

1-1-2015

Breaking The Ice: How Plaintiffs May Establish Premises Liability in "Black Ice" Cases Where the Dangerous Condition is by Definition Not Visible or Apparent to Property Owners

Hon. Mark C. Dillon

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

Recommended Citation

Dillon, Hon. Mark C. (2015) "Breaking The Ice: How Plaintiffs May Establish Premises Liability in "Black Ice" Cases Where the Dangerous Condition is by Definition Not Visible or Apparent to Property Owners," *Hofstra Law Review*: Vol. 43 : Iss. 3 , Article 3. Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol43/iss3/3>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

BREAKING THE ICE: HOW PLAINTIFFS MAY ESTABLISH PREMISES LIABILITY IN “BLACK ICE” CASES WHERE THE DANGEROUS CONDITION IS BY DEFINITION NOT VISIBLE OR APPARENT TO PROPERTY OWNERS

*Hon. Mark C. Dillon**

I. INTRODUCTION

Plaintiffs injured as a result of accidents involving “black ice” encounter peculiar challenges in establishing liability against defendant property owners, which are not faced by plaintiffs injured by other forms of property conditions. Black ice forms as a result of winds and temperatures that are colder than the paved surfaces beneath it.¹ The freezing process, under such conditions, expels air bubbles from the water, causing the ice that forms on the paved surface to be unusually smooth, thin, and virtually invisible.² The invisibility and transience of black ice means that property owners are typically not on prior notice of the icy conditions, which, in turn, means that plaintiffs injured in accidents involving black ice find it difficult, if not impossible, to establish all of the elements required for tort liability in their favor.³

This Article examines the difficulties that plaintiffs face in establishing liability in black ice cases, with a focus upon the manner in which plaintiffs may try to establish liability of property owners, and the fact that defendants may seek to establish defenses. Until now, no law review article has examined these issues.

*Mark C. Dillon is a Justice of the Appellate Division of the New York State Supreme Court, Second Judicial Department, and is an Adjunct Professor of New York Practice at Fordham Law School. The editing of this Article was assisted during its drafting stage by Deborah Robbins, a student of Pace Law School, and Zachary Press, a student of Cardozo Law School, who each interned at the Appellate Division during the summer of 2014.

1. *What Is Black Ice?*, WISEGEEK, <http://www.wisegeek.com/what-is-black-ice.htm> (last visited Apr. 12, 2015); see *infra* notes 142-53 and accompanying text.

2. *What Is Black Ice?*, *supra* note 1.

3. See *infra* Part III.

II. PRINCIPLES OF PREMISES LIABILITY

Liability claims for alleged black ice conditions must be viewed, at least initially, in the context of premises liability principles.

It is axiomatic that property owners in New York are under an obligation to maintain their premises in a reasonably safe condition for the protection of persons whose presence is reasonably foreseeable.⁴ Prior to 1976, New York made common law distinctions between persons present upon property based on whether their status was that of trespassers, licensees, or invitees.⁵ The duties owed to each category of persons were different and plotted along a “sliding scale,”⁶ by which persons with higher legal status upon property were owed a greater duty of care by the property owner, and persons with the least legal status were owed virtually no duty. The lowest category of persons was the “trespasser” whose presence upon property was without privilege,⁷ to whom the property owner generally owed no duty of care as to property

