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Is the Natural Accumulation Rule All Wet?

Michael J. Poelle*

I. INTRODUCTION

In *Hankla v. Burger Chef Systems, Inc.*,¹ the Illinois Appellate Court broadly concluded that what has been termed the natural accumulation rule is well established in Illinois.² Under the rule, neither a governmental entity nor a private landowner is liable for injuries caused by a natural accumulation of ice, snow, or water on public or private premises—even if the landowner is aware that the accumulation is hazardous.³ At the time Illinois adopted this rule, it followed the lead set in other states that governmental entities should not be held liable for injuries resulting from ice and snow on their streets and sidewalks.⁴

Nevertheless, several appellate decisions properly note that many other states have now come out against the natural accumulation rule.⁵ Furthermore, policies which may have once justified the rule are arguably no longer valid, particularly insofar as the rule applies to private parties.⁶ In fact, one appellate decision concluded that a key Illinois Supreme Court opinion on the matter is antiquated.⁷ These

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1. 418 N.E.2d 35 (Ill. App. 4th Dist. 1981).

2. *Id.*

3. *Id.* at 36.

4. *Graham v. City of Chicago*, 178 N.E. 911, 912-13 (Ill. 1931). For further discussion of *Graham*, see *infra* notes 8-15 and accompanying text.

5. See, e.g., *Watson v. J.C. Penney Co.*, 605 N.E.2d 723, 725 (Ill. App. 4th Dist. 1992) (observing that Alaska, Maine, and Michigan have overruled the natural accumulation rule), *appeal denied*, 612 N.E.2d 525 (Ill. 1993); *Smalling v. LaSalle Nat'l Bank*, 433 N.E.2d 713, 715 (Ill. App. 4th Dist. 1982) (observing that Alaska, Colorado, Michigan, and Oregon have abandoned the rule). For further analysis, see *infra* part VII and appendix.

6. For further discussion, see *infra* parts VIII-IX. For example, the *Hankla* court noted that Illinois courts have not defined just what makes an accumulation a "natural" one. *Hankla v. Burger Chef Sys., Inc.*, 418 N.E.2d 35, 36 (Ill. App. 4th Dist. 1981).

7. *Lansing v. County of McLean*, 359 N.E.2d 165, 169 (Ill. App. 4th Dist. 1977) ("This writer is of the opinion that [*Strappelli v. City of Chicago*, 20 N.E.2d 43 (Ill.

justifications warrant a reexamination of the natural accumulation rule.

This Article examines the natural accumulation rule in detail and analyzes whether it is still appropriate for Illinois. Part II of this Article traces the origin of the rule in Illinois as a rule used primarily to exonerate governmental entities. In Parts III and IV, this Article discusses how the Illinois Appellate Court has expanded this rule to exonerate private parties. Parts V and VI examine two methods by which plaintiffs can avoid the rule: (1) by proving that the hazard was artificial, or (2) by showing that the defendant voluntarily assumed a duty and performed it negligently. In Part VII, this Article examines the rule as applied in other states, and in Part VIII, this Article evaluates the rule's shortcomings. Finally, Parts IX and X conclude that although the rule has no justification as applied to governmental entities, it is particularly inappropriate as applied to private parties and should be abolished.

II. HISTORICAL ORIGIN: LIABILITY ON GOVERNMENT PROPERTY

In 1931, in *Graham v. City of Chicago*,⁸ the Illinois Supreme Court resolved appellate court uncertainty by holding that a city is only liable for injuries arising from the failure to remove snow and ice from its streets and sidewalks when the dangerous conditions which resulted from the snow and ice were produced by "artificial" causes.⁹ In *Graham*, public school authorities flooded a schoolyard during freezing weather in order to provide a skating area for students.¹⁰ During this process, however, the school authorities allowed water to overflow onto a sidewalk on which the plaintiff slipped thirteen days later.¹¹

Noting that other states had exonerated cities for injuries resulting from "natural accumulations" of snow and ice on their streets and sidewalks,¹² the Illinois Supreme Court observed that it would be

1939)], a case decided in 1939, properly fits the circumstances of that time, but that it is ill-suited to today's conditions in which governmental units possess the means to neutralize dangerous conditions arising from prolonged accumulations of ice on highways."), *aff'd on other grounds*, 372 N.E.2d 822 (Ill. 1978). Nevertheless, another appellate court has disagreed with this, maintaining that the rule is still appropriate. See *Williams v. Lincoln Towers Assocs.*, 566 N.E.2d 501, 503 (Ill. App. 2d Dist.), *appeal denied*, 575 N.E.2d 925 (Ill. 1991).

8. 178 N.E. 911 (Ill. 1931).

9. *Id.* at 913.

10. *Id.* at 912.

11. *Id.* at 913.

12. *Id.* at 912.

“unreasonable to compel a city to expend the money and perform the labor necessary to keep its walks reasonably free from [natural accumulation of] ice and snow during winter months.”¹³ The *Graham* court emphasized that immunity under these circumstances must be limited to cases in which the ice and snow result from natural causes.¹⁴ Because the city in this case not only flooded the sidewalk, but also allowed the ice to remain on the sidewalk for thirteen days after actual notice of the dangerous condition, the supreme court found the city liable for the plaintiff’s injuries.¹⁵

In *Riccitelli v. Sternfeld*,¹⁶ the Illinois Supreme Court expanded the rule to exonerate private citizens as well.¹⁷ In *Riccitelli*, the defendants, gasoline station operators, had cleared away snow from their driveways and public sidewalks, piling the snow along each side of the public’s path.¹⁸ Alternate freezes and thaws caused ice to form on the sidewalks, and although the defendants placed rock salt along the walks, the salt did not keep the plaintiff from slipping and falling.¹⁹ The supreme court concluded that the defendants were not liable, although it failed to classify the hazard as natural.²⁰ *Riccitelli* appears

13. *Id.* at 913. The supreme court later applied this “natural accumulation rule” to exonerate the City of Chicago for severe injuries suffered by a passenger who fell on an icy safety island and slipped under a streetcar. *Strappelli v. City of Chicago*, 20 N.E.2d 43, 44 (Ill. 1939) (“The snow and ice on the safety island in question accumulated as a result of natural causes and the condition was undoubtedly a general one throughout the city on the day of the injury.”).

14. *Graham*, 178 N.E.2d at 913. The supreme court stated:

[T]he rule must be predicated on the formation of ice from natural causes, for it would be neither unreasonable, impracticable, nor expensive, as a general proposition, to compel the removal of ice from sidewalks which was produced by artificial causes. It is the generality of a situation resulting from natural causes that gives rise to the rule. Without that generality there would be no reason for the rule. There is no more cause for excusing a city from liability where damages have accrued from ice which has formed on a walk in an unnatural way than there is to excuse it from damages when a walk has been permitted to become defective from any other cause.

Id.

15. *Id.* (explaining that “[t]he city’s liability did not arise from the mere flooding of the sidewalk, but from its neglect to remove the ice which had formed there in an artificial way and its omission to make the place reasonably safe after notice of the dangerous condition.”).

16. 115 N.E.2d 288 (Ill. 1953).

17. *Id.* at 290. It is significant that although the Illinois Appellate Court has extended the rule to immunize private parties in other cases, see *infra* parts III-IV, the Illinois Supreme Court has only examined the rule for private parties in the context of public roads and sidewalks.

18. *Riccitelli*, 115 N.E.2d at 289.

19. *Id.* at 289-90.

20. *Id.* at 290. As the supreme court noted:

to have been motivated less by logic than by the policy that citizens should be encouraged to clear away snow and ice from public ways, especially because these citizens have no legal obligation to do so.²¹

The Illinois General Assembly has also addressed this problem by passing two statutes affecting the application of this rule. In 1965, Illinois enacted the Local Governmental and Governmental Employees Tort Immunity Act²² (the "Tort Immunity Act") which essentially codified the natural accumulation rule as it applied to public entities.²³ Under the Tort Immunity Act, "[n]either a local public entity nor a public employee is liable for an injury caused by the effect of weather conditions . . . on . . . public ways."²⁴ In addition, in 1979, Illinois enacted the Snow Removal Act²⁵ to immunize private citizens from liability arising from their negligent attempts to remove ice and snow from public sidewalks adjoining their residences.²⁶

In one sense, both the Tort Immunity Act and the Snow Removal Act provide broader immunity than the common law rule because

Whether or not the snow which melted to form the ice on which the plaintiff slipped came from snow which had been shoveled off the walk or snow which had been removed from plaintiff's driveway no one can say. Suffice it to say, that to form the ice in question the snow had to melt and run from piles which had been banked during a snow-removal operation. This ice could have been formed by the snow which the city pushed up over the curb from the street. Certainly, there is no showing of any act on the part of defendants which places upon them the liability for this injury.

Id.

21. *See id.* The supreme court repeated the First Appellate District's statement that "[t]he general assumption is that the industry displayed by citizens removing snow after a snowfall is desirable, if not necessary." *Id.* (quoting *Riccitelli v. Sternfeld*, 109 N.E.2d 921, 922 (Ill. App. 1st Dist. 1952), *aff'd*, 115 N.E.2d 288 (Ill. 1953)).

22. 1965 Ill. Laws 2983, §§ 1-101 to 10-101 (codified as amended at ILL. COMP. STAT. ANN. ch. 745, §§ 10/1-101 to 10/10-101 (West 1993)).

23. *See* ILL. COMP. STAT. ANN. ch. 745, § 10/3-105(a) (West 1993). In contrast, the general principle expressed in the Tort Immunity Act is that a municipality owes a duty of reasonable care in maintaining its property for individuals using the property in a reasonably foreseeable manner. *Id.* § 10/3-102(a).

24. *Id.* § 10/3-105(a).

Neither a local public entity nor a public employee is liable for an injury caused by the effect of weather conditions as such on the use of streets, highways, alleys, sidewalks or other public ways. . . . For the purpose of this section, the effect of weather conditions as such includes but is not limited to the effect of wind, rain, flood, hail, ice or snow but does not include physical damage to or deterioration of streets

Id.

25. P.A. 81-591, §§ 1 to 2, 1979 Ill. Laws 2328 (codified at ILL. COMP. STAT. ANN. ch. 745, §§ 75/0.01 to 75/2 (West 1993)).

26. *See* ILL. COMP. STAT. ANN. ch. 745, § 75/1 (West 1993); *see also infra* notes 110-11 and accompanying text.

neither distinguishes between natural and artificial snow or ice.²⁷ Yet, at the same time, the Tort Immunity Act expressly permits liability where the weather conditions caused physical damage or deterioration of public ways or traffic signals.²⁸ Furthermore, the Snow Removal Act preserves liability when private landowners willfully or wantonly impose snow or ice hazards upon pedestrians.²⁹

Interpreting the provisions of the Tort Immunity Act, the Illinois Supreme Court, in *Lansing v. County of McLean*,³⁰ upheld a motion to dismiss a wrongful death claim resulting from a driver whose automobile swerved out of control on a sheet of highway ice and crashed into a culvert.³¹ The *Lansing* complaint alleged that the county failed to remove or warn of ice and slush which had accumulated on the highway two days earlier, even though the same highway was free of snow and ice in a neighboring county.³² In reversing the demurrer, the *Lansing* court held that under the terms of the Tort Immunity Act, the county waived any immunity it might have had by virtue of purchasing liability insurance to cover this type of incident.³³ Despite this waiver, however, the supreme court denied recovery by concluding that the natural accumulation rule predated the statute and provided a separate common law defense.³⁴

27. See ILL. COMP. STAT. ANN. ch. 745, § 10/3-105 (the Tort Immunity Act); *id.* § 75/2 (the Snow Removal Act); *cf.* *Bellino v. Village of Lake in the Hills*, 520 N.E.2d 1196, 1197-98 (Ill. App. 2d Dist. 1988) (exonerating the village under the Tort Immunity Act despite the plaintiff's claims that piling snow into mounds during a removal process resulted in an unnatural accumulation).

