence of that and all of the evidence in the record, which is what the Court has to look at, there's no evidence at all to show that there was any unnatural accumulation. There's really been no argument and no pleading that claims that we did anything to aggravate the situation where he fell. We were beat up on for the comment about the melts and as trial lawyers, we all do that. We take a comment from the other side and we pound them over the head, but it doesn't have anything to do with what happened here that was on the steps and he avoided the steps because of the ice that was on the steps. There are many more questions about the record right now, I'd be happy to address those or I can turn back to my argument as to why we think that the Massachusetts rule is appropriate and why the court of appeals erred here. There have been a number of ice cases in Texas at the court of appeals. There's six or seven of them cited in my brief. I noted just last week another one came out of the Austin court of appeals. The courts all seem to be, even though they don't say the Massachusetts rule, and this Court doesn't even necessarily need to say the Massachusetts rule, the Texas courts do all seem to be going that direction and so we would request that the Court adopt that rule. In reaching that rule, the important issue from our perspective is the public policy considerations, the public policy considerations in an ice case, we submit, would be the same as those in a mud case. It is burdensome on the landowner. It is difficult for them to deal with. It would be expensive for them to deal with. That it is easier for the pedestrian to deal with the situation as they perceive it.

JUSTICE NATHAN L. HECHT: Why are the majority of jurisdictions going the other way?

ATTORNEY STUART SMITH: Well, I think right now it is really a tossup between the other jurisdictions. If they are going that way, certainly some states are trending to more of a we're going to put the burden on

landowners and we're going to protect the public. I submit that that is not the correct allocation. Even if they are trending that way, I think a state such as Texas are in a different situation. We don't deal with ice that often and it would be a bigger burden to put that burden on the landowner when the ice storm lasts a day. And, basically, the signal that the Court would be sending is you can't really deal with it and if there's going to be a fact issue every time someone falls, it may not be strict liability, but it is close to strict liability. If somebody slips in your parking lot, you're going to get sued and you're going to have to try to defend it and you're going to have to try to show that what you did is reasonable and the message to the premises' owner is shut down and I don't think that is the message that you want to send. I think we should let people take some responsibility for their own safety. And if we have an ice storm and you want to go to the grocery store and try to buy groceries or if you want to try to pick up your prescription or if you want to try to make it to a doctor's appointment or go shopping or whatever people were doing in these half dozen cases that we've seen that have come up to the court of appeals, the plaintiff or pedestrian can make that decision on their own and they ought to be allowed to make that decision without the courts really dictating to businesses that you have got to shut down because we've had an ice storm and you have that risk of liability. And here, I think the plaintiff perfectly proves that he was willing to accept that risk. This was not an emergency situation. This is a situation where it was optional to go to the doctor and they decided to go to the doctor for an 8 o'clock appointment and so they left home. It's normally a 35-minute drive. They got up early and went out early and spent an hour and a half driving down I-35 to get to Scott and White to go to this doctor's appointment and they could have skipped that appointment and come in the next day when the ice had melted and they elected to take the chance to go out into their yard, into the driveway, on I-35 and assumed all those risks and yet Scott and White now has the burden once they drive into our parking lot that we are now responsible for their safety and we could have taken all kinds of steps and yet if there was one little patch somewhere, we would be held liable.

JUSTICE HARRIET O'NEILL: Let me ask you about that. Under the Massachusetts rule, I understand the landowner can't be liable for remedial measures and I understand the logic behind that, but are there any parameters on that if the remedial measures were negligent or create another dangerous condition? What's the scope of remedial protection?

ATTORNEY STUART SMITH: Yes, there can be liability, generally, if you aggravate the situation. In other words, if we're out there shoveling the ice and we create a curb of ice or a big bump of ice and someone tripped over it that somehow made it more dangerous than it was.

JUSTICE HARRIET O'NEILL: So if the, hypothetically, if there had been sand or ice or shoveling, it created a pile of ice where he slipped, then could they be liable for that?