4. *Bingham v. N.Y.C. Transit Auth.*, 864 N.E.2d 49, 54 (N.Y. 2007); *Kellman v. 45 Tiemann Assocs., Inc.*, 662 N.E.2d 255, 256 (N.Y. 1995); *Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451, 457-58 (N.Y. 1980); *Friedman v. 1753 Realty Co.*, 986 N.Y.S.2d 175, 177 (App. Div. 2014); *Pellegrino v. Trapasso*, 980 N.Y.S.2d 813, 814 (App. Div. 2014); *Perruzza v. L & M Creations of N.Y.*, 981 N.Y.S.2d 435, 436 (App. Div.), *appeal denied*, 20 N.E.3d 662 (N.Y. 2014); *Kruger v. Donzelli Realty Corp.*, 975 N.Y.S.2d 689, 689 (App. Div. 2013), *appeal denied*, 9 N.E.3d 368 (N.Y. 2014); *Onetti v. Gatsby Condo.*, 975 N.Y.S.2d 27, 29 (App. Div. 2013); *Payton v. 5391 Transit Rd., LLC*, 967 N.Y.S.2d 799, 800 (App. Div. 2013); *Van Dina v. Olsen*, 965 N.Y.S.2d 352, 352 (App. Div. 2013); *Cassone v. State*, 925 N.Y.S.2d 197, 198 (App. Div. 2011); *Gradwohl v. Stop & Shop Supermarket Co.*, 896 N.Y.S.2d 85, 87 (App. Div. 2010); *Haire v. Bonelli*, 870 N.Y.S.2d 591, 593 (App. Div. 2008), *aff'd*, 967 N.Y.S.2d 475, *appeal denied*, 998 N.E.2d 399 (N.Y. 2013); *Scott v. Redl*, 842 N.Y.S.2d 485, 487 (App. Div. 2007); *Perez v. Metro. Museum of Art*, 758 N.Y.S.2d 325, 326 (App. Div. 2003); *Martinez v. Santoro*, 710 N.Y.S.2d 374, 375 (App. Div. 2000); *Williams v. Citibank, N.A.*, 677 N.Y.S.2d 318, 320 (App. Div. 1998); *Johnson v. Slocum Realty Corp.*, 595 N.Y.S.2d 244, 245 (App. Div. 1993); *see also Reimold v. Walden Terrace, Inc.*, 926 N.Y.S.2d 153, 154-55 (App. Div. 2011) (finding that the obligation extends to tenants).

5. *Merriman v. Baker*, 313 N.E.2d 773, 775-76 (N.Y. 1974) (holding that an owner must exercise reasonable care in respect to licensees); *Beauchamp v. N.Y.C. Hous. Auth.*, 190 N.E.2d 412, 415 (N.Y. 1963) (holding that an owner's only duty to trespassers is to “refrain from inflicting willful, wanton or intentional injuries”); *Lo Casto v. Long Island R.R. Co.*, 160 N.E.2d 846, 848 (N.Y. 1959) (holding that an owner's only duty to trespassers is to “refrain from inflicting willful, wanton or intentional injuries”); *Krause v. Alper*, 151 N.E.2d 895, 897 (N.Y. 1958) (holding that an owner must exercise reasonable care in respect to licensees); *Mayer v. Temple Props. Inc.*, 122 N.E.2d 909, 911-12 (N.Y. 1954) (holding that an owner's only duty to trespassers is to “refrain from inflicting willful, wanton or intentional injuries”); *Haefeli v. Woodrich Eng'g Co.*, 175 N.E. 123, 125 (N.Y. 1931) (holding that an owner must use reasonable care to prevent injuries to invitees); *Higgins v. Mason*, 174 N.E. 77, 79 (N.Y. 1930) (holding that an owner must exercise reasonable care in respect to licensees); *Meiers v. Fred Koch Brewery*, 127 N.E. 491, 492 (N.Y. 1920) (holding that an owner must use reasonable care to prevent injuries to invitees); *Vaughan v. Transit Dev. Co.*, 118 N.E. 219, 219-20 (N.Y. 1917) (holding that an owner's only duty to trespassers is to refrain from inflicting intentional injuries).

6. *Basso v. Miller*, 352 N.E.2d 868, 875 (N.Y. 1976) (Breitel, C.J., concurring).