28. ILL. COMP. STAT. ANN. ch. 745, § 10/3-105(a). In practice, it may be difficult to distinguish between an "effect" of weather conditions, for which no liability exists, and "physical damage or deterioration" of property resulting from weather conditions, for which liability does exist. See *Ciochon v. Bellino*, 540 N.E.2d 840 (Ill. App. 1st Dist. 1989) (finding a question of fact whether the malfunction of street lights was an "effect" of weather conditions or the result of "physical damage").

29. See ILL. COMP. STAT. ANN. ch. 745, § 75/2.

30. 372 N.E.2d 822 (Ill. 1978).

31. *Id.* at 824.

32. *Id.*

33. *Id.* at 825. The supreme court had previously held that if a public entity is insured, then the Tort Immunity Act provides a waiver from any immunity it otherwise may have. *Id.* (citing *Sullivan v. Midlothian Park Dist.*, 281 N.E.2d 659 (Ill. 1972)).

34. *Id.* at 826. The supreme court observed that "[t]he rule announced in *Graham* and *Strappelli* did not indeed rest on a doctrine of governmental immunity, but rather upon the absence of liability in circumstances where the defendant had taken no action contributing to the injury." *Id.* (citing *Graham*, 178 N.E. 911, and *Strappelli*, 20 N.E.2d 43).

After holding that the natural accumulation rule applied to the case, the supreme court held that the county had no duty to warn motorists of the condition of the highway. *Id.* at 827. Furthermore, the supreme court observed that the complaint alleged no facts showing that the county had actual or constructive notice of the conditions on the

The entrenchment of the natural accumulation rule can best be seen in cases involving common carriers. Normally, a common carrier, such as an airline or a bus service, owes its passengers not just a duty of ordinary care, but a duty of the highest care.³⁵ Notwithstanding this general principle, Illinois courts have uniformly ruled that the natural accumulation rule supersedes the elevated duty of common carriers.³⁶

III. BEYOND LIABILITY ON GOVERNMENT PROPERTY: LANDLORD-TENANT

Significantly, the Illinois Supreme Court has only used the natural accumulation rule in decisions involving public roads and sidewalks.³⁷ In 1952, however, the Second District of the Illinois Appellate Court, aware that it was treading upon new ground,³⁸ held that a private landlord owed no duty to remove ice and snow accumulating from natural causes on a common private sidewalk shared by all tenants.³⁹ In *Cronin v. Brownlie*,⁴⁰ the appellate court extended the natural accumulation rule to exonerate private landlords, without analyzing in detail whether the same policies that justified immunizing governmental entities also justified extending the rule to private landlords.⁴¹

highway in sufficient time to provide a warning. *Id.*

35. *E.g.*, *Serritos v. Chicago Transit Auth.*, 505 N.E.2d 1034, 1038 (Ill. App. 1st Dist.), *appeal denied*, 515 N.E.2d 127 (Ill. 1987).

36. *See, e.g.*, *Sheffer v. Springfield Airport Auth.*, 632 N.E.2d 1069, 1071 (Ill. App. 4th Dist. 1994) (holding that a municipal airport authority owes no duty to its passengers to clean away natural ice from either the tarmac or the pathway leading to the airport terminal); *Serritos*, 505 N.E.2d at 1039 (holding that a municipal transit system has neither a duty to clear its vehicles of natural precipitation nor a duty to warn its passengers of the dangerous conditions). Illinois courts have also extended the no-duty ruling to the owners of non-municipal building elevators, who also traditionally owed the duty of highest care to their passengers. *Shoemaker v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 543 N.E.2d 1014, 1017 (Ill. App. 1st Dist. 1989).

37. *But see* *McElligott v. Illinois Cent. R.R.*, 227 N.E.2d 764, 770 (Ill. 1967) (admitting that "[a] railroad has no greater duty than a municipality to remove or otherwise offset the effect of natural accumulations of snow or ice from that part of its right of way not encompassed by its crossings and approaches.").

38. *Cronin v. Brownlie*, 109 N.E.2d 352, 354 (Ill. App. 2d Dist. 1952) ("We find no cases in Illinois exactly in point. The authorities throughout the country appear to be divided.").

39. *Id.* at 356. The Snow Removal Act applies only when the injury occurs on a public sidewalk. *See* ILL. COMP. STAT. ANN. ch. 745, § 75/2; *see also supra* notes 25-26 and accompanying text.

40. 109 N.E.2d 352 (Ill. App. 2d Dist. 1952).

41. Instead, the appellate court examined cases in other states exonerating landlords and concluded that, because ice and snow are common in our climate, landlords should not be liable unless they create a greater danger than was brought about naturally. *See id.* at 355-56. The court stated:

In our northern climate where ice and snow come frequently and are accepted by

Cronin and its progeny are an exception to the general rule that in maintaining common areas, a landlord owes a duty of reasonable care to all people lawfully on the premises.⁴²

The extension of the natural accumulation rule to cover landlords did not go uncontested. In *Durkin v. Lewitz*,⁴³ the Second Division of the First Appellate District disagreed with the Second Appellate District's conclusion in *Cronin*.⁴⁴ On similar facts,⁴⁵ the *Durkin* court rejected the rule approved in *Cronin*.⁴⁶ Instead, the appellate court in *Durkin* promulgated a different rule: landlords must use reasonable care to keep their premises reasonably safe, including using reasonable care to remove natural snow and ice hazards.⁴⁷ The *Durkin* court observed that although the rule adopted in *Cronin* is considered by some to be the majority rule, the authorities appeared to be equally divided and that many cases cited as support for the rule do not truly support it.⁴⁸

all, it appears to us that the rule adopted by the majority of the states finding no liability against the landlord is more reasonable and persuasive than the minority view. Applying the majority rule [in other jurisdictions] to the facts in the instant case, it appears to us to be unreasonable and somewhat impractical to require a landlord to remove ice and snow from sidewalks used jointly by his tenants where the ice and snow arise from natural causes.

Id. at 356.

42. *E.g.*, *Murphy v. Illinois State Trust Co.*, 31 N.E.2d 305, 307 (Ill. 1940); *accord* *Kuhn v. General Parking Corp.*, 424 N.E.2d 941, 945 (Ill. App. 1st Dist. 1981). The Illinois Appellate Court has agreed with the position taken by the Restatement (Second) of Torts § 361 (1965), subjecting a landlord to liability for physical harm caused by a dangerous condition on that portion of the land within the landlord's control, if by reasonable care the landlord could have discovered the condition and made it safe. *E.g.*, *Magnotti v. Hughes*, 373 N.E.2d 801, 803 (Ill. App. 5th Dist. 1978).

43. 123 N.E.2d 151 (Ill. App. 1st Dist. 1954).

44. *See id.* at 155-56.

45. In *Durkin*, the plaintiff was a household employee of the tenants who fell on loose ice on the landing of an apartment building's second floor. *Id.* at 153. Neither the court nor the defendants disputed the plaintiff's claim that the ice resulted from a defective roof gutter. *Id.*

46. *Id.* at 155-56. In a thorough analysis, the *Durkin* court referred to the rule approved in *Cronin* as the "Massachusetts rule" which holds that the failure to remove snow and ice poses no liability. *Id.* at 155 (citing *Cronin*, 109 N.E.2d 352). The *Durkin* court opined that although the rule may be appropriate in Massachusetts, which only requires landlords to maintain the premises as they existed at the time of the letting, it is inappropriate for Illinois, which requires landlords to use reasonable care in maintaining the premises. *See id.* at 155-56.

47. *Id.* at 156. In contrast to the Massachusetts rule, the *Durkin* court referred to its rule as the "Connecticut rule." *Id.* Under the Connecticut rule, a landlord is not automatically exempted from liability for injuries caused by the natural accumulation of precipitation, and must instead use due care in maintaining its premises. *Id.*

48. *Id.* at 155. The *Durkin* court hedged its ruling by observing that even if the Massachusetts rule were applied instead of the Connecticut rule, a duty still existed because the ice in question was an "artificial" formation caused by a defective gutter. *Id.* at 157.

The *Durkin* court's attempt to disavow the natural accumulation rule, however, did not stand; two other divisions of the First Appellate District rejected the *Durkin* approach in favor of the natural accumulation rule. The Third Division concluded that the *Durkin* approach would place a "virtually impossible" burden on landlords, and further correctly noted that the *Durkin* approach was dictum because an artificial condition existed in that case.⁴⁹ The Fifth Division attacked the *Durkin* approach on the ground that, unlike physical defects, landlords could not foresee or control intermittent natural occurrences such as snow and ice, especially considering the "climatic vagaries of this area with its unpredictable snowfalls and frequent temperature changes."⁵⁰ Thus, the natural accumulation rule has prevailed in landlord-tenant cases.

Notwithstanding the natural accumulation rule, a landlord may be held liable in three situations. First, liability may arise when a landlord artificially accumulates snow or ice or aggravates a natural accumulation.⁵¹ Second, liability may arise when a landlord negligently attempts to remove the hazard.⁵² Finally, liability may arise when a landlord has assumed the duty by contract with the tenant.⁵³

In practice, however, these loopholes may be illusory for most tenant plaintiffs.⁵⁴ For cases involving natural snow or ice hazards,

49. *Chisolm v. Stephens*, 365 N.E.2d 80, 87-88 (Ill. App. 1st Dist. 1977) (stating that "dicta in *Durkin* was expressly rejected by this court in *Foster v. George J. Cyrus & Co.* [, 276 N.E.2d 38 (Ill. App. 1st Dist. 1971)]"); see also *supra* notes 42, 45 (explaining that although landlords in Illinois owe a duty of reasonable care for dangerous conditions, such a duty was irrelevant in *Durkin* because, in that case, the hazardous condition was artificial).

50. *Gehrman v. Zajac*, 340 N.E.2d 184, 186 (Ill. App. 1st Dist. 1975); see also *Lewis v. W.F. Smith & Co.*, 390 N.E.2d 39, 43 (Ill. App. 1st Dist. 1979) (upholding the natural accumulation rule for landlords).

51. *Williams*, 566 N.E.2d at 503. For example, one court held that where moisture from piled-up snow drained onto a parking lot and refroze, and the defendant did not place salt or cinders on the ice, the accumulation was unnatural. *Webb v. Morgan*, 531 N.E.2d 36, 39 (Ill. App. 5th Dist. 1988), *appeal denied*, 535 N.E.2d 922 (Ill. 1989). For further discussion of this area of liability, see *infra* part V.