ATTORNEY STUART SMITH: If it was something that he tripped over, I think and you may not even be trying to make this distinction, but I want to make sure I don't leave anything unclear. If they had just, there are cases that say if you shovel ice and it's still just slippery

ice, you haven't created liability, but if you create something hidden that someone could stumble over, there could be liability.

JUSTICE HARRIET O'NEILL: A different kind of hazard?

ATTORNEY STUART SMITH: Exactly. I mean if it's --

JUSTICE PHIL JOHNSON: How about if you put de-icing material such as help on the parking lot and their claim is that makes it more slippery.

ATTORNEY STUART SMITH: I think if you could prove that it really did make it more slippery, there could be liability.

JUSTICE PHIL JOHNSON: You have a traditional summary judgment here and if there was proof that the help was there and they claimed it made it more slippery, your burden would be to prove was not more slippery?

ATTORNEY STUART SMITH: Right, if they had come forth with evidence that there was melts there where he slipped and it made it more slippery, then we would have a fact issue.

JUSTICE PHIL JOHNSON: Okay and that goes to Justice O'Neill's question. That would be one instance where you could have aggravated the situation at least according to the pleadings.

ATTORNEY STUART SMITH: Right and that makes sense logically because if we had left it alone, he would have had whatever chance he had of falling, but because we did something, we increased his chances of falling and here there's absolutely no evidence that we did anything that increased his chances of falling.

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Smith, if there are, let's say there are two hospitals side by side, and I'm trying to decide which hospital to go to and there's one that clearly there's no undertaking to eliminate the risk of falling from ice. There's no sanding. There's, I mean, I just see nothing, nothing's been done and on the other one, it looks like the hospital is taking some efforts to clear the ice to make it safer for patients to come on the premise. I'm likely to go to the one where there's, it looks like it's a safer environment for me to walk from my car into the hospital. Now, if there are areas that they don't -- so that's sort of an invitation to come to this hospital over that one, but if there's some areas that they deice and some that they don't, I fall on the one that they don't. Shouldn't I have some reason to complain about that or no?

ATTORNEY STUART SMITH: I don't think you should, Judge. I mean, I think you're almost implying that somehow they've misled you by saying they're safer and if they did, if they put up big billboards that said, you know, we're the safe hospital, they're the dangerous hospital, you might have, I'm thinking maybe a DTPA claim or misre-presentation claim, but when you look at premises liability, you go back to the issue of duty and that's a big issue before this Court from reading cases over the last few years and here, I think, you want to come down where there is no duty and the fact that I think you're touching on an issue that is important and that is you can try as hard as you want and you cannot make the premises completely safe when there's ice.

JUSTICE DAVID M. MEDINA: Well, I agree with that, but you seem to have stated earlier that once there's ice as there was in parts of Texas last week, perhaps everyone should stay home, but a business is inviting you to come in and spend your money and you can hurt yourself and so be it because you should have not assumed the risk to get on a road and do all the things you have to do to get there, I was following that line until I started thinking about mud. I stepped in some mud this morning and fell on my backside and through no fault of my own, but if you go into a store, what's the difference, mud or ice? You know, one, it's, the ground still gets wet.

ATTORNEY STUART SMITH: Well I agree and I don't think there should be liability in either case and I think --

JUSTICE DAVID M. MEDINA: If there's a big rainstorm, there's mud everywhere, we need to stay home and not go anywhere.

ATTORNEY STUART SMITH: No, I'm not saying people should stay home. I'm saying --

JUSTICE DAVID M. MEDINA: But you say the burden should be on the plaintiff is what you said, the burden, but obviously got to prove their case, but what I hear you saying is that business owners and premises owners have no culpability when there's a rainstorm or maybe a snowstorm.