7. *See Vaughan*, 118 N.E. at 219; RESTATEMENT (SECOND) OF TORTS § 329 (1965).

maintenance or warning of dangers,⁸ she was merely required to refrain from setting traps⁹ or “inflicting willful, wanton or intentional injuries upon the trespasser.”¹⁰ The next category of persons on the scale was the “licensee,” who enters upon property with the express or implied consent of the owner, such as spectators or salesmen, for purposes that serve the licensee rather than the owner of the land.¹¹ Property owners owed such persons only the duty of exercising reasonable care in warning licensees of any known dangers upon the property.¹² The persons with the highest legal status upon property were the public or business purpose “invitees,” whose presence benefits the possessor of the property,¹³ such as employees and tenants. For invitees, the property owner was under a duty to maintain the premises in a reasonably safe condition *and* to warn the invitees of known dangers.¹⁴

The task of fitting plaintiffs into neat categories of trespassers, licensees, and invitees has proven to be difficult in many instances.¹⁵ Those difficulties caused the New York Court of Appeals (“Court of Appeals”) to re-examine the distinctions by focusing attention not on the legal status of the plaintiffs, but upon the conduct of the defendants in maintaining their properties.¹⁶ Thus, in the groundbreaking 1976 cases of *Basso v. Miller*¹⁷ and *Scurti v. City of New York*,¹⁸ the Court of Appeals changed the rules of property owner liability by abolishing the distinction between trespassers, licensees, and invitees, and, instead, adopted a single uniform standard of reasonable care that takes into account the likelihood of injury to others, the seriousness of injuries, the burden of avoiding the risks, and the foreseeability of persons upon the

8. See RESTATEMENT (SECOND) OF TORTS § 333; see also Graham Hughes, *Duties to Trespassers: A Comparative Survey and Revaluation*, 68 YALE L.J. 633, 639-40 (1959) (describing New York’s common-law approach to the trespasser plaintiff); Fleming James, Jr., *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 144, 148-50 (1953) (noting that, traditionally, property owners owed no duty to trespassers for dangers arising from both natural and artificial conditions).

9. *Beauchamp*, 190 N.E.2d at 415; *Mayer*, 122 N.E.2d at 912.

10. *Beauchamp*, 190 N.E.2d at 415; *Lo Casto*, 160 N.E.2d at 848.

11. See *Vaughan*, 118 N.E. at 219; RESTATEMENT (SECOND) OF TORTS § 330 & cmts. c, e.

12. *Merriman v. Baker*, 313 N.E.2d 773, 775-76 (N.Y. 1974); *Krause v. Alper*, 151 N.E.2d 895, 897 (N.Y. 1958); *Higgins v. Mason*, 174 N.E. 77, 79 (N.Y. 1930); RESTATEMENT (SECOND) OF TORTS §§ 341-342.

13. See *Haefeli v. Woodrich Eng’g Co.*, 175 N.E. 123, 125 (N.Y. 1931); *Meiers v. Fred Koch Brewery*, 127 N.E. 491, 492 (N.Y. 1920); RESTATEMENT (SECOND) OF TORTS § 332(2)-(3).

14. *Haefeli*, 175 N.E. at 125; see also *Schwab v. Rubel Corp.*, 37 N.E.2d 234, 236 (N.Y. 1941) (holding that if an employer has knowledge of the existence of a danger, she has a duty to “give warning of the peril”).

15. See, e.g., *Basso v. Miller*, 352 N.E.2d 868, 871 (N.Y. 1976).

16. *Peralta v. Henriquez*, 790 N.E.2d 1170, 1173 (N.Y. 2003).

17. 352 N.E.2d 868 (N.Y. 1976).