52. *Webb*, 531 N.E.2d at 39. For example, a landlord who voluntarily clears accumulated snow in a parking lot assumes a duty to use ordinary care in the removal. *Sims v. Block*, 236 N.E.2d 572, 575-76 (Ill. App. 2d Dist. 1968); *accord* *Cupp v. Nelson*, 282 N.E.2d 513, 515 (Ill. App. 1st Dist. 1972). For further discussion, see *infra* part VI.

53. *Cupp*, 282 N.E.2d at 515.

54. *Williams* illustrates the frustrations experienced by many tenant plaintiffs. In that case, the tenant plaintiff alleged that her landlord orally required tenants to clean off snow from their automobiles before their parking lot would be plowed. *Williams*, 566 N.E.2d at 502. The plaintiff, who was elderly, alleged that she was injured when she tripped on natural snow while cleaning off her automobile. *Id.* Since the plaintiff did not allege that the snowplowing was done negligently, nor that her landlord coerced her

injured tenants may have problems in attempting to impose a duty on their landlords to remove a natural accumulation hazard based either on a contract or a prior gratuitous undertaking. For example, even if a landlord has removed snow or ice on prior occasions, the landlord has no duty to continue removal, whether or not the tenant relied on the past practice.⁵⁵ Furthermore, in cases where a landlord is expressly bound by contract to remove the natural hazard from common areas, a tort duty does not arise unless the landlord fails to use due care in performing the covenant.⁵⁶ Even in this instance, however, the landlord must be given a reasonable period of time in which to remove the accumulation.⁵⁷

IV. BEYOND LANDLORD-TENANT: GENERAL PREMISES LIABILITY

Just as the Illinois Appellate Court has extended the rule to exonerate landlords, it has also extended the natural accumulation rule to all premises liability cases. This rule serves as an exception to the general doctrine that a business invitor owes a duty of ordinary and reasonable care in protecting invitees against hazards of the premises.⁵⁸ In 1968, in *Sims v. Block*,⁵⁹ the Second District Appellate Court explicitly

to clean her car with threats of eviction, the court upheld the decision granting the defendant's motion to dismiss. *Id.* at 503-05.

55. See *Cronin*, 109 N.E.2d at 356. In *Chisolm*, the appellate court explained that when a landlord gratuitously removes the accumulation, this does not create a duty to act similarly in the future, but only a duty that the removal must be performed with due care. 365 N.E.2d at 85-86.

56. See *Tressler v. Winfield Village Coop.*, 481 N.E.2d 75, 77 (Ill. App. 4th Dist. 1985). After the original lease is signed, any new promise made by a landlord to remove natural hazards will not create a contractual duty unless the new promise is supported by new consideration. *Chisolm*, 365 N.E.2d at 84.

57. See *Tressler*, 481 N.E.2d at 77.

58. *Ward v. K Mart Corp.*, 554 N.E.2d 223, 229 (Ill. 1990) ("It must be remembered that under our Premises Liability Act, and at least nominally under the common law, the landowner's or occupier's duty toward his invitees is that of reasonable care."); *Genaust v. Illinois Power Co.*, 343 N.E.2d 465, 472 (Ill. 1976) ("A possessor of land owes an invitee a duty of exercising reasonable care to discover dangerous conditions on his land."); *Stephen v. Swiatkowski*, 635 N.E.2d 997, 1001 (Ill. App. 1st Dist. 1994) ("An owner or occupier of property has a duty to invitees to use reasonable care to maintain the premises in a reasonably safe condition."); cf. *Perminas v. Montgomery Ward & Co.*, 328 N.E.2d 290, 294 (Ill. 1975) (holding that once an invitor is aware of a dangerous condition on his premises, a duty arises either to correct or to warn). In fact, Illinois has adopted the position of the Restatement (Second) of Torts § 343 (1965) that the invitor's duty of reasonable care for conditions on the premises extends to those whom the invitor should expect will not realize the danger or will fail to protect themselves against it. *Ward*, 554 N.E.2d at 229.

59. 236 N.E.2d 572 (Ill. App. 2d Dist. 1968).

concluded that landlords and business inviters should be held to the same standard of care in removing natural accumulations.⁶⁰ In addition, although landowners previously owed licensees substantially narrower duties than they owed invitees,⁶¹ this distinction no longer exists in Illinois under the Premises Liability Act⁶² which imposes the same duty of reasonable care on each.⁶³ Consequently, Illinois courts now treat all those lawfully on the premises equally, and therefore,

60. *Id.* at 575. In *Sims*, which involved the alleged negligence of a landlord in maintaining a parking lot, the Illinois Appellate Court reasoned:

[W]e feel that the standard of care required of a landlord who provides a parking lot for the convenience of his tenants, in no sense varies from the standard of care applicable in those instances wherein a store makes a parking lot available for its customers.

In both cases the parking lot is a convenience designed to attract the customers to the store and the tenants to the apartments. We believe, therefore, that each relationship dictates the application of a similar rule as to the care required.

Id.

The seeds of this extension, however, date much further back. *See, e.g., Kelly v. Huyvaert*, 56 N.E.2d 638, 639-40 (Ill. App. 2d Dist. 1944) ("Our attention has been called to no case wherein the property owner has been held liable when the icy condition had been general throughout the neighborhood and was not aggravated, or caused in any way by the property owner, but where the same had been caused by nature."). *But cf. Murray v. Bedell Co.*, 256 Ill. App. 247, 250 (Ill. App. 1st Dist. 1930) (assuming a business invitor had a general duty of care to remedy a natural accumulation but implicitly resting its decision for the invitor on assumption of risk or contributory negligence).

61. *Ward*, 554 N.E.2d at 227.

62. ILL. COMP. STAT. ANN. ch. 740, § 130/2; *see also Ward*, 554 N.E.2d at 227 (noting the "substantially narrower duties" owed licensees were changed when Illinois enacted the Premises Liability Act in 1984).

63. *See* ILL. COMP. STAT. ANN. ch. 740, § 130/2. Notwithstanding the Premises Liability Act, trespassers, including children, continue to be treated differently. *See id.* § 130/3 ("Nothing herein affects the law as regards any category of trespasser, including the trespassing child entrant.").

In *Harkins v. System Parking, Inc.*, 542 N.E.2d 921, 922-23 (Ill. App. 1st Dist. 1989), an allegedly trespassing plaintiff sued when she slipped and fell on the rutted ice in the defendant's parking lot. The *Harkins* court ultimately exonerated the defendant for two reasons: (1) as a trespasser, the plaintiff needed to allege willful and wanton misconduct by the defendant, and (2) she failed to show that the defendant artificially created the condition of the lot. *Id.* at 923-24. In such cases, the lack of a duty seems obvious; a duty for a natural accumulation is not even owed those lawfully on the premises, such as tenants or invitees. *See supra* notes 54-55 and accompanying text. Instead, *Harkins* followed the Illinois position that the only common law duty owed an adult trespasser is to refrain from willful and wanton injury, unless the landowner or occupier discovers the trespasser, tolerates habitual trespass, or operates a highly dangerous artificial condition on the premises. *Harkins*, 542 N.E.2d at 924; *see also Lee v. Chicago Transit Auth.*, 605 N.E.2d 493, 498-99 (Ill. 1992) (restating the Illinois rule that a landowner merely owes trespassers the duty to refrain from willfully and wantonly injuring them, unless the landowner discovers, tolerates, or knows about the trespasser).

exonerate landowners and business owners from liability caused by natural hazards.

As one might expect, therefore, appellate courts have carved out the same exceptions to the natural accumulation rule for those lawfully on the premises as it has for tenants. A tenant, invitee, or anyone lawfully on the land may try to show that the accumulation was artificial or has become aggravated in some way so that it is no longer truly natural.⁶⁴ Failing that frontal attack, those lawfully on the land have only two other options: (1) to allege the landowner's breach of a contractual obligation,⁶⁵ or (2) to show that the landowner voluntarily and gratuitously undertook to remove the natural accumulation of precipitation and did so negligently.⁶⁶

V. NATURAL OR ARTIFICIAL ACCUMULATION?

The most direct way for a plaintiff to avoid the natural accumulation rule is to show that the injury was caused either by an artificial hazard or by an aggravation of a natural hazard. In this instance, however, the plaintiff has the further burden of proving a link between the injury and the hazard; merely inviting speculation about the link is insufficient.⁶⁷ For example, ice and snow made jagged and bumpy by pedestrian trampling will not be considered an artificial condition created by a defendant who did not cause it but may have known about it.⁶⁸

64. See *supra* notes 45-48 and accompanying text. *Stypinski v. First Chicago Bldg. Corp.*, 574 N.E.2d 717, 718 (Ill. App. 1st Dist. 1991) (“[A] landowner does have a duty, and therefore may be liable when injuries occur as a result of an unnatural or artificial accumulation of snow and ice or a natural condition aggravated by the owner.”); *accord Choi v. Commonwealth Edison Co.*, 578 N.E.2d 33, 37 (Ill. App. 1st Dist.), *appeal denied*, 584 N.E.2d 127 (Ill. 1991).

65. This alternative is chimerical, however, because the typical contractual obligation to remove a natural accumulation is part of a contract between the invitor and a third party, such as a snow removal service. *Wells v. Great Atl. & Pac. Tea Co.*, 525 N.E.2d 1127, 1131 (Ill. App. 1st Dist. 1988). Therefore, the breach of a contractual duty between the landowner and the third party does not give rise to a tort duty on behalf of the invitee. *Id.* at 1131-32. This strongly contrasts with the landlord-tenant situation where any contractual obligation to remove a natural accumulation exists in favor of the tenant and may provide the basis for a tort duty. See *id.*

66. See *infra* part VI.

67. See, e.g., *Madeo v. Tri-Land Properties, Inc.*, 606 N.E.2d 701, 704 (Ill. App. 2d Dist. 1992) (finding no “concrete evidence” linking snow piled from defendants’ plow to a formation of ice which caused the plaintiff’s fall).

68. *Strappelli*, 20 N.E.2d at 44. As the *Strappelli* court stated:

The snow and ice on the safety island in question accumulated as a result of natural causes. . . . Snow when trampled upon by many pedestrians and when subject to alternate thawing into slush and freezing forms itself, when frozen hard, into irregular mounds which become slippery and difficult at times to

The indispensable crux of the natural accumulation rule is the often amorphous distinction between a natural accumulation and an artificial one. For a court to classify a hazard as artificial, it must have an identifiable cause attributable to the defendant, such as a leaky roof⁶⁹ or other overhead structure,⁷⁰ an excessively sloping⁷¹ or irregularly surfaced parking lot,⁷² or an improperly constructed sidewalk.⁷³ In practice, however, the distinction itself seems more often artificial than natural. As one court lamented: "The parties have not cited, nor have we found, an Illinois court which has detailed the differences between natural and unnatural accumulations."⁷⁴ Too often the distinction is in the eye of the beholder. The Fifth Appellate District has realistically reasoned that, in natural accumulation cases, everything turns on the facts rather than the way in which the rule is expressed.⁷⁵ Given the pervasive uncertainty about the basic distinction, it is not surprising that the Fifth Appellate District would leave the distinction to the jury as a question of fact whenever possible.⁷⁶

walk upon.

Id.; accord *Erasmus v. Chicago Hous. Auth.*, 407 N.E.2d 1031, 1033 (Ill. App. 1st Dist. 1980) ("[P]edestrian traffic that, presumably, created the rutted and uneven [ice] surface cannot be considered 'unnatural' on an urban sidewalk.").

