

# Burns & Farrey

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## SJC changes the analysis for snow and ice cases in Massachusetts

In a much anticipated and unanimous decision, the Massachusetts Supreme Judicial Court abolished the longstanding legal distinction between natural and unnatural accumulations of snow and ice in premises liability cases. With the decision in *Papadopoulos et al. v. Target Corp. et al.*, SJC-10529, Massachusetts Courts will now apply the same obligation of reasonable care that a property owner owes to lawful visitors regardless of the type of hazard involved, doing away with the exception in premises liability law previously applicable to snow and ice hazards.

Prior to this decision, a defendant in Massachusetts was not liable for an injury that occurred as a result of a “natural accumulation” of snow and ice. Under this “rule,” unique to Massachusetts, a defendant was not liable for an accumulation of snow and ice if it did not create or alter the accumulation; “natural accumulations” were not regarded as an “actionable property defect.”



In *Papadopoulos*, Emanuel Papadopoulos slipped and fell on patch of ice in a parking lot in front of a Target store located at the Liberty Tree Mall. The lot had been plowed and was “essentially clear,” although Mr. Papadopoulos did apparently notice some scattered snow and areas of ice. The ice involved in the accident was found to have formed from melted snow that ran off and refroze from a plowed pile of snow on a median, or snow that had fallen from this snow pile. The motion judge allowed the defendants’ motions for summary judgment, finding that the accident involved a “natural accumulation.”

### Why Change the Rule?

The Papadopoulos Court reasoned that the rule focusing on the “natural”/“unnatural” distinction should be abandoned and replaced by the general standard applicable to all other premises liability cases because:

- The rule was outdated and should have evolved with the rest of landlord/tenant and premises liability jurisprudence;
- The distinction misdirected the factfinder from the proper focus (i.e., whether the property owner acted reasonably to keep the property safe), and was difficult to apply;
- The rule lead to some unreasonable results, such as allowing owners to leave snow and ice where they know people will be traveling;
- The rationale that such conditions are “open and obvious” is unjustified;
- The rationale that liability for such conditions would place impractical, if not impossible, obligations on land owners is not persuasive to any other New England state.

The duty now is to “act as a reasonable person under all of the circumstances including the likelihood of injury to others, the probable seriousness of such injuries, and the burden of reducing or avoiding the risk.”

### Impact Going Forward

The Papadopoulos Court reassures defendants that the new approach “introduces no special burden on property owners. If a property owner knows or reasonably should know of a dangerous condition on its property, whether arising from an accumulation of snow or ice, or rust on a railing, or a discarded banana peel, the property owner owes a duty to lawful visitors to make reasonable efforts to protect lawful visitors against danger.”

The new rule will “not make a property owner an insurer of its property” and will not “impose unreasonable maintenance burdens.” The level of snow removal expected “will depend on the amount of foot traffic to be anticipated on the property, the magnitude of the risk reasonably feared, and the burden and expense of snow and ice removal.”

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Judges and juries will soon be grappling with these questions as the SJC ruled that the new standard shall be applied retroactively. While the holding will not revive an action that has been concluded by judgment or settlement, it will apply to all pending claims and actions, even where the accidents pre-dated the Papadopoulos ruling.

While it is too soon to know for sure, the abolition of the previously intimidating “natural accumulation” rule, in favor of the more amorphous reasonable care/negligence standard, will likely mean that plaintiff attorneys will be more likely to take on and file lawsuits involving injuries resulting from slips and falls on snow or

ice. These claims are no longer good candidates for summary judgment motions as the question of reasonable care under the circumstances involves issues of fact to be determined at trial.

The Papadopoulos opinion specifically discusses premises liability in the context of landlords and property owners, despite the fact that the plaintiff also named the company responsible for snow removal as a defendant. While Papadopoulos is silent as to the effect of this decision on the standard applicable to snow contractors’ liability, we expect the same reasonable care standard will apply. ☞

rather than mitigate the problems posed by medical bills, because the amounts paid, like the bills or charges themselves, may not have more than a tenuous relationship to the reasonable value of the provider’s medical services.”

However, the SJC attempted to find some middle ground by ruling that defendants wishing to challenge the reasonableness of the medical expenses may call a representative of the medical provider and “elicit evidence concerning the provider’s stated charges and the range of payments that that provider accepts for the particular type of services the plaintiff received.” Because the witness will not be allowed to identify the particular plaintiff’s insurer or third-party payor, or to testify to the actual amount paid on the plaintiff’s behalf, the court concluded that this solution is consistent with the purpose and dictates of Section 79G and the so-called “collateral source rule,” that excludes evidence of any recovery by the plaintiff from any “collateral source,” i.e., evidence of any insurance payments or other compensation received from third parties.

The SJC remanded the case for a new trial noting that “jury instructions may need to be modified to be consistent with this opinion.”