18. 354 N.E.2d 794 (N.Y. 1976).

property.¹⁹ The 1976 standard of duty, which is still in effect today, imposes upon all property owners uniform property maintenance obligations in favor of all persons who find themselves on property, regardless of how such persons came to be there.²⁰ Of course, in actions involving dangerous or defective premises conditions, the condition must also be a proximate cause of the plaintiff's accident and injuries for liability to attach.²¹ If the condition is not proximately related to a plaintiff's accident or injuries, then its existence is ultimately of no legal significance.²²

Liability by property owners for breaching the duty of care is subject to a number of tort elements and defenses, each of which are discussed below.²³

A. The Creation of the Dangerous Condition by a Property Owner, or Actual or Constructive Notice of Its Existence

A property owner may not be held liable for damages arising from a plaintiff's personal injuries merely by the happening of an accident itself.²⁴ Nor is any property owner an insurer that no accident will ever

19. *Basso*, 352 N.E.2d at 872; *Scurti*, 354 N.E.2d at 795, 798; e.g., *Peralta*, 790 N.E.2d at 1173; *Macey v. Truman*, 519 N.E.2d 304, 305 (N.Y. 1987); *Toes v. Nat'l Amusements, Inc.*, 941 N.Y.S.2d 666, 668 (App. Div. 2012); *Harris v. Debbie's Creative Child Care, Inc.*, 928 N.Y.S.2d 583, 585 (App. Div. 2011); *Anton v. Corr. Med. Servs., Inc.*, 904 N.Y.S.2d 535, 536 (App. Div. 2010); *Cortez v. Ne. Realty Holdings, LLC*, 911 N.Y.S.2d 151, 153 (App. Div. 2010); *Sciara v. Morey*, 889 N.Y.S.2d 549, 549 (App. Div. 2009); *Groom v. Vill. of Sea Cliff*, 857 N.Y.S.2d 646, 647 (App. Div. 2008); *Salomon v. Prainito*, 861 N.Y.S.2d 718, 719 (App. Div. 2008); *Smith v. N.Y.C. Hous. Auth.*, 861 N.Y.S.2d 379, 380-81 (App. Div. 2008); *Karsdon v. Barringer*, 748 N.Y.S.2d 395, 396 (App. Div. 2002); *Blum v. Grunberg*, 704 N.Y.S.2d 845, 846 (App. Div. 2000); *Perrelli v. Orlow*, 708 N.Y.S.2d 742, 743 (App. Div. 2000); *O'Neill v. Maiara*, 701 N.Y.S.2d 108, 109 (App. Div. 1999); *Berk v. 11 Atl. Ave. Realty Corp.*, 615 N.Y.S.2d 145, 146 (App. Div. 1994); *Henderson v. L & K Collision Corp.*, 536 N.Y.S.2d 183, 185 (App. Div. 1989); *Arena v. Ostrin*, 520 N.Y.S.2d 785, 786 (App. Div. 1987); *Grandy v. Bavaro*, 521 N.Y.S.2d 956, 957 (App. Div. 1987).

20. *Basso*, 352 N.E.2d at 872; *Scurti*, 354 N.E.2d at 795, 798; e.g., *Toes*, 941 N.Y.S.2d at 668.

21. See *Conneally v. Diocese of Rockville Ctr.*, 984 N.Y.S.2d 127, 128 (App. Div. 2014); *Irizary v. Heller*, 943 N.Y.S.2d 606, 607-08 (App. Div. 2012); *Sermos v. Gruppuso*, 944 N.Y.S.2d 245, 246-47 (App. Div. 2012); *Comack v. VBK Realty Assocs., Ltd.*, 852 N.Y.S.2d 370, 372 (App. Div. 2008); *Quick v. G.G.'s Pizza & Pasta, Inc.*, 861 N.Y.S.2d 762, 763 (App. Div. 2008); *Nappi v. Inc. Vill. of Lynbrook*, 796 N.Y.S.2d 537, 537 (App. Div. 2005); *Alvino v. Lin*, 751 N.Y.S.2d 585, 586 (App. Div. 2002); *Gordon v. Muchnick*, 579 N.Y.S.2d 745, 746 (App. Div. 1992).