69. *E.g.*, *Lapidus v. Hahn*, 450 N.E.2d 824 (Ill. App. 1st Dist. 1983).

70. *E.g.*, *Linde v. Welch*, 420 N.E.2d 490 (Ill. App. 1st Dist. 1981).

71. *E.g.*, *McCann v. Bethesda Hosp.*, 400 N.E.2d 16 (Ill. App. 1st Dist. 1980).

72. *E.g.*, *Wolter v. Chicago Melrose Park Assocs.*, 386 N.E.2d 495 (Ill. App. 1st Dist. 1979).

73. *E.g.*, *Stroyeck v. A.E. Staley Mfg.*, 167 N.E.2d 689 (Ill. App. 3d Dist. 1960); see also *Gilberg v. Toys "R" Us, Inc.*, 467 N.E.2d 947, 949-50 (Ill. App. 1st Dist. 1984) (requiring an identifiable cause attributable to the defendant). In one case, a court deemed a hazard artificial where the defendant piled snow around light posts, where it melted, drained onto a parking lot, and froze. *Johnson v. National Super Mkts., Inc.*, 630 N.E.2d 934, 938 (Ill. App. 5th Dist. 1994).

Thus, where a plaintiff slipped and fell on water located on an exit ramp inside a laundromat, an appellate court considered the hazard natural because nothing indicated whether the water was natural water tracked in from outside or unnatural water from one of the washing machines. *Branson v. R & L Inv., Inc.*, 554 N.E.2d 624, 629 (Ill. App. 1st Dist. 1990). Another appellate court reached the same legal result where a plaintiff slipped and fell as a result of walking in a "frosty" parking lot, but could not show whether the precipitation was natural or the result of the defendant rinsing a bakery truck in the vicinity. *Finn v. Dominick's Finer Foods, Inc.*, 614 N.E.2d 358, 360 (Ill. App. 1st Dist. 1993).

74. *Hankla v. Burger Chef Sys., Inc.*, 418 N.E.2d 35, 36 (Ill. App. 4th Dist. 1981); see also *Watson v. J.C. Penney Co.*, 605 N.E.2d 723, 727 (Ill. App. 4th Dist. 1992) (Knecht, J., dissenting) ("The trend of modern cases is to reject the natural accumulation of snow and ice rule. One reason may be no one understands the difference between a natural accumulation of ice and snow, and an unnatural accumulation.").

75. *Webb v. Morgan*, 531 N.E.2d 36, 39 (Ill. App. 5th Dist. 1988), *appeal denied*, 535 N.E.2d 922 (Ill. 1989).

76. The Fifth Appellate District has held that whether a hazard is natural or artificial

Many Illinois cases involve the problems of snow, ice, or rain falling naturally outside a business and being tracked inside the establishment. Illinois courts have uniformly held that absent some pre-existing defect in the floor, tracking natural precipitation into a business does not make the hazard artificial.⁷⁷ Similarly, snow or ice naturally accumulating on a sloping incline does not become an artificial hazard, even on a ramp with a thirty-degree grade.⁷⁸ Nevertheless, if a foreign substance such as oil, grease, or garden soil becomes mixed with the tracked-in moisture, a jury may find that the total hazard was artificial.⁷⁹

With the continuing construction of high-rise buildings in congested municipalities like Chicago, the question of duty for severe injuries caused by natural accumulations of snow and ice tumbling from the roofs and facades is likely to become a greater legal problem in the future.⁸⁰ If man-made structures, such as sidewalks, ramps, and sloping parking lots, do not normally turn a natural accumulation into an artificial one, it seems that the same result should follow for snow

is a question of fact for the jury to decide. *Endsley v. Harrisburg Medical Ctr.*, 568 N.E.2d 470, 472 (Ill. App. 5th Dist. 1991) (rejecting *Spirn v. Joseph*, 493 N.E.2d 1197 (Ill. App. 3d Dist. 1986) (finding the issue to be a question of law)).

77. *E.g.*, *Stypinski v. First Chicago Bldg. Corp.*, 574 N.E.2d 717, 718-19 (Ill. App. 1st Dist. 1991); *see Choi v. Commonwealth Edison Co.*, 578 N.E.2d 33, 37 (Ill. App. 1st Dist.), *appeal denied*, 584 N.E.2d 127 (Ill. 1991); *Wilson v. Gorski's Food Fair*, 554 N.E.2d 412, 414 (Ill. App. 1st Dist. 1990); *Handy v. Sears, Roebuck & Co.*, 538 N.E.2d 846, 848 (Ill. App. 1st Dist. 1989).

78. *See, e.g.*, *Selby v. Danville Pepsi-Cola Bottling Co.*, 523 N.E.2d 697, 701 (Ill. App. 4th Dist.), *appeal denied*, 530 N.E.2d 264 (Ill. 1988) ("Plaintiff in essence asked this court to impose a duty to guard against the dangers of a nondefective slope when that slope is covered by natural ice or snow. This is contrary to Illinois law."); *Smalling v. LaSalle Nat'l Bank*, 433 N.E.2d 713, 714 (Ill. App. 4th Dist. 1982); *Greenwood v. Leu*, 302 N.E.2d 359, 363-64 (Ill. App. 5th Dist. 1973). *But see McCann*, 400 N.E.2d at 20-21 (holding that a seven percent incline presented a question of fact).

79. *See Swartz v. Sears, Roebuck & Co.*, 636 N.E.2d 642, 649 (Ill. App. 1st Dist.) (oil and grease), *appeal denied*, 622 N.E.2d 1228 (Ill. 1993); *Johnson v. Sears, Roebuck & Co.*, 542 N.E.2d 841, 843 (Ill. App. 1st Dist. 1989) (garden soil).

80. A pending trial court case involves a pedestrian killed by a chunk of ice falling from a Chicago department store. *Larsen v. Neiman-Marcus Group*, No. 94 L 4091C, (Ill. Cir. Ct. Cook County filed Mar. 8, 1994). Contemporary architecture, featuring sloping glass roofs and inclined glass walls, creates in snowfall areas "the very real hazard of snow and ice accumulating on these slopes and falling on pedestrians below." *Sliding Snow: A Challenge*, MICROCLIMATE NEWSLETTER (Morrison Hershfield Ltd.), 1985, vol. 1 at 1-2. Snow rails to avoid icicle formation, snow-retaining devices for sills, and heat-tracing to prevent ice and snow build-up are some ways of preventing ice and snow from falling from buildings. Michael F. Lepage & Colin J. Williams, *Cold Room Studies for Snow and Ice Control on Buildings 1* (Rowan, Williams, Davies & Irwing, Inc., Guelph, Ontario Canada) (July 19, 1994) (unpublished manuscript, on file with author) ("The trend toward sloping roofs on high-rises, malls, schools and other structures has increased the risk of sliding snow or ice in many North American cities.").

and ice falling from otherwise non-defective buildings.⁸¹ Ironically, when bricks, glass, or chunks of terra cotta fall from high-rises, the plaintiff is not blocked from recovery, even though the danger to life and limb may well be the same.⁸²

Under the natural accumulation rule, if the hazard is classified as natural, landowners or occupiers have no duty to remove it, even if they have notice and a reasonable amount of time to remedy the condition.⁸³ Furthermore, if the hazard is natural, even failure to warn about a natural accumulation is insufficient to establish liability of any kind.⁸⁴ Even if a plaintiff succeeds in persuading a court that an accumulation is artificial, however, no duty to remove or warn arises unless the defendant has actual or constructive notice of the hazard.⁸⁵

81. *Cf. Bansch v. Donnelly*, 396 N.E.2d 869, 872 (Ill. App. 3d Dist. 1979) (exonerating a defendant where the plaintiff failed to prove that ice forming on a building's facade was artificial, implying that liability will not lie in any case where natural ice falls from a non-defective roof). In a related case, one appellate court upheld the trial court's dismissal of an action by a plaintiff claiming she was lifted and blown ten feet due to the unnatural wind currents created by the design and configuration of the defendant's building. *Resag v. Washington Nat'l Ins. Co.*, 414 N.E.2d 107, 108 (Ill. App. 1st Dist. 1980). Even if the erection and design of the building were to be considered an artificial alteration of the land, which the court left open, a tort duty would still not arise because the economic burden on the landowner would be so enormous as to outweigh the likelihood of harm. *See id.* at 109.

82. *Terry Wilson & Ben Grove, It's Not Only Mercury That's Falling in Loop*, CHI. TRIB., Aug. 10, 1994, § 2, at 6.

83. *See, e.g., Wolter v. Chicago Melrose Park Assocs.*, 386 N.E.2d 495, 501 (Ill. App. 1st Dist. 1979); *Gehrman v. Zajac*, 340 N.E.2d 184, 185-86 (Ill. App. 1st Dist. 1975); *Foster v. George J. Cyrus & Co.*, 276 N.E.2d 38, 42 (Ill. App. 1st Dist. 1971). A duty exists, however, to comply with a city ordinance requiring a handrail. *Lewis v. W.F. Smith & Co.*, 390 N.E.2d 39, 43-44 (Ill. App. 1st Dist. 1979).

84. *Lansing*, 372 N.E.2d at 827 ("[W]e agree with the defendants' position that if they had no duty to remove snow and ice, they had no duty to warn users of the highway that they had not done so."); *accord Branson v. R & L Inv., Inc.*, 554 N.E.2d 624, 629 (Ill. App. 1st Dist. 1990) (finding no duty to provide illumination or other safeguard); *Selby*, 523 N.E.2d at 701; *Greenwood*, 302 N.E.2d at 362-63 (finding no duty to provide illumination or warning or to provide handrails, salt, or foot mat); *Newcomm v. Jul*, 273 N.E.2d 699, 701-02 (Ill. App. 3d Dist. 1971) (finding no duty to warn by illumination or otherwise). Yet, in contrast, where the natural accumulation rule is not involved, an inventor has a duty to properly illuminate ingress and egress. *See Seipp v. Chicago Transit Auth.*, 299 N.E.2d 330, 334-35 (Ill. App. 1st Dist. 1973).

85. *See Ostry v. Chateau Ltd. Partnership*, 608 N.E.2d 1351, 1357 (Ill. App. 2d Dist.), *appeal denied*, 616 N.E.2d 338 (Ill. 1993); *Gilberg v. Toys "R" Us, Inc.*, 467 N.E.2d 947, 949 (Ill. App. 1st Dist. 1984); *Hayes v. Bailey*, 400 N.E.2d 544, 546 (Ill. App. 3d Dist. 1980); *Clauson v. Lake Forest Improvement Trust*, 275 N.E.2d 441, 444 (Ill. App. 2d Dist. 1971).

Constructive notice arises when the hazard has existed for such a sufficient length of time that, in the exercise of ordinary prudence, the defendant should have discovered it. *Wells v. Great Atl. & Pac. Tea Co.*, 525 N.E.2d 1127, 1131 (Ill. App. 1st Dist. 1988) ("Plaintiff must present evidence that the defective condition, in this case the ice, not

VI. VOLUNTARY AND GRATUITOUS UNDERTAKING

Plaintiffs failing to classify a hazard as artificial are not necessarily foreclosed from recovery. Nevertheless, in natural accumulation cases, because it is unusual for plaintiffs to sue on the basis of a pre-existing contract, the only remaining realistic alternative is to show that a defendant voluntarily and gratuitously assumed a duty, and performed the duty negligently. Even this alternative is not as easy as it may seem, however, because Illinois courts have not been eager to find such voluntary and gratuitous undertakings.