ATTORNEY STUART SMITH: Well, the Court has already said that there's no culpability when there's naturally occurring mud as that is defined, but I may have misspoken earlier or certainly I left the wrong impression. I do not want the Court to send a signal that people should stay at home. I'm saying that the Court would send the signal if they adopted the Connecticut rule that people should stay home or that businesses should not open, which would then result in people not obtaining the services. I'm saying we should have the freedom of choice if we want to go out in an ice storm and the truth is we all do that all the time. We've probably all worked at businesses that shut down, yet we voluntarily went in.

JUSTICE DAVID M. MEDINA: Maybe we need to create a Texas rule or some type of southern rule.

ATTORNEY STUART SMITH: Well I think, Texas has always stand, stood for people should make their own decisions.

JUSTICE DALE WAINWRIGHT: Counsel, just one final question. The hospital and the Foundation, same entity or different? What's the --

ATTORNEY STUART SMITH: It is. There were three entities that were sued.

JUSTICE DALE WAINWRIGHT: I'm trying to understand, is it same entity or different and you said it is?

ATTORNEY STUART SMITH: It is one entity.

JUSTICE DALE WAINWRIGHT: One entity.

ATTORNEY STUART SMITH: Even though it has an "and" in the middle. It is the Scott and White Memorial Hospital and Scott, Sherwood and Brindley Foundation. That is all one entity and it dates back to a long time ago as to how it got that name.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Counselor. The Court is ready to hear arguments from the Respondents.

MARSHALL: May it please the Court, Mr. Bostwick will present argument for the Respondent.

ORAL ARGUMENT OF FREDERICK BOSTWICK ON BEHALF OF THE RESPONDENT

ATTORNEY FREDERICK BOSTWICK: Please the Court, I find it almost humorous in this day and time that Texas is being asked to blindly follow Massachusetts of all places.

JUSTICE NATHAN L. HECHT: But our choice is Connecticut.

ATTORNEY FREDERICK BOSTWICK: And I would submit Connecticut or in the case of Washington State, which has adopted the Connecticut rule, that might be preferable in most instances. But seriously, I really think that the issue before this Court for all practical purposes and I've heard several of the justices mention it and I think what the Court is being asked by the petitioner to do is basically to reverse itself in terms of the history of jurisprudence and graft in what is effectively a no-duty concept because of the assumption of the risk.

JUSTICE HARRIET O'NEILL: Well, but you say reverse. What about our, what is it, the case we decided with mud MO-dental--

ATTORNEY FREDERICK BOSTWICK: The rape case.

JUSTICE HARRIET O'NEILL: Yes, that why is mud so much different from ice because we appeared to apply the Massachusetts rule in that case.

ATTORNEY FREDERICK BOSTWICK: Well, you actually didn't, I mean, you couldn't have applied the Massachusetts rule because the Massachusetts rule is restricted solely to snow and ice. I would submit that the rape case is decidedly different. It was based upon dirt. Dirt is, particularly in Texas, ubiquitous. It is everywhere. It is all the time, 365 days a year and snow is far different. Snow and ice is something that, frankly, in most of Texas rarely occurs. One or two days a year.

JUSTICE HARRIET O'NEILL: But wouldn't that sort of be in favor of exempting liability for a naturally occurring condition that you're not used to dealing with?

ATTORNEY FREDERICK BOSTWICK: Well, I think that argument could be made, but I think the better argument and the better analysis is that because it occurs so infrequently that does not demand or necessitate some no-duty enclave.

JUSTICE EVA GUZMAN: But when you're looking at a business and it does occur so infrequently and asking the property owner to invest in

resources and equipment to deal with something that occurs very infrequently from a policy standpoint, how is that?