### Impact Going Forward

In a concurring opinion, Justice Judith Cowin described the majority’s decision to allow “range of payments” evidence, while excluding evidence of amounts actually paid, as a “nervous compromise.” Deferring to trial judges to formulate appropriate instructions, the majority opinion suggested that “it would be appropriate to include an instruction that acknowledges the existence and widespread use of medical insurance,” but explains that what was paid or covered by insurance is irrelevant to the jury’s task. In light of evidentiary rules against admitting evidence of insurance, this vague guidance for new jury instructions could result in an increase in appeals by defendants. Also, this decision will likely complicate the discovery process by injecting “range of payments” concerns as a necessary issue to explore. Similarly, this decision could undermine the practical benefits of Section 79G and both lengthen trials and complicate the ability to select a convenient trial date, given the likely need for more live medical expert witnesses. ☞

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## Medical Expense Evidence Open to New Challenges in Massachusetts

In a personal injury action, a commonly disputed damages issue is the reasonable value of medical services provided to an injured party. Usually, medical bills are offered as evidence of the value of such services. However, in light of the modern insurance industry, there is often a large disparity between the amount billed for medical services and the amount actually paid. In Law v. Griffith, the Massachusetts Supreme Judicial Court (“SJC”) addressed the admissibility of both types of evidence—the amount billed, and the amount actually paid—in determining the reasonable value of medical services.

### A Significant Disparity

In February 2001, Joanne Law was involved in an automobile accident with Daniel Griffith, after Griffith allegedly ran a stop sign. Ms. Law sued Mr. Griffith for negligence and sought damages that included the cost of her subsequent surgery and physical therapy.

Ms. Law’s medical bills totaled \$112,269.94. However, the medical providers accepted significantly lower payments from Ms. Law’s insurer, MassHealth (the Massachusetts Medicaid program). In fact, pursuant to the terms of the providers’ agreements with Medicaid, MassHealth only paid out \$16,387.14 for Ms. Law’s treatment.

At trial, the court ruled that with regard to damages, Ms. Law could present evidence only of the \$16,387.14 that was actually paid out, as opposed to the \$112,269.94 that had been billed. The trial judge reasoned that the bills were not expected to be paid by either the plaintiff or her insurer, and thus were not relevant to establish the value of the medical services the plaintiff

had received. Subsequently, the jury found for the plaintiff and awarded her \$48,500.00 in damages—which was then reduced to \$28,556.50 to account for Ms. Law’s comparative negligence and for amounts already received.

Ms. Law appealed the decision, arguing that the trial judge improperly excluded the significantly larger amounts in the medical bills.

### Dollars and Sense?

In analyzing the issue, the SJC relied on the direct language of the statute that allows attorneys to submit medical bills and records into evidence without calling the actual medical providers, as long as the records are certified as authentic. According to the court, General Laws c. 233, § 79G (“Section 79G”), provides “unambiguously” that medical bills are admissible to establish the reasonable value of relevant medical services. “An itemized bill..., including hospital medical records, relating to medical... services,... shall be admissible as evidence of the fair and reasonable charge for such services....” The court held that under the direct language of Section 79G, Ms. Law should have been able to submit evidence of her medical bills at trial.

Next, the court turned to the question of whether the amounts actually paid should also be admissible. Ruling that the actual amounts paid are not admissible, the SJC reasoned that in today’s health care system, only a small percentage of patients pay the full amount billed for medical service, due to many factors, including discounts created in complicated insurance agreements. “The actual amounts paid by an insurer to the provider may confound

## Also Noteworthy:

In Global Investors v. National Fire Ins. Co., the Massachusetts Court of Appeals recently reaffirmed the well-established “at issue” exception to the attorney-client privilege, namely, that “a litigant may implicitly waive the privilege... by injecting certain types of claims or defenses into a case.” The court also noted the important distinction that an “at issue” waiver does not amount to a blanket waiver of the attorney-client privilege for the entire case, but only with regard to what has been placed at issue.

On appeal, the issue was whether the attorney for the plaintiffs could be deposed. That attorney had represented the plaintiffs in an underlying matter that settled before the insurer had taken a position relative to its duty to defend. The plaintiffs sought attorney’s fees from the underlying action and consequential damages based on allegations that they were compelled by the lack of a defense from the insurer to settle on less favorable terms.

The Appeals Court held that the Plaintiffs had indeed effected an “at issue” waiver of the attorney-client privilege, because the “advice of counsel, at the time [they] took certain action, [was] directly or indirectly implicated in [their] claim.” Specifically, the claim for consequential damages “relie[d] on the relative merits and values of their case in the [underlying] Maine litigation,” and the attorney was the sole source of that information. “The plaintiffs have resisted discovery on the basis of the privilege, but relied on the privileged communications or information to support their allegations.”

It is not hard to imagine that a court could apply this same rule and allow a deposition of coverage counsel where an “advice of counsel” defense is asserted in litigation involving a coverage dispute. ☞



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