22. See *Singh v. McCrossen*, 975 N.Y.S.2d 336, 336-37 (App. Div. 2013); *Kolodziejczak v. Kolodziejczak*, 920 N.Y.S.2d 520, 522-23 (App. Div. 2011); *Lynch v. Winchester Homeowner's Ass'n.*, 883 N.Y.S.2d 247, 248-49 (App. Div. 2009); *Madir v. 21-23 Maiden Lane Realty, LLC*, 780 N.Y.S.2d 369, 371 (App. Div. 2004); *Ortiz v. Jimtion Food Corp.*, 712 N.Y.S.2d 122, 123 (App. Div. 2000).

23. See *infra* Part II.A-E.

24. See, e.g., *Paul v. Consol. Fireworks of Am.*, 105 N.E. 795, 796 (N.Y. 1914); *Toss v. Randall*, 719 N.Y.S.2d 295, 296 (App. Div. 2001); *Mikula v. Duliba*, 464 N.Y.S.2d 910, 913 (App. Div. 1983); *DiLorenzo v. Venosa*, 375 N.Y.S.2d 395, 396 (App. Div. 1975).

occur on her land.²⁵ Liability requires that there be a breach of the property owner's defined duty of reasonable care to the plaintiff.²⁶ More specifically, for a property owner to be held liable for a defective or dangerous premises condition, the plaintiff is required to establish at least one of three potential evidentiary predicates. First, the plaintiff may prove that the defendant property owner *created* the dangerous or defective premises condition.²⁷ The "creation" of a condition involves active, affirmative conduct of the property owner, as distinguished from mere passivity or neglect.²⁸ There is a rationale behind the rule that makes sense—a property owner may be held liable for affirmative conduct creating a dangerous or defective condition, as the creation of a condition breaches the duty of reasonable care and places the property owner on self-notice that the condition exists and should be remedied.

A second basis for premises liability is where the property owner has not affirmatively created a dangerous or defective condition on the property, but receives *actual notice* from some source that such a condition exists.²⁹ The rationale behind the requirement of actual notice

25. See *Sanatass v. Consol. Investing Co.*, 887 N.E.2d 1125, 1128 (N.Y. 2008); *Torres v. State*, 795 N.Y.S.2d 710, 711 (App. Div. 2005); *Stanton v. Town of Oyster Bay*, 769 N.Y.S.2d 383, 384 (App. Div. 2003); *Nardi v. Crowley Marine Assocs., Inc.*, 741 N.Y.S.2d 246, 247 (App. Div. 2002); *Williams v. Citibank, N.A.*, 677 N.Y.S.2d 318, 320 (App. Div. 1998); *Csukardi v. Bishop McDonnell Camp*, 539 N.Y.S.2d 408, 409 (App. Div. 1989); *Bannerman v. Vill. of Hastings-on-Hudson*, No. SC-0135, 2006 WL 27472, at *5 (N.Y. Just. Ct. Jan. 2, 2006).

26. *E.g.*, *Turcotte v. Fell*, 502 N.E.2d 964, 967 (N.Y. 1986); *Solomon v. City of New York*, 489 N.E.2d 1294, 1294 (N.Y. 1985); *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531, 533 (N.Y. 1981); *Witz v. Cadillac Hotel, Inc.*, 227 N.E.2d 308, 308 (N.Y. 1967); *Earl v. Adducci*, 842 N.Y.S.2d 643, 644 (App. Div. 2007); *Farrell v. Okeic*, 698 N.Y.S.2d 132, 134 (App. Div. 1999); *J. Rosen Furs, Inc. v. Sigma Plumbing & Heating Corp.*, 670 N.Y.S.2d 596, 596-97 (App. Div. 1998); *Zavaro v. Westbury Prop. Inv. Co.*, 664 N.Y.S.2d 611, 611 (App. Div. 1997); *Abdul-Azim v. RDC Commercial Ctr., Inc.*, 620 N.Y.S.2d 70, 70-71 (App. Div. 1994); *Alvarez v. Lindsay Park Hous. Corp.*, 572 N.Y.S.2d 357, 358 (App. Div. 1991); *Siegel v. Hofstra Univ.*, 545 N.Y.S.2d 935, 936 (App. Div. 1989); *Huth v. Allied Maint. Corp.*, 532 N.Y.S.2d 880, 881 (App. Div. 1988); *McGill v. Caldors, Inc.*, 522 N.Y.S.2d 976, 977 (App. Div. 1987); *DeRosa v. Fordham Univ.*, 238 N.Y.S.2d 778, 780 (App. Div. 1963); *see, e.g.*, *Mitchell v. Icolari*, 969 N.Y.S.2d 503, 505 (App. Div. 2013); *Kraut v. City of New York*, 925 N.Y.S.2d 624, 626 (App. Div. 2011); *Ruiz v. Griffin*, 898 N.Y.S.2d 590, 592 (App. Div. 2010); *Ingrassia v. Lividikos*, 864 N.Y.S.2d 449, 452 (App. Div. 2008).