ATTORNEY FREDERICK BOSTWICK: Well I think this case is a good example. Without the application of any rule at this point, Scott and White had invested, if you want to call it that, in sand and deicer. For most institutions, that's not much of an investment and when you balance it and really when you look at it from a public policy standpoint, the balance is is there a greater burden on the business or is there a greater burden on the individual? And I kind of think of this, I guess, in terms of a situation perhaps at home. I've got 80-year-old parents. There is a light snow or a light ice. My mother who drives and is ambulatory decides to go to the grocery or the beauty parlor or the pharmacy, the ice is not the same. I mean, one of the things that is kind of assumed is that the presence of the ice and snow is uniform and that's not the case at all. In fact, oftentimes, the ice or snow that may accumulate on my yard is vastly different from what has accumulated a mile or two or even five away. And so to assume that my mother, as she gets into her car, appreciates the risk that is before her and then drives to the grocery and goes to the grocery and is in a situation where those conditions are different, maybe not fully appreciated because we've all heard the term "black ice". Sometimes it's difficult to ascertain exactly what conditions, particularly with snow and ice, and the degree of risk involved. And what you're being asked if you adopt the Massachusetts rule is to create, is to abandon any balancing. I mean, we've got a general premises liability concept or analysis that has been used for all sorts of conditions for decades. And there is no reason to abandon that analysis simply because it is snow and ice.

JUSTICE DALE WAINWRIGHT: So your position would create a duty to act reasonably on behalf of any businesses where there's snow and ice?

ATTORNEY FREDERICK BOSTWICK: I would submit to you that that duty already exists because that is general premises liability analysis.

JUSTICE DALE WAINWRIGHT: And if that's the case, since ice and snow can be different here versus a block down the street versus a mile down the street, would it be the case that every one of these disputes would then get to a jury, every one would have a fact question assuming decent pleading and competent lawyers?

ATTORNEY FREDERICK BOSTWICK: I would say that it would happen more often than not and a good example is the Walmart case that's cited in both briefs. There was a fairly lengthy analysis, thoughtful analysis, I thought came to the wrong conclusion, but a thoughtful analysis. And interestingly enough in that case, the facts of that case indicated that Walmart did absolutely nothing. I mean nothing to try to make the snowy, icy conditions that existed in their parking lot, on their sidewalks and in their entryways any safer for the public that it was inviting in. And yet, despite that, and this is of curious note, despite that, a jury found that there were only 70% negligent in that instance, having done nothing and so, frankly, I would agree and I think it was with Justice Pope that we ought not to import a distrust of juries. I mean, Justice Pope said in the case *Parker v. Highland Park*, which abolished the no-duty concept at least in certain instances, said the no-duty doctrine has generally been condemned. It's a harsh doctrine and it imports a distrust of juries and I see no

reason to distrust juries and I think the Walmart case is a good example of that.

JUSTICE NATHAN L. HECHT: But the problem really is with the rule because the rule generally is to warn or make safe.

ATTORNEY FREDERICK BOSTWICK: I'm sorry?

JUSTICE NATHAN L. HECHT: The rule generally is to warn or make sense.

ATTORNEY FREDERICK BOSTWICK: Actually, I believe the rule is to warn or take reasonable steps to make the premises as safe as reasonably possible.

JUSTICE NATHAN L. HECHT: Well, but there's no reason to warn because if you see snow and ice and the weatherman is saying we're in an ice storm and so the problem is with trying to make it safe, there's really no way to make it safe. People are going to slip on ice.

ATTORNEY FREDERICK BOSTWICK: Well, that's -- I respectfully disagree and I think the State of Washington has spoken to that and said that there are lots of tools presently available. Scott and White used some of them, salt, deicer properly used. Now in this case, Scott and White admits that it did not follow the directions of the deicer and, in fact, made the conditions worse. But I would submit to this Court --

JUSTICE DALE WAINWRIGHT: But you don't dispute there was no deicer in the street where he fell?

ATTORNEY FREDERICK BOSTWICK: Well I think the record taken generally and it is frankly somewhat ambiguous, seemed to indicate that the deicer was used where the sand was used and so I would say that the record is unclear on that, frankly.

JUSTICE DALE WAINWRIGHT: So you think the record is unclear whether there was any sand or deicer in the street.

ATTORNEY FREDERICK BOSTWICK: I think the record is clear that the person, the responsible person, Ms. Free, for Scott and White said that she used or that they used sand in crosswalks, on sidewalks and entryways. So I believe that the record is fairly clear that the sand was used in that area.