For instance, the law is well-established that a defendant who removes an overlay of snow but leaves a natural ice formation underneath, cannot be liable for falls on the ice.⁸⁶ This result seems odd because a defendant in such a case has arguably made the condition more dangerous. The risk of falling on slick, exposed ice, particularly when there is inadequate lighting, is probably greater than when snow covers the ice and provides greater traction.⁸⁷

Furthermore, defendants who make only minimal efforts to alleviate a natural hazard do not assume a duty to remove the hazard thoroughly. Merely sprinkling salt or other substances, without taking further action to clear away ice or snow, is insufficient to constitute a voluntary undertaking and is not actionable as a matter of law.⁸⁸ Similarly, a business which uses mats on its floors has no duty to prevent the mats from becoming overly saturated with rainwater or snow.⁸⁹

the snow bank, had been there long enough to charge the responsible party with notice and knowledge of the dangerous condition.”).

86. See *Graf v. St. Luke's Evangelical Lutheran Church*, 625 N.E.2d 851, 854 (Ill. App. 2d Dist.), *appeal denied*, 638 N.E.2d 1115 (Ill. 1994); *Webb v. Morgan*, 531 N.E.2d 36, 39 (Ill. App. 5th Dist. 1988), *appeal denied*, 535 N.E.2d 922 (Ill. 1989); *Eichler v. Plitt Theatres, Inc.*, 521 N.E.2d 1196, 1201 (Ill. App. 2d Dist.), *appeal denied*, 530 N.E.2d 243 (Ill. 1988); *Wells*, 525 N.E.2d at 1131; *Erasmus*, 407 N.E.2d at 1033; *Anderson v. Davis Dev. Corp.*, 241 N.E.2d 222, 224 (Ill. App. 3d Dist. 1968).

87. *But cf. Wells*, 525 N.E.2d at 1133 (“There is absolutely no evidence in the record to indicate that the parking lot was more dangerous after it was plowed than before it was plowed and that allegation will be summarily dismissed.”).

88. *Lewis*, 390 N.E.2d at 43 (“The mere sprinkling of salt, which may cause the ice to melt, although it later refreezes, has not been found to be the kind of act which aggravates a natural condition and leads to liability on the part of a landlord.”); see also *DeMario v. Sears, Roebuck & Co.*, 284 N.E.2d 330, 332 (Ill. App. 1st Dist. 1972) (explaining that the use of salt alone does not constitute an undertaking); *Riccitelli*, 115 N.E.2d at 290 (same).

89. *Roberson v. J.C. Penney Co.*, 623 N.E.2d 364, 367 (Ill. App. 3d Dist. 1993); *Wilson v. Gorski's Food Fair*, 554 N.E.2d 412, 415 (Ill. App. 1st Dist. 1990). No duty exists to lay down a mat, even though defendant has used mats before for rainy or snowy conditions. *Lohan v. Walgreens Co.*, 488 N.E.2d 679, 682 (Ill. App. 1st Dist. 1986);

This restrictive interpretation appears to be based on policy considerations. The Illinois Supreme Court and the Illinois General Assembly have expressed the policy that the law should encourage citizens to take the initiative to remove ice and snow, even if they do so negligently.⁹⁰ Therefore, following this policy, it is necessary for the courts to refuse to recognize any duty to remove natural accumulation hazards in order to encourage these private efforts.

VII. THE RULE IN OTHER STATES

As the Appendix illustrates, there is no clear consensus for the natural accumulation rule. Indeed, most states hold landlords, businesses, and governments to a standard of due care.⁹¹ Cases involving landlord-tenant liability represent the strongest rejection of the natural accumulation rule. In fact, only ten states adopt the rule.⁹² In contrast, forty states plus the District of Columbia apply a standard of due care, with many states rejecting the rule outright.⁹³ Furthermore,

see also Richter v. Burton Inv. Properties, 608 N.E.2d 1254, 1258-59 (Ill. App. 2d Dist. 1993) (holding that the placement of mats on a ceramic tile floor did not create a duty to cure an excessively slippery floor).

90. *See Riccitelli*, 115 N.E.2d at 290 ("The defendant displayed zeal in cleaning his walks."), *aff'g* 109 N.E.2d 921, 922 (Ill. App. 1st Dist. 1952) ("The general assumption is that the industry displayed by citizens removing snow after a snowfall is desirable, if not necessary."); ILL. COMP. STAT. ANN. ch. 745, § 75/1 (stating in the Snow Removal Act that "[i]t is declared to be the public policy of this State that owners and others residing in residential units be encouraged to clean the sidewalks abutting their residences of snow and ice.").

91. *See infra* appendix. Under the Federal Tort Claims Act, claims against the federal government are weighed based upon the law of the individual state. 28 U.S.C. § 1346(b) (1988).

92. *See, e.g.,* Kilbury v. McConnell, 438 S.W.2d 692 (Ark. 1969); Williams v. Lincoln Towers Assocs., 566 N.E.2d 501 (Ill. App. 2d Dist.), *appeal denied*, 575 N.E.2d 925 (Ill. 1991); Morris v. Boyd, 295 N.E.2d 170 (Mass. App. Ct. 1973); Gossman v. Lambrecht, 221 N.W.2d 424 (Mich. Ct. App. 1974); Maschoff v. Koedding, 439 S.W.2d 234 (Mo. Ct. App. 1969); Rennick v. Hoover, 606 P.2d 1079 (Mont. 1980); Greenstein v. Springfield Dev. Corp., 204 N.Y.S.2d 518 (N.Y. Civ. Ct. 1960); LaCourse v. Fleitz, 503 N.E.2d 159 (Ohio 1986); Weatherall v. Yorktown Homeowners Ass'n, 852 P.2d 815 (Okla. Ct. App. 1993); Davis v. Lindau, 70 N.W.2d 686 (Wis. 1955). For a complete breakdown, *see infra* appendix.

93. *See, e.g.,* Lord v. Lencshire House, Ltd., 272 F.2d 557 (D.C. Cir. 1959); Kopke v. AAA Warehouse Corp., 494 P.2d 1307 (Colo. 1972); Kraus v. Newton, 558 A.2d 240 (Conn. 1989); Monroe Park Apartments Corp. v. Bennett, 232 A.2d 105 (Del. 1967); Grier v. Jeffco Management Co., 335 S.E.2d 408 (Ga. Ct. App. 1985); Rossow v. Jones, 404 N.E.2d 12 (Ind. Ct. App. 1980); Reuter v. Iowa Trust & Sav. Bank, 57 N.W.2d 225 (Iowa 1953); Davis v. Coleman Management Co., 765 S.W.2d 37 (Ky. Ct. App. 1989); Johnson v. Bellefonte Ins. Co., 449 So. 2d 1134 (La. Ct. App.), *writ denied*, 456 So. 2d 164 (La.) *and* 456 So. 2d 165 (La. 1984); Anderson v. Marston, 213 A.2d 48 (Me. 1965); Langley Park Apartments, Section H, Inc. v. Lund, 199 A.2d 620 (Md. 1964); Strong v. Shefelveland, 81 N.W.2d 247 (Minn. 1957); Wilson v. Allday, 487 So. 2d 793

in the area of business or general premises liability, only fifteen states have adopted the rule,⁹⁴ while thirty-four states and the District of Columbia favor applying due care.⁹⁵ Surprisingly, only thirty-one

(Miss. 1986); *Danner v. Myott Park, Ltd.*, 306 N.W.2d 580 (Neb. 1981); *Dubreuil v. Dubreuil*, 229 A.2d 338 (N.H. 1967); *MacGregor v. Tinker Realty Co.*, 117 A.2d 45 (N.J. Super. Ct. App. Div. 1955); *Lenz v. Ridgewood Assocs.*, 284 S.E.2d 702 (N.C. Ct. App. 1981), *review denied*, 290 S.E.2d 702 (N.C. 1982); *Papa v. Pittsburgh Penn-Center Corp.*, 218 A.2d 783 (Pa. 1966); *Barenbaum v. Richardson*, 328 A.2d 731 (R.I. 1974); *Grizzell v. Foxx*, 348 S.W.2d 815 (Tenn. Ct. App. 1960); *Cornwell v. Barton*, 422 P.2d 663 (Utah 1967); *Smith v. Monmaney*, 255 A.2d 674 (Vt. 1969); *Langhorne Rd. Apartments, Inc. v. Bisson*, 150 S.E.2d 540 (Va. 1966); *Geise v. Lee*, 529 P.2d 1054 (Wash. 1975); *Hape v. Rath*, 492 P.2d 974 (Wyo. 1972). Sixteen other states have not explicitly referred to natural accumulation hazards in the landlord-tenant context; presumably these states also adopt a general standard of due care. For a complete breakdown, see *infra* appendix.

94. See, e.g., *Watson v. J.C. Penney Co.*, 605 N.E.2d 723 (Ill. App. 4th Dist. 1992), *appeal denied*, 612 N.E.2d 525 (Ill. 1993); *Ferguson v. J. Bacon & Sons*, 406 S.W.2d 851 (Ky. 1966); *Miller v. New Amsterdam Casualty Co.*, 164 So. 2d 676 (La. Ct. App.), *writ refused*, 167 So. 2d 668 (La. 1964); *Baldessari v. Produce Terminal Realty Corp.*, 282 N.E.2d 649 (Mass. 1972); *Willis v. Springfield Gen. Osteopathic Hosp.*, 804 S.W.2d 416 (Mo. Ct. App. 1991); *Boehm v. Alanon Club*, 722 P.2d 1160 (Mont. 1986); *Brandert v. Scottsbluff Nat'l Bank & Trust Co.*, 235 N.W.2d 864 (Neb. 1975); *Herndon v. Arco Petroleum Co.*, 536 P.2d 1023 (Nev. 1975); *Nevins v. Great Atl. & Pac. Tea Co.*, 559 N.Y.S.2d 539 (N.Y. App. Div. 1990); *Strandness v. Montgomery Ward*, 199 N.W.2d 690 (N.D. 1972); *Weaver v. Standard Oil Co.*, 572 N.E.2d 205 (Ohio Ct. App. 1989); *Sullins v. Mills*, 395 P.2d 787 (Okla. 1964); *Meadows v. Heritage Village Church & Missionary Fellowship, Inc.*, 409 S.E.2d 349 (S.C. 1991) (involving wet grass); *Hodge v. Quik-Pik Icehouse*, 445 S.W.2d 266 (Tex. Civ. App. 1969); *Watts v. Holmes*, 386 P.2d 718 (Wyo. 1963). For a complete breakdown, see *infra* appendix.