27. See *Hickman v. Medina*, 980 N.Y.S.2d 834, 835 (App. Div. 2014); *Schron v. Jean's Fine Wine & Spirits, Inc.*, 979 N.Y.S.2d 684, 685 (App. Div. 2014); *Schroek v. Gies*, 973 N.Y.S.2d 515, 516 (App. Div. 2013); *Hamelin v. Town of Chateaugay*, 955 N.Y.S.2d 669, 670 (App. Div. 2012); *Lee v. Ana Dev. Corp.*, 921 N.Y.S.2d 232, 233 (App. Div. 2011); *Shay v. Mozer, Inc.*, 915 N.Y.S.2d 147, 148 (App. Div. 2011); *Goldes v. City of New York*, 797 N.Y.S.2d 102, 103-04 (App. Div. 2005); *Herbst v. Nevele Country Club Inc.*, 674 N.Y.S.2d 497, 498 (App. Div. 1998); *George v. Ponderosa Steak House*, 632 N.Y.S.2d 893, 894 (App. Div. 1995).

28. See *O'Brien v. City of Schenectady*, 809 N.Y.S.2d 294, 295-96 (App. Div. 2006); *see also* *Cook v. Rezende*, 300 N.E.2d 428, 428-29 (N.Y. 1973); *DiGrazia v. Lemmon*, 813 N.Y.S.2d 560, 562 (App. Div. 2006); *Goldes*, 797 N.Y.S.2d at 103-04; *Moscato v. City of New York*, 792 N.Y.S.2d 104, 105 (App. Div. 2005).

29. See, *e.g.*, *Piacquadio v. Recine Realty Corp.*, 646 N.E.2d 795, 796 (N.Y. 1994); *Bogart v.*

is that once a property owner is informed that a dangerous or defective condition exists on the property, a duty is triggered to remedy the condition in order to assure that the property is reasonably safe for persons whose future presence upon it is reasonably foreseeable. Actual notice may be delivered to a property owner either orally or in writing.³⁰ In negligence actions against municipalities arising from personal injury, property damage, or wrongful death incurred by reason of dangerous or defective highways, bridges, culverts, or sidewalks, the prior notice must be in a writing and delivered to the municipality's clerk or highway superintendent,³¹ unless the danger or defect is affirmatively created by