JUSTICE DALE WAINWRIGHT: And Mr. Fair fell in the street, not on the sidewalk.

ATTORNEY FREDERICK BOSTWICK: Well, he fell in a crosswalk and that was an area that, I think, if you look at the record from Ms. Free's testimony was an area that was an area where sand was used.

JUSTICE DALE WAINWRIGHT: Was the crosswalk across the street?

ATTORNEY FREDERICK BOSTWICK: Actually, it was a set of stairs leading down from.

JUSTICE DALE WAINWRIGHT: [inaudible] trick questions, I'm just trying to find out where he fell.

ATTORNEY FREDERICK BOSTWICK: The crosswalk was across a roadway, a private roadway at Scott and White leading to a parking lot.

JUSTICE DALE WAINWRIGHT: Getting back to the rule and we've said a number of times that there's a duty to exercise reasonable care to protect when there is a condition that creates a unreasonable risk of harm, not just a dangerous condition, but an unreasonably dangerous condition. It sounds like their position would be that snow and ice are unreasonably dangerous wherever they occur. If there's going to be a duty to remove or make safe, as you've stated, then snow and ice would be unreasonably dangerous wherever it occurs in Texas.

ATTORNEY FREDERICK BOSTWICK: I would say under general jurisprudence rules, that is a jury issue. The jury must decide in a premises liability case whether snow and ice as it exists in a particular situation and that's why I think when you talk about the concept of snow and ice as though it's uniform and everywhere the same is just to ignore reality.

JUSTICE DALE WAINWRIGHT: But to get, I mean the duty question is a court question. It's not a jury question.

ATTORNEY FREDERICK BOSTWICK: I understand that.

JUSTICE DALE WAINWRIGHT: Whether there's a duty is a question of law and to be, for there to be a duty, you have to establish the basis for the duty, which is unreasonable risk of harm, right?

ATTORNEY FREDERICK BOSTWICK: Correct.

JUSTICE DALE WAINWRIGHT: So I'm --

ATTORNEY FREDERICK BOSTWICK: That's the legal standard.

JUSTICE DALE WAINWRIGHT: Right, so I'm confused when you said that's a jury question.

ATTORNEY FREDERICK BOSTWICK: Well, a jury must answer a --

JUSTICE DALE WAINWRIGHT: Okay, the jury answers breach and causation and damages, but the duty question is for this Court, right?

ATTORNEY FREDERICK BOSTWICK: The jury submission would be did the condition that existed in a particular situation create an unreasonable risk of harm. That would be one of the questions in a general premises liability analysis that a jury was asked and they can answer in certain instances where there may be almost no snow or a little bit of ice or black ice or concealed ice that it is under those circumstances and isn't in another.

JUSTICE HARRIET O'NEILL: I'm a little bit confused as to what the record shows the condition of the area was where he slipped and I understand it's not crystal clear, but didn't Mr. Fair testify that they should have sanded where he slipped?

ATTORNEY FREDERICK BOSTWICK: Yes.

JUSTICE HARRIET O'NEILL: Which would indicate there was no sand there.

ATTORNEY FREDERICK BOSTWICK: Well, it would indicated that he observed no sand as he was stepping down. And you've got to also understand that his recollection came, I mean, he is testifying after he has slipped, fallen, hit his head, injured his back and so whether or not his subsequent recollection of observation of sand on snow or ice is accurate or not, I don't know.

JUSTICE HARRIET O'NEILL: But you would agree that the statement they should have sanded where I slipped is some indication there was not sand where he slipped.

ATTORNEY FREDERICK BOSTWICK: I would agree with that.

JUSTICE HARRIET O'NEILL: And if that's the case, then why in that area wasn't it naturally occurring or can we not infer that it was naturally occurring.

ATTORNEY FREDERICK BOSTWICK: Well, I think there is a, I think there is, there is a difference in the record because Ms. Free, on behalf of Scott and White, said that crosswalks, pathways, stairs and places of that sort had been sanded several times during the night.