95. See, e.g., *Terrell v. Warehouse Groceries*, 364 So. 2d 675 (Ala. 1978); *Kremer v. Carr's Food Ctr., Inc.*, 462 P.2d 747 (Alaska 1969); *Kuykendall v. Newgent*, 504 S.W.2d 344 (Ark. 1974); *King-Soopers, Inc. v. Mitchell*, 342 P.2d 1006 (Colo. 1959); *Woods v. Prices Corner Shopping Ctr. Merchants Ass'n*, 541 A.2d 574 (Del. Super. Ct. 1988); *Todd v. F.W. Woolworth Co.*, 366 S.E.2d 674 (Ga. 1988); *Robertson v. Magic Valley Regional Medical Ctr.*, 793 P.2d 211 (Idaho 1990); *Hammond v. Allegretti*, 311 N.E.2d 821 (Ind. 1974); *Hanson v. Town & Country Shopping Ctr., Inc.*, 144 N.W.2d 870 (Iowa 1966); *Agnew v. Dillons, Inc.*, 822 P.2d 1049 (Kan. 1991); *Isaacson v. Husson College*, 297 A.2d 98 (Me. 1972); *Raff v. Acme Mkts., Inc.*, 233 A.2d 786 (Md. 1967); *Quinlivan v. Great Atl. & Pac. Tea Co.*, 235 N.W.2d 732 (Mich. 1975); *Peterson v. W.T. Rawleigh Co.*, 144 N.W.2d 555 (Minn. 1966); *Johnson v. Boydston*, 605 So. 2d 727 (Miss. 1992); *Merkel v. Safeway Stores, Inc.*, 187 A.2d 52 (N.J. Super. Ct. Law Div. 1962); *Proctor v. Waxler*, 503 P.2d 644 (N.M. 1972); *Berger v. Cornwell*, 132 S.E.2d 317 (N.C. 1963); *Dawson v. Payless for Drugs*, 433 P.2d 1019 (Or. 1967); *Morris v. Atlantic & Pac. Tea Co.*, 121 A.2d 135 (Pa. 1956); *Cutroneo v. F.W. Woolworth Co.*, 315 A.2d 56 (R.I. 1974); *Mumford v. Thomas*, 603 S.W.2d 154 (Tenn. Ct. App. 1980); *Martin v. Safeway Stores, Inc.*, 565 P.2d 1139 (Utah 1977); *Wakefield v. Tygate Motel Corp.*, 640 A.2d 981 (Vt. 1994); *Kings Mkts., Inc. v. Yeatts*, 307 S.E.2d 249 (Va. 1983). Wisconsin applies the duty by statute. See WIS. STAT. § 101.11 (1975). Eight states and the District of Columbia have not explicitly referred to natural accumulation hazards in this context. Presumably these jurisdictions also adopt a general standard of due care.

Washington courts are divided on the issue. Compare *Schaeffer v. Woodhead*, 821

states allow municipalities some form of immunity for natural accumulations on streets and sidewalks, many of these by applying statutes.⁹⁶ Although the justification for the rule seems most apparent in this municipal context, twenty states still require the municipality or adjacent property owner to use due care in removing ice and snow from the streets and sidewalks.⁹⁷ In short, although Illinois has adopted the rule in all these contexts, it is one of the few states to do so.⁹⁸

P.2d 75 (Wash. Ct. App. 1991) (applying the rule) *with* Leonard v. Pay'n Save Drug Stores, Inc., 880 P.2d 61 (Wash. Ct. App. 1994) (applying due care) *and* Maynard v. Sisters of Providence, 866 P.2d 1272 (Wash. Ct. App. 1994) (same). For a complete breakdown, see *infra* appendix.

96. See, e.g., Smith v. District of Columbia, 189 F.2d 671 (D.C. Cir. 1951); Hale v. City of Anchorage, 389 P.2d 434 (Alaska 1964); Bittle v. Brunetti, 750 P.2d 49 (Colo. 1988); Burns v. Boudwin, 282 A.2d 620 (Del. 1971); Pearson v. Boise City, 333 P.2d 998 (Idaho 1959); Klikas v. Hanover Square Condominium Ass'n, 608 N.E.2d 541 (Ill. App. 1st Dist. 1992), *appeal denied*, 612 N.E.2d 514 (Ill. 1993); Leinbach v. State, 587 N.E.2d 733 (Ind. Ct. App. 1992); Speakman v. Dodge City, 22 P.2d 485 (Kan. 1933); Commonwealth v. Brown, 346 S.W.2d 24 (Ky. 1961); Monteleon v. City of New Orleans, 617 So. 2d 49 (La. Ct. App. 1993); Verreault v. City of Lewiston, 104 A.2d 538 (Me. 1954); New Highland Recreation, Inc. v. Fries, 229 A.2d 89 (Md. 1967); Sullivan v. Town of Brookline, 626 N.E.2d 870 (Mass. 1994); Williams v. Department of Transp., 520 N.W.2d 342 (Mich. Ct. App. 1994); Koen v. Tschida, 493 N.W.2d 126 (Minn. Ct. App. 1992); Harris v. Woolworth, 824 S.W.2d 31 (Mo. Ct. App. 1991); Connolly v. City of Omaha, 66 N.W.2d 916 (Neb. 1954); Rutkauskas v. Hodgins, 423 A.2d 291 (N.H. 1980); Pico v. State, 560 A.2d 1193 (N.J. 1989); Palazzo v. S.P.H.E. Real Estate, Inc., 483 N.Y.S.2d 127 (N.Y. App. Div. 1984); Clark v. Stoudt, 12 N.W.2d 708 (N.D. 1944); Lopatkovich v. City of Tiffin, 503 N.E.2d 154 (Ohio 1986); Kelley v. Park View Apartments, Inc., 330 P.2d 1057 (Or. 1958); Solinsky v. City of Wilkes-Barre, 99 A.2d 570 (Pa. 1953); Hareld v. Napolitano, 615 A.2d 1015 (R.I. 1992); Budahl v. Gordon & David Assocs., 323 N.W.2d 853 (S.D. 1982); West v. Provo City Corp., 495 P.2d 1251 (Utah 1972); Nelson v. City of Tacoma, 577 P.2d 986 (Wash. Ct. App. 1978); Christo v. Dotson, 155 S.E.2d 571 (W. Va. 1967); Damaschke v. City of Racine, 441 N.W.2d 332 (Wis. Ct. App. 1989); Norman v. City of Gillette, 658 P.2d 697 (Wyo. 1983). For a complete breakdown, see *infra* appendix.

97. Admittedly, many of the states rejecting the rule in this context are southern states, where ice and snow are less frequently such a problem. See, e.g., Walker v. City of Coconino, 473 P.2d 472 (Ariz. Ct. App. 1970); Willoughby v. City of New Haven, 197 A. 85 (Conn. 1937); Chambers v. Southern Wholesale, Inc., 92 So. 2d 188 (Fla. 1956); Busselle v. Doubleday, 486 N.W.2d 45 (Iowa Ct. App. 1992); City of Baldwin v. Rowan, 232 So. 2d 157 (Miss. 1970); Mosseller v. City of Asheville, 147 S.E.2d 558 (N.C. 1966); Browder v. City of Sweetwater, 477 S.W.2d 198 (Tenn. 1972); Latimer v. Walgreen Drug Co., 233 S.W.2d 209 (Tex. Civ. App. 1950); Johnson v. J.S. Bell, Jr., & Co., 117 S.E.2d 85 (Va. 1960). Twelve states have not explicitly referred to natural accumulation hazards in this context; presumably these states also adopt a general standard of due care. For a complete breakdown, see *infra* appendix.

98. Only seven states, Illinois, Kentucky, Massachusetts, Missouri, Nebraska, New York, and Ohio, apply the natural accumulation rule in all types of cases. See *infra* appendix.

VIII. THE NATURAL ACCUMULATION RULE'S SHORTCOMINGS

The natural accumulation rule should be limited or abolished. If taken seriously, the rule favors inaction over action. Those who try to clear away natural accumulations of snow, ice, or rain on their private property run the risk of imposing a self-inflicted duty on themselves if their actions constitute negligence.⁹⁹ In contrast, those who take no action whatsoever are free of any duty, even when a pre-existing relationship of government-citizen, invitor-invitee, or landlord-tenant exists.

Under the natural accumulation rule, an inactive defendant, who can remove a foreseeable danger with little or no burden, never suffers liability, even though the social unreasonableness of the inaction may be egregious. It is true that our common law tradition does not normally impose a tort duty on a stranger to assist another.¹⁰⁰ Nevertheless, a pre-existing relationship between the potential rescuer and the person in peril has always been an exception to this tradition.¹⁰¹ If a relationship is sufficient to create a duty to rescue when the potential rescuer does not have control over the hazard, then a pre-existing relationship should be all the more the basis of a duty of due care when the defendant owns or occupies the premises on which natural precipitation has accumulated.

The potential breadth of the natural accumulation rule, if taken seriously, is also unacceptable. If the "naturalness" of a weather effect is insufficient to create a duty, then a defendant who builds a hospital over an earthquake fault line should be no more liable than a defendant who builds a sloped roof high-rise, an inclined parking lot, an embankment, or an ice-prone bridge in a region of the country beset by snow. Both earthquakes and snow are natural and known conditions, yet courts would not follow the same logic in the case of an earthquake that they do for weather conditions such as snow, ice, or rain. An Arizona court would likely hold a defendant, who stored a high explosive in the hot summer sun and claimed lack of duty, liable even though the accumulation of heat on the explosive was a "natural" condition. Similarly, an Illinois court would likely hold that a municipality owed a duty to warn of an approaching tornado even though the tornado is a "naturally" accumulating wind condition.

99. See *supra* part VI.

100. MICHAEL A. MENLOWE & ALEXANDER MCCALL SMITH, *THE DUTY TO RESCUE* 5 (1993) ("It is therefore interesting that in the law in English-speaking common law countries there is no general duty to rescue in either the criminal or the civil law.").

101. *Id.* at 63 ("This category provides the clearest instances of a legally recognized duty to rescue in common law systems.").

Moreover, the natural accumulation rule is simply too vague for courts to apply consistently. The deterioration of wood, concrete, or metal by elements such as wind or temperature is no less natural than the deterioration by snow, ice, or rain.¹⁰² Furthermore, it is difficult to classify snow or ice falling from a high-rise on a warm spring day as either natural or artificial.¹⁰³ If the presence or construction of the high-rise renders the accumulation artificial, then one may ask why streets and sidewalks, not in themselves defective, do not convert fallen snow, ice, or rain into artificial accumulations as well. If, for example, a Lake Michigan wind sprays water from Buckingham Fountain in Chicago onto a concrete walkway where the water later freezes, the whole process is a combination of both natural and artificial causes. The essential problem, therefore, is that the categorical distinction between natural and artificial accumulations is an unworkable concept because it oversimplifies reality by its either-or approach.¹⁰⁴

Probably the most persuasive argument against the natural accumulation rule, however, is that the distinction between a naturally dangerous accumulation and an artificially dangerous accumulation is simply not relevant enough to determine a tort duty. In *Graham v. City of Chicago*,¹⁰⁵ the Illinois Supreme Court focused on a far more relevant factor: "It is the *generality* of a situation resulting from natural causes that gives rise to the rule. Without that generality there would be no reason for the rule."¹⁰⁶ The supreme court was rightly concerned that a general snowstorm over an entire city would present such a heavy burden on municipal authorities that the courts should not impose upon these authorities a duty to remove natural accumulation hazards.¹⁰⁷

Following this reasoning, the "generality" of a snowstorm is not necessarily the same as its "naturalness." For instance, snow may fall on only a small portion of a municipality and would be no burden at all to remove. Such a condition would not be "general" even if it is still

102. Cf. ILL. COMP. STAT. ANN. ch. 745, § 10/3-105(a) (providing immunity from the effect of weather conditions, but not from physical damage to traffic signals, streets, highways, or other public ways caused by weather conditions).