F.W. Woolworth Co., 249 N.E.2d 771, 771-72 (N.Y. 1969); *Friedman v. 1753 Realty Co.*, 986 N.Y.S.2d 175, 177-78 (App. Div. 2014); *Hamilton v. Picardo*, 988 N.Y.S.2d 306, 307 (App. Div.), *appeal denied*, 20 N.E.3d 659 (N.Y. 2014); *Heyward v. Shanne*, 980 N.Y.S.2d 202, 204 (App. Div. 2014); *Ingram v. Costco Wholesale Corp.*, 985 N.Y.S.2d 272, 273 (App. Div. 2014); *McGrath v. George Weston Bakeries, Inc.*, 986 N.Y.S.2d 644, 645 (App. Div. 2014); *Moore v. Great Atl. & Pac. Tea Co.*, 985 N.Y.S.2d 605, 605-06 (App. Div. 2014); *Williams v. Yang Qi Nail Salon, Inc.*, 979 N.Y.S.2d 625, 626-27 (App. Div. 2014); *Dennis v. Lakhani*, 958 N.Y.S.2d 170, 171-72 (App. Div. 2013); *Kudrina v. 82-04 Lefferts Tenants Corp.*, 973 N.Y.S.2d 364, 364-65 (App. Div. 2013); *Morrison v. Apostolic Faith Mission of Portland*, 974 N.Y.S.2d 568, 569 (App. Div. 2013); *Rendon v. Broadway Plaza Assocs. Ltd.*, 971 N.Y.S.2d 575, 577 (App. Div. 2013); *Williams v. Thomas*, 977 N.Y.S.2d 810, 811-12 (App. Div. 2013), *appeal denied*, 9 N.E.3d 369 (N.Y. 2014); *Acevedo v. N.Y.C. Transit Auth.*, 947 N.Y.S.2d 599, 600 (App. Div. 2012); *Patrick v. Grimaldi*, 954 N.Y.S.2d 698, 699-700 (App. Div. 2012); *Salim v. W. Reg'l Off-Track Betting Corp.*, 954 N.Y.S.2d 791, 793 (App. Div. 2012); *Sermos v. Gruppuso*, 944 N.Y.S.2d 245, 246 (App. Div. 2012); *Spinoccia v. Fairfield Bellmore Ave., LLC*, 943 N.Y.S.2d 601, 601-02 (App. Div. 2012); *Winder v. Exec. Cleaning Servs., LLC*, 936 N.Y.S.2d 687, 688 (App. Div. 2012); *Alami v. 215 E. 68th St., L.P.*, 931 N.Y.S.2d 647, 649 (App. Div. 2011); *Rizos v. Galini Seafood Rest.*, 933 N.Y.S.2d 703, 704 (App. Div. 2011); *Stever v. HSBC Bank USA, N.A.*, 920 N.Y.S.2d 510, 512 (App. Div. 2011); *Anderson v. Weinberg*, 894 N.Y.S.2d 292, 293 (App. Div. 2010); *Drago v. DeLuccio*, 913 N.Y.S.2d 747, 748 (App. Div. 2010); *Nelson v. Cunningham Assocs., L.P.*, 908 N.Y.S.2d 713, 714 (App. Div. 2010); *Pommerenck v. Nason*, 914 N.Y.S.2d 826, 828 (App. Div. 2010); *Villano v. Strathmore Terrace Homeowners Ass'n*, 908 N.Y.S.2d 124, 126 (App. Div. 2010); *Cintron v. N.Y.C. Transit Auth.*, 877 N.Y.S.2d 446, 447 (App. Div. 2009); *Dennehy-Murphy v. Nor-Topia Serv. Ctr., Inc.*, 876 N.Y.S.2d 512, 513 (App. Div. 2009); *Ensher v. Charlton*, 884 N.Y.S.2d 186, 187 (App. Div. 2009); *Racztes v. Horne*, 892 N.Y.S.2d 258, 259 (App. Div. 2009); *Starling v. Suffolk Cnty. Water Auth.*, 881 N.Y.S.2d 149, 150 (App. Div. 2009); *Tsai v. Duane Reade, Inc.*, 883 N.Y.S.2d 89, 89-90 (App. Div. 2009); *Verma v. City of New York*, 879 N.Y.S.2d 540, 541 (App. Div. 2009); *Denker v. Century 21 Dep't Stores, LLC*, 866 N.Y.S.2d 681, 682 (App. Div. 2008); *Iannuzzi v. Town of Wallkill*, 864 N.Y.S.2d 470, 471 (App. Div. 2008); *Jackson v. City of New York*, 865 N.Y.S.2d 613, 614 (App. Div. 2008); *Khamis v. CG Foods, Inc.*, 856 N.Y.S.2d 132, 133 (App. Div. 2008); *Rubin v. Cryder House*, 834 N.Y.S.2d 316, 317 (App. Div. 2007).