JUSTICE HARRIET O'NEILL: So if it was sanded, is it your position that Scott and White made it more dangerous by sanding?

ATTORNEY FREDERICK BOSTWICK: Actually, I would say probably not by the sand by the application of the melts in the places that it was applied made those situations more dangerous because the people failed to follow the directions on the melts, which would have required that they scrape immediately after they applied the melts.

JUSTICE HARRIET O'NEILL: So your causation theory depends upon proof that melts was in the area where he slipped?

ATTORNEY FREDERICK BOSTWICK: My causation theory, I mean that's only if this Court chooses to apply the Massachusetts rule and, frankly, I believe that that would be a step backwards in premises liability jurisprudence and I would certainly urge this Court to deal with snow and ice the same way it deals with other hazards. I frankly feel that to the language that for whatever reason Massachusetts jurisprudence ceased upon to justify, now that wasn't the reason that they applied the rule. The reason they applied the Massachusetts rule back at the turn of the century was because of the climatic conditions that existed in Massachusetts for months at a time.

JUSTICE HARRIET O'NEILL: But where? I tell you where I get hung up on this.

ATTORNEY FREDERICK BOSTWICK: Sure.

JUSTICE HARRIET O'NEILL: If we just look at our MO Dental case and mud where we did seem to apply the Massachusetts rule, it's hard for me to see such a difference between a hazard created by mud naturally

occurring and a hazard created by ice and except that it just doesn't happen much. That's a hard distinction to hang a hat on.

ATTORNEY FREDERICK BOSTWICK: Well I think the fact that it doesn't happen much is a major distinction and the fact that dirt is everywhere. Ice is not.

JUSTICE EVA GUZMAN: Does that fact that ice is somewhat predictable come into the analysis? In other words, you would know ahead of time that there are conditions that would produce ice?

ATTORNEY FREDERICK BOSTWICK: I think you do and, frankly, in the State of Texas, it happens very little and so the question is if you're gonna, if you're going to go to a no-duty concept, which has been criticized by this Court as recently as 2007, if you're gonna go there and I'll cite you to Jackson v. Axelrod, I'm sorry.

JUSTICE HARRIET O'NEILL: Well, we're circular a little bit because we've been there and in MO Dental, you're just saying it doesn't apply.

ATTORNEY FREDERICK BOSTWICK: I'm saying MO, there's no indication in M & O Dental that it was to be applied beyond dirt and mud.

JUSTICE HARRIET O'NEILL: I understand, but you said we haven't gone there. We have gone there. Just with a different context.

ATTORNEY FREDERICK BOSTWICK: In dealing with a different substance that is everywhere all the time. It cannot be avoided. It's there 365 days a year and it is everywhere. Snow and ice is seldom here and what I would suggest to this Court is that the appropriate, I mean, for a social policy issue, which is basically the basis of a no-duty concept, if you're gonna go that way and accept the harshness and rigidity of a no-duty concept, which is the basis of criticism of no-duty concepts. If you're going to go there, then you have to balance the relative burdens and in this case with snow and ice and most of the places in the State of Texas, a business owner has a minimal investment to deal with snow and ice, but it also has the option, which public schools take every year every time there is snow and ice and that is, if a business is going to invite people into their business and by opening their stores, asking them to come spend money, did they have the option of either taking the steps to make it reasonably safe or to open late.

JUSTICE PAUL W. GREEN: Well, but they do that in the sense that if, for example, you've got a situation where you've got a store and you've got slick tile out in front of it and it rains. Well the tile by itself, let's say dry tile, so it wouldn't be slippery so it's not unreasonably dangerous until it rains, but in a situation of ice, it doesn't matter where it is. It could be on rough asphalt and if an icy condition comes in, then it becomes slippery not by any reason of what the premises owner has done. It's just because it's ice.