103. See *supra* notes 80-82 and accompanying text.

104. Cf. *Watson v. J.C. Penney Co.*, 605 N.E.2d 723, 727 (Ill. App. 4th Dist. 1992) (Knecht, J., dissenting) ("The trend of the modern cases is to reject the natural accumulation of snow and ice rule. One reason may be no one understands the difference between a natural accumulation of ice and snow, and an unnatural accumulation."), *appeal denied*, 612 N.E.2d 525 (Ill. 1993).

105. 178 N.E. 911 (Ill. 1931). For a discussion of this case, see *supra* notes 8-15 and accompanying text.

106. *Graham*, 178 N.E. at 913 (emphasis added).

107. *Id.*

“natural.” Similarly, a municipality may have cleared practically all of its streets and highways, but carelessly missed one street. Again, in such a case, the remaining snow is not a general condition, even though the snow itself is natural. By following *Graham* and focusing on whether the condition is general or specific, rather than whether it is natural or artificial, a more rational solution to the natural accumulation rule in Illinois can be fashioned.

Although the rule correctly concludes that a private landowner who adjoins a public sidewalk should not be liable for a natural accumulation of precipitation, this has nothing to do with the generality of the condition or even its naturalness. Instead, the outcome is correct because under the common law, ownership or control over a situation is an essential predicate for a court to impose a duty.¹⁰⁸ This result would be the same even if another party left precipitation or an artificial condition on the sidewalk.¹⁰⁹ Indeed, to forestall any municipal attempts to impose liability on adjoining landowners, the Illinois General Assembly passed into law the Snow Removal Act,¹¹⁰ which exonerates landowners from liability when they attempt to remove ice and snow.¹¹¹

The *Graham* distinction involving the generality of the hazard holds particular merit as applied to governmental entities. In the case of a massive snow-, ice-, or rainstorm, the burden on a municipality to protect against injury is usually great because the weather condition is usually general. In other cases, however, the weather condition may be limited and would not pose an unusual burden on the municipality. Therefore, such a blanket form of immunity as granted under the

108. In Illinois, landowners have no common law duty to maintain any adjoining public sidewalk which they neither own nor control. See, e.g., *Riccitelli*, 115 N.E.2d at 290 (“Both sides concede that a property owner is under no obligation to clear the snow from sidewalks adjoining his premises.”). Even an ordinance requiring landowners to maintain public sidewalks and keep them clear of ice and snow does not create a tort duty to an injured party. *Klikas v. Hanover Square Condominium Ass’n*, 608 N.E.2d 541, 545 (Ill. App. 1st Dist. 1992), *appeal denied*, 612 N.E.2d 514 (Ill. 1993).

109. In *Ziembra v. Mierzwa*, the Illinois Supreme Court stated:

Section 368 [of the Restatement (Second) of Torts (1965)] presents the well-established common law rule that a landowner’s only duty towards travelers on an adjacent highway is to keep his land free from conditions which are unreasonably dangerous to such travelers who may come into contact with the condition.

566 N.E.2d 1365, 1367 (Ill. 1991).

110. P.A. 81-591, §§ 1 to 2, 1979 Ill. Laws 2328 (codified at ILL. COMP. STAT. ANN. ch. 745, §§ 75/1 to 75/2 (West 1993)) (exonerating an owner, lessor or occupant of any residential property who removes or attempts to remove snow or ice from an abutting sidewalk unless willful or wanton).

111. ILL. COMP. STAT. ANN. ch. 745, § 75/2.

natural accumulation rule is unjustified. Instead, immunity should depend upon whether the condition is a general one, rather than whether it is naturally created. In addition, courts should take into account the technological advances in snow and ice removal that make snow and ice removal far less burdensome than in 1931, the date of the *Graham* decision.¹¹² Unfortunately, the fact remains that the Tort Immunity Act protects governmental entities by codifying a version of the natural accumulation rule.¹¹³ Therefore, unless the Illinois General Assembly changes its statutory scheme, courts must continue to immunize both governmental entities for accidents occurring upon public streets and sidewalks and private landowners for accidents occurring upon public sidewalks.

IX. A PROPOSAL FOR ILLINOIS

The Illinois courts are free to abolish the natural accumulation rule as it applies to accidents occurring on private property. The Illinois Supreme Court has never directly held that the rule should be extended to private defendants, such as inviters and landlords, in cases of accidents occurring on their private property.¹¹⁴ Instead, all of its decisions applying the rule have concerned government property.¹¹⁵ Therefore, Illinois courts may abolish the rule in these contexts.

The reasons for eliminating the natural accumulation rule as it applies to private defendants, such as inviters and landlords, are substantial. The burden on these private defendants, unlike the usual burden on a municipality, is not general—it is specific to their locale. Private landowners are only responsible for the limited clean-up of their property and, therefore, the burden on them cannot be compared to a municipality's general burden in combating a city-wide snowfall.

Not only would the burden placed upon private parties be minimal due to the size of the hazard, but it would also be minimal in terms of

112. The development after 1931 of salt-spreaders, snowblowers, and reversible and winged snowplows mounted on diesel trucks were major technological breakthroughs. Telephone Interview with Roy Fonda, Bureau Chief of Maintenance, Dist. 1, Illinois Department of Transportation (Nov. 29, 1994). The City of Chicago implemented a snow-route parking system in 1980, and in the mid-1980s, the City extended snow removal to side streets after every snowfall instead of just after blizzards. After the 1967 record snowstorm, the City acquired a much larger and more reliable fleet of snow removal equipment. Telephone Interview with Terry Levin, Public Information Officer, City of Chicago (Nov. 29, 1994).

113. ILL. COMP. STAT. ANN. ch. 745, § 10/3-105; *see supra* notes 22-26 and accompanying text.

114. *See supra* note 34 and accompanying text.

115. *But cf. Lansing*, 372 N.E.2d at 826-27 (involving a public defendant, but noting the appellate court extension to private defendants).

the tasks required to cure it. Private landowners already have the duty to provide reasonable protection to those lawfully on the land from harm caused by defects in their premises, such as slipping on a foreign substance, tripping over the leg of a cart left in an aisle, or stumbling over a loose brick on a walkway.¹¹⁶ To impose a limited duty to clear snow or ice on the same pathways is no greater burden. Furthermore, to require at least a warning, proper illumination, or salt spreading, in place of precipitation removal, would also impose a minimal burden. Although Illinois law requires these acts in other cases,¹¹⁷ it has failed to do so in the case of a natural accumulation.¹¹⁸

Furthermore, the risk of injury is often more foreseeable in the case of a private defendant than in the case of a municipality. Unlike a municipality, private defendants are far more likely to know of natural accumulation hazards on their property. Moreover, although a citizen may have many alternatives to encountering snow, ice, or rain on a particular street, an invitee or tenant often has little or no choice in encountering the dangers of naturally accumulated precipitation. For example, if the only entrance to a store is slick with ice or snow, invitees have no choice but to cross it. The same holds true for tenants; they have no choice but to enter and exit their homes on a frequent basis, whether or not their landlord has cleared the entrance of ice or snow.

In fact, in *Ward v. K Mart Corp.*,¹¹⁹ the Illinois Supreme Court followed section 343A of the Restatement in holding that an invitor can be liable to an invitee even for a known and obvious danger on the land, where the invitor should anticipate the harm despite the plaintiff's knowledge of the danger and its obviousness.¹²⁰ Even though a known and obvious danger is usually an absolute defense, there are times when a landowner should expect that an invitee will not discover or realize the danger of a known or obvious condition of the land. For example, an invitee may be distracted and momentarily forget the

116. *Greenwood v. Leu*, 302 N.E.2d 359, 363 (Ill. App. 5th Dist. 1973). Yet, one Illinois court found these examples distinguishable because they did not involve a natural accumulation of snow or ice. *Id.* ("None of these cases deal with the particular problem of invitees sustaining injuries as a result of falls on snow and ice covered sidewalks or entranceways to a defendant's premises.").

117. *See, e.g., Seipp v. Chicago Transit Auth.*, 299 N.E.2d 330, 334-35 (Ill. App. 1st Dist. 1973).

118. *See Greenwood*, 302 N.E.2d at 363 (finding no duty to provide a handrail, salt, or a foot mat); *Kelly v. Huyvaert*, 56 N.E.2d 638, 639-40 (Ill. App. 2d Dist. 1944) (finding no duty to scatter cinders or sand); *see supra* note 84 and accompanying text.

119. 554 N.E.2d 223 (Ill. 1990).

120. *Id.* at 231-32.

known and obvious danger.¹²¹ Alternatively, a plaintiff may have no choice but to encounter a known and obvious danger.¹²² Both of these illustrative exceptions commonly apply to invitees and to tenants.

X. CONCLUSION

The natural accumulation rule has little merit, and Illinois courts should, at the very least, eliminate the extension of the rule to private defendants.¹²³ Private defendants should not receive such a blanket immunity for many reasons. Unlike a governmental entity, inviters and landlords reap direct economic benefits from patrons or tenants in the form of prices and rents. It is only reasonable that this direct economic gain should be counterbalanced by a corresponding duty of care toward their customers and tenants. Even if Illinois courts imposed such a duty, private inviters and landlords would be able to pass on any added costs of doing business in the form of marginally higher prices or rents. Finally, even though a private defendant and plaintiff may both know of the natural accumulation hazard, the private defendant is in a better position to remove the hazard and is in a better legal and practical position to eradicate it.

Contrary to some common arguments, creating a normal tort duty for natural accumulation hazards will not make private defendants

121. RESTATEMENT (SECOND) OF TORTS § 343A cmt. f (1965). This was the exceptional situation in *Ward*, 554 N.E.2d at 234 (finding that the defendant store had reason to anticipate that a customer carrying a large item from the store might be momentarily distracted and forget about a pole near the door).

122. See RESTATEMENT (SECOND) OF TORTS § 343A cmt. f (1965), stating:

Such reason [to expect harm to the visitor from known or obvious dangers] may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.

Id.

123. The Fourth Appellate District recently rejected an argument that the Illinois Supreme Court's decisions in *Ward* and in *Lee* form the basis for a change in the natural accumulation rule. *Weygandt v. Jewel Food Stores*, No. 4-93-0604, slip op. at 3 (Ill. App. Ct. Dec. 30, 1993) (granting summary judgment under the natural accumulation rule against a business invitee who fell on tracked-in water inside a store), *appeal denied*, 633 N.E.2d 16 (Ill. 1994). Similarly, the Fifth Appellate District rejected the argument that the natural accumulation rule is inappropriate beyond municipality liability cases, yet still refused to uphold a summary judgment against a plaintiff employee on the basis that what is "natural" or "unnatural" should be left to a jury. *Endsley v. Harrisburg Medical Ctr.*, 568 N.E.2d 470 (Ill. App. 5th Dist. 1991).