ATTORNEY FREDERICK BOSTWICK: But all present jurisprudence requires is either that they warn or number two, that they take reasonable steps. They are not an insurer. They aren't required to ensure safety. This is not a strict liability concept. All that's required and this is that they take reasonable steps. Salting, deicing, those are reasonable steps.

JUSTICE PAUL W. GREEN: Like a playground. A playground situation where you have children's play equipment, slides. They're not unreasonably dangerous until it's in the middle of July and it's 105 degrees outside and those slides become unreasonably dangerous. In that event, there could be some problem and that's why you see these covers over these playgrounds these days.

ATTORNEY FREDERICK BOSTWICK: Which is a reasonable step.

JUSTICE PHIL JOHNSON: Counsel, would there have been any steps that the clinic could have taken to make that crosswalk so that there was no duty to your client, sand, anything? Were there any steps they could have taken so that there was no duty to your client, or does it all go to a jury under your theory?

ATTORNEY FREDERICK BOSTWICK: Well, under present jurisprudence, general premises liability jurisprudence, the question of whether the steps that were taken were reasonable would be a jury question just like it was in the Walmart case.

JUSTICE PHIL JOHNSON: You see an unreasonably dangerous condition, before you ever get to were they reasonable, it has to be an unreasonably dangerous condition.

ATTORNEY FREDERICK BOSTWICK: Correct.

JUSTICE PHIL JOHNSON: So were there any steps if they sanded, if they, were there anything, was there anything they could do to protect the no-duty determination in your view, under your view of the theory of law?

ATTORNEY FREDERICK BOSTWICK: Well, I guess my theory is that I believe that jurisprudence dictates that you be as consistent as you reasonably can and I see no reason in this instance to treat snow and ice any differently than any other condition, which creates a dangerous situation on premises of a business invitee.

JUSTICE PHIL JOHNSON: So let me ask this. If they had gone out and put three shovelfuls every hour of sand there and your client walked across it, slipped and said there just wasn't, at that point it's still an unreasonably dangerous condition and goes to the jury to see if the three shovels per hour were reasonable action?

ATTORNEY FREDERICK BOSTWICK: Well, I think that would be the basis if I were defending that case for a motion for summary judgment. I would put on evidence.

JUSTICE PHIL JOHNSON: On what basis?

ATTORNEY FREDERICK BOSTWICK: That my shoveling of sand, as you have indicated --

JUSTICE PHIL JOHNSON: Reasonable action?

ATTORNEY FREDERICK BOSTWICK: Made that condition not unreasonably dangerous as a matter of law.

JUSTICE PHIL JOHNSON: So that would still be the no-duty question?

ATTORNEY FREDERICK BOSTWICK: Correct.

JUSTICE PHIL JOHNSON: But you also still have it in the negligent aspect. But there is some area at some point it comes to no duty?

ATTORNEY FREDERICK BOSTWICK: Right.

JUSTICE DON R. WILLETT: If we go with Massachusetts, do you concede that you lose or do you argue that some of the exceptions then apply?

ATTORNEY FREDERICK BOSTWICK: If you go with Massachusetts, I believe that that does not dictate a decision or necessarily that we lose because I do believe that the landowner was actively negligent in this case and the problem, frankly, with going with the Massachusetts rule is which Massachusetts rule are you going with and what state law that has been adopted by various, by the 13 or so jurisdictions that have adopted it are you going to graft in along with the general no-duty concept? I don't know. There have been all sorts of exceptions that have been grafted on to various applications of the Massachusetts rule by various states, those minority that have adopted it, but recognizing the harshness and rigidity and the fact that it basically says that it is beneficial for the landowner to do nothing from a liability standpoint, certainly not good social policy. Under the Massachusetts rule, if I'm a store owner, I can sit there and watch a lady, my mother slip at nine or a friend from across the street slip at 11 and somebody else at one and there's no liability. That is not good social policy. I would urge this Court not to adopt that, but if it were to adopt it, I think we fit within certain exceptions depending on which exceptions you likewise adopt.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counselor.

ATTORNEY FREDERICK BOSTWICK: Thank you.

REBUTTAL ARGUMENT OF STUART SMITH ON BEHALF OF PETITIONER

ATTORNEY STUART SMITH: I would submit that it is not as complicated or confusing or that there are as many exceptions as opposing counsel suggests and I would also respond to the parade of horribles argument that you just heard about the people slipping over and over and over. There are cases out there that says if you have a series of accidents like that and the landowner becomes aware of that that a duty does arise. The exceptions are simply common sense and the law ought to follow common sense and if the Court adopts the Massachusetts rule, whether you call it the Massachusetts rule or not, I knew I was going to take a shot on it being the Massachusetts rule. Call it the Texas rule. Call it the rape rule. It doesn't matter to me what you call it, but it's common sense and the common sense, if you adopt the rule that there is no liability for a naturally occurring substance, then it has to follow that if you take action and you don't make it worse, you shouldn't be held liable.

JUSTICE PAUL W. GREEN: Well rain, rain is naturally occurring and yet we hold people responsible for slip-and-falls when there is a an unreasonably dangerous condition created by a naturally falling rain, don't we?

ATTORNEY STUART SMITH: You're talking about inside the store when it's wet?

JUSTICE PAUL W. GREEN: Outside in the front porch of a Walmart.

ATTORNEY STUART SMITH: I don't believe that if there's rain falling on a normal substance or a normal surface that you would find liability in that case.

JUSTICE PAUL W. GREEN: You think there's no duty in that circumstance?

ATTORNEY STUART SMITH: I don't think the landowner can stop the rain from coming down on a --

JUSTICE PAUL W. GREEN: There's a duty to warn or make safe. You know that. As far as I know, at least part of Parker [inaudible] is still alive in this State and it doesn't apply to independent contractors apparently, but if it is true that landowners do owe a duty to warn or make safe as applies to naturally falling rain on what could then be a slick surface, why wouldn't it also apply to ice?

ATTORNEY STUART SMITH: Well, it is more, rain does occur more often obviously, and this Court, at least in the case of mud, has held that it is a naturally occurring substance and that for social policy reasons that the burden would not be placed on the landowner to try to deal with that and I would submit those same considerations apply to ice and apply more strongly to ice and if the Court, in this case, need only take the next to last paragraph of the rape case and change the word mud to ice and it makes logical sense in that case.

JUSTICE DON R. WILLETT: Going back to the ground supervisor's affidavit, how close were her observations to the scene of the accident in terms of timing, in terms of, just sort of what do we know from her affidavit by what she observed?

ATTORNEY STUART SMITH: She, as opposing counsel did an excellent job of pointing out in her deposition did not have personal observation of the accident site. She did not go there following it at all. Her affidavit and her testimony are just general as to what happened on the premise, but there was an ice storm and that they attempted to deal with it by using melts in some places and sand in other places. I heard questions during Mr. Bostwick's testimony or during his presentation. I just want to make it clear that for summary judgment purposes, we accept that there could have been sand where he fell even though he said that there wasn't as far as he knew, but even if there was sand there, there was absolutely no evidence that the sand made the condition worse and there's no evidence that salt was there, but I would submit that even if there was evidence that salt had been there, there would be no liability because the salt did not make it worse and there's a long line of cases saying that salting does not create liability when it refreezes unless you do something to aggravate it, for instance, if you caused a bunch of water to run off and create a

pool or a dam or something unnatural like that. So I submit that all of the evidence here shows that we did have a natural situation as it was defined and that, therefore, this Court should reverse the court of appeals and affirm the summary judgment of the trial court in favor of Scott and White.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel, the cause is submitted, That concludes arguments for this morning and the Marshall will now adjourn the Court.

MARSHALL: All rise.

Scott and White Memorial Hospital and Scott, Sherwood and Brindley Foundation, Petitioner, v. Gary Fair and Linda Fair, Respondents.
2009 WL 5113431 (Tex.) (Oral Argument)

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