Nevertheless, Justice Londrigan of the Fourth Appellate District, in a thoughtful dissenting opinion, argued that the rule was erroneously extended to landowners. *Smalling v. LaSalle Nat'l Bank*, 433 N.E.2d 713, 717-20 (Ill. App. 4th Dist. 1982) (Londrigan, J., dissenting).

insurers of their premises. Plaintiffs would still need to prove a breach of the duty of reasonable care and would still confront the usual rules of proximate causation and damages. In addition, unlike other states, Illinois does not assume that the comparative negligence doctrine overrides the normally absolute defense against an invitee who encounters a known and obvious risk.¹²⁴ Thus, even in those exceptional cases where the invitor should anticipate that an invitee will encounter a known and obvious danger, the partial defense of comparative negligence is still available.¹²⁵

In 1984, the Illinois General Assembly abolished the common law distinction between invitees and licensees and required that a landowner or occupier of land owes exactly the same duty of reasonable care to each.¹²⁶ In doing so, the General Assembly carved out no exception for the natural accumulation rule, even though it left intact the common law treatment of trespassers.¹²⁷ The Illinois judiciary would be well advised to follow this policy lead and overrule the natural accumulation rule as it applies to private businesses, landlords, and landowners.

124. *Ward*, 554 N.E.2d at 228.

125. See ILL. COMP. STAT. ANN. ch. 735, § 5/2-1116 (requiring damages to be reduced proportionately according to the degree of plaintiff's fault, but if the plaintiff's fault exceeds 50%, he recovers nothing); *Ward*, 554 N.E.2d at 234 ("There was further ample evidence of plaintiff's own negligence contributing to his injury.").

126. ILL. COMP. STAT. ANN. ch. 740, §§ 130/1 to 130/3.

127. *Id.*

APPENDIX

THE STATUS OF THE NATURAL ACCUMULATION
RULE IN DIFFERENT PARTY SETTINGS

STATE	BUSINESS/ INVITEE	LANDLORD/ TENANT	MUNICIPALITY/ LICENSEE
ALABAMA	Due Care 364 So. 2d 675 (Ala. 1978)	No Mention	No Mention
ALASKA	Due Care 462 P.2d 747 (Alaska 1969)	No Mention	Applies Rule 389 P.2d 434 (Alaska 1964)
ARIZONA	No Mention	No Mention	Due Care 473 P.2d 472 (Ariz. Ct. App. 1970)
ARKANSAS	Due Care 504 S.W.2d 344 (Ark. 1974)	Applies Rule 438 S.W.2d 692 (Ark. 1969)	No Mention
CALIFORNIA	No Mention	No Mention	No Mention
COLORADO	Due Care 342 P.2d 1006 (Colo. 1959)	Due Care 494 P.2d 1307 (Colo. 1972)	Applies Rule 750 P.2d 49 (Colo. 1988)
CONNECTICUT	No Mention	Due Care 558 A.2d 240 (Conn. 1989)	Due Care 197 A. 85 (Conn. 1937)

DELAWARE	Due Care 541 A.2d 574 (Del. Super. Ct. 1988)	Due Care 232 A.2d 105 (Del. 1967)	Applies Rule 282 A.2d 620 (Del. 1971)
DISTRICT OF COLUMBIA	No Mention	Due Care 272 F.2d 557 (D.C. Cir. 1959)	Applies Rule 189 F.2d 671 (D.C. Cir. 1951)
FLORIDA	No Mention	No Mention	Due Care 92 So. 2d 188 (Fla. 1956)
GEORGIA	Due Care 366 S.E.2d 674 (Ga. 1988)	Due Care 335 S.E.2d 408 (Ga. Ct. App. 1985)	No Mention
HAWAII	No Mention	No Mention	No Mention
IDAHO	Due Care 793 P.2d 211 (Idaho 1990)	No Mention	Applies Rule 333 P.2d 998 (Idaho 1959)
ILLINOIS	Applies Rule 605 N.E.2d 723 (Ill. App. 4th Dist. 1992)	Applies Rule 566 N.E.2d 501 (Ill. App. 2d Dist. 1991)	Applies Rule 608 N.E.2d 541 (Ill. App. 1st Dist. 1992)
INDIANA	Due Care 311 N.E.2d 821 (Ind. 1974)	Due Care 404 N.E.2d 12 (Ind. Ct. App. 1980)	Applies Rule 587 N.E.2d 733 (Ind. Ct. App. 1992)
IOWA	Due Care 144 N.W.2d 870 (Iowa 1966)	Due Care 57 N.W.2d 225 (Iowa 1953)	Due Care 486 N.W.2d 45 (Iowa Ct. App. 1992)

KANSAS	Due Care 822 P.2d 1049 (Kan. 1991)	No Mention	Applies Rule 22 P.2d 485 (Kan. 1933)
KENTUCKY	Applies Rule 406 S.W.2d 851 (Ky. 1966)	Due Care 765 S.W.2d 37 (Ky. Ct. App. 1989)	Applies Rule 346 S.W.2d 24 (Ky. 1961)
LOUISIANA	Applies Rule 164 So. 2d 676 (La. Ct. App. 1964)	Due Care 449 So. 2d 1134 (La. Ct. App. 1984)	Applies Rule 617 So. 2d 49 (La. Ct. App. 1993)
MAINE	Due Care 297 A.2d 98 (Me. 1972)	Due Care 213 A.2d 48 (Me. 1965)	Applies Rule 104 A.2d 538 (Me. 1954)
MARYLAND	Due Care 233 A.2d 786 (Md. 1967)	Due Care 199 A.2d 620 (Md. 1964)	Applies Rule 229 A.2d 89 (Md. 1967)
MASSACHUSETTS	Applies Rule 282 N.E.2d 649 (Mass. 1972)	Applies Rule 295 N.E.2d 170 (Mass. App. Ct. 1973)	Applies Rule 626 N.E.2d 870 (Mass. 1994)
MICHIGAN	Due Care 235 N.W.2d 732 (Mich. 1975)	Applies Rule 221 N.W.2d 424 (Mich. Ct. App. 1974)	Applies Rule 520 N.W.2d 342 (Mich. Ct. App. 1994)
MINNESOTA	Due Care 144 N.W.2d 555 (Minn. 1966)	Due Care 81 N.W.2d 247 (Minn. 1957)	Applies Rule 493 N.W.2d 126 (Minn. Ct. App. 1992)

MISSISSIPPI	Due Care 605 So. 2d 727 (Miss. 1992)	Due Care 487 So. 2d 793 (Miss. 1986)	Due Care 232 So. 2d 157 (Miss. 1970)
MISSOURI	Applies Rule 804 S.W.2d 416 (Mo. Ct. App. 1991)	Applies Rule 439 S.W.2d 234 (Mo. Ct. App. 1969)	Applies Rule 824 S.W.2d 31 (Mo. Ct. App. 1991)
MONTANA	Applies Rule 722 P.2d 1160 (Mont. 1986)	Applies Rule 606 P.2d 1079 (Mont. 1980)	No Mention
NEBRASKA	Applies Rule 235 N.W.2d 864 (Neb. 1975)	Due Care 306 N.W.2d 580 (Neb. 1981)	Applies Rule 66 N.W.2d 916 (Neb. 1954)
NEVADA	Applies Rule 536 P.2d 1023 (Nev. 1975)	No Mention	No Mention
NEW HAMPSHIRE	No Mention	Due Care 229 A.2d 338 (N.H. 1967)	Applies Rule 423 A.2d 291 (N.H. 1980)
NEW JERSEY	Due Care 187 A.2d 52 (N.J. Super. Ct. Law Div. 1962)	Due Care 117 A.2d 45 (N.J. Super. Ct. App. Div. 1955)	Applies Rule 560 A.2d 1193 (N.J. 1989)
NEW MEXICO	Due Care 503 P.2d 644 (N.M. 1972)	No Mention	No Mention

NEW YORK	Applies Rule 559 N.Y.S.2d 539 (N.Y. App. Div. 1990)	Applies Rule 204 N.Y.S.2d 518 (N.Y. Civ. Ct. 1960)	Applies Rule 483 N.Y.S.2d 127 (N.Y. App. Div. 1984)
NORTH CAROLINA	Due Care 132 S.E.2d 317 (N.C. 1963)	Due Care 284 S.E.2d 702 (N.C. Ct. App. 1981)	Due Care 147 S.E.2d 558 (N.C. 1966)
NORTH DAKOTA	Applies Rule 199 N.W.2d 690 (N.D. 1972)	No Mention	Applies Rule 12 N.W.2d 708 (N.D. 1944)
OHIO	Applies Rule 572 N.E.2d 205 (Ohio Ct. App. 1989)	Applies Rule 503 N.E.2d 159 (Ohio 1986)	Applies Rule 503 N.E.2d 154 (Ohio 1986)
OKLAHOMA	Applies Rule 395 P.2d 787 (Okla. 1964)	Applies Rule 852 P.2d 815 (Okla. Ct. App. 1993)	No Mention
OREGON	Due Care 433 P.2d 1019 (Or. 1967)	No Mention	Applies Rule 330 P.2d 1057 (Or. 1958)
PENNSYLVANIA	Due Care 121 A.2d 135 (Pa. 1956)	Due Care 218 A.2d 783 (Pa. 1966)	Applies Rule 99 A.2d 570 (Pa. 1953)
RHODE ISLAND	Due Care 315 A.2d 56 (R.I. 1974)	Due Care 328 A.2d 731 (R.I. 1974)	Applies Rule 615 A.2d 1015 (R.I. 1992)

SOUTH CAROLINA	Applies Rule 409 S.E.2d 349 (S.C. 1991)	No Mention	No Mention
SOUTH DAKOTA	No Mention	No Mention	Applies Rule 323 N.W.2d 853 (S.D. 1982)
TENNESSEE	Due Care 603 S.W.2d 154 (Tenn. Ct. App. 1980)	Due Care 348 S.W.2d 815 (Tenn. Ct. App. 1960)	Due Care 477 S.W.2d 198 (Tenn. 1972)
TEXAS	Applies Rule 445 S.W.2d 266 (Tex. Civ. App. 1969)	No Mention	Due Care 233 S.W.2d 209 (Tex. Civ. App. 1950)
UTAH	Due Care 565 P.2d 1139 (Utah 1977)	Due Care 422 P.2d 663 (Utah 1967)	Applies Rule 495 P.2d 1251 (Utah 1972)
VERMONT	Due Care 640 A.2d 981 (Vt. 1994)	Due Care 255 A.2d 674 (Vt. 1969)	No Mention
VIRGINIA	Due Care 307 S.E.2d 249 (Va. 1983)	Due Care 150 S.E.2d 540 (Va. 1966)	Due Care 117 S.E.2d 85 (Va. 1960)
WASHINGTON	Split in Circuits	Due Care 529 P.2d 1054 (Wash. 1975)	Applies Rule 577 P.2d 986 (Wash. Ct. App. 1978)

WEST VIRGINIA	No Mention	No Mention	Applies Rule 155 S.E.2d 571 (W. Va. 1967)
WISCONSIN	Due Care Wis. STAT. § 101.11 (1975)	Applies Rule 70 N.W.2d 686 (Wis. 1955)	Applies Rule 441 N.W.2d 332 (Wis. Ct. App. 1989)
WYOMING	Applies Rule 386 P.2d 718 (Wyo. 1963)	Due Care 492 P.2d 974 (Wyo. 1972)	Applies Rule 658 P.2d 697 (Wyo. 1983)

TOTALS

	BUSINESS/ INVITEE	LANDLORD/ TENANT	MUNICIPALITY/ LICENSEE
APPLIES RULE	15	10	31
DUE CARE	26	25	9
NO MENTION	9	16	11
SPLIT	1		