30. See *Quiroa v. Ferenczi*, 909 N.Y.S.2d 762, 763 (App. Div. 2010); *Dawson v. Raimon Realty Corp.*, 758 N.Y.S.2d 100, 101 (App. Div. 2003); *Gelpi v. 37th Ave. Realty Corp.*, 721 N.Y.S.2d 380, 381 (App. Div. 2001); *Austin v. Town of Southampton*, No. 09-7577, 2012 WL 149344, at *3 (N.Y. Sup. Ct. Jan. 13, 2012), *aff'd*, 979 N.Y.S.2d 127 (App. Div. 2014).

31. N.Y. HIGH. LAW § 139(2) (McKinney 2014); N.Y. TOWN LAW § 65-a(1)-(2) (McKinney 2013); N.Y. VILLAGE LAW § 6-628 (McKinney 2011); N.Y. SECOND CLASS CITIES LAW § 244 (McKinney 1994); e.g., *Gorman v. Town of Huntington*, 907 N.E.2d 292, 295 (N.Y. 2009); *Hanover Ins. Co. v. Town of Pawling*, 943 N.Y.S.2d 152, 153 (App. Div. 2012); *Kenney v. Cnty. of Nassau*, 940 N.Y.S.2d 130, 132 (App. Div. 2012); *Scovazzo v. Town of Tonawanda*, 921 N.Y.S.2d

the municipality³² or results from a municipal “special use” of the highway, bridge, culvert, or sidewalk.³³ The prior written notice requirement includes accidents where ice is alleged as being a competent producing cause.³⁴ The failure by any property owner to correct a condition within a reasonable time, despite prior actual notice of it, allows for the imposition of liability for breach of the owner’s duty of care.³⁵

In the absence of a property owner’s affirmative creation of a condition or the actual notice thereof, liability may also be imposed if the property owner was on *constructive notice* of the condition.³⁶ Constructive notice triggers if a dangerous or defective premises condition existed for a long enough period of time that the property owner, through the exercise of reasonable care, should have become aware of the condition and taken steps to remedy it.³⁷ Constructive

591, 591 (App. Div. 2011); *Kiszenik v. Town of Huntington*, 895 N.Y.S.2d 208, 209-10 (App. Div. 2010); *Napolitano v. Suffolk Cnty. Dep’t of Pub. Works*, 884 N.Y.S.2d 484, 486 (App. Div. 2009); *Filaski-Fitzgerald v. Town of Huntington*, 795 N.Y.S.2d 614, 614 (App. Div. 2005); *Glaser v. Cnty. of Orange*, 803 N.Y.S.2d 669, 669-70 (App. Div. 2005); *Camenson v. Town of N. Hempstead*, 748 N.Y.S.2d 790, 791 (App. Div. 2002); *Polak v. Gomes*, 719 N.Y.S.2d 275, 275 (App. Div. 2001); *Butts v. Vill. of Sag Harbor*, 688 N.Y.S.2d 197, 197 (App. Div. 1999); *DeLuca v. Cnty. of Nassau*, 615 N.Y.S.2d 741, 742 (App. Div. 1994).

32. *E.g.*, *Kieman v. Thompson*, 534 N.E.2d 39, 40 (N.Y. 1988); *Lipari v. Town of Oyster Bay*, 983 N.Y.S.2d 852, 853 (App. Div. 2014); *Moncrieffe v. City of White Plains*, 982 N.Y.S.2d 579, 581 (App. Div. 2014); *Tallerico v. City of Peekskill*, 980 N.Y.S.2d 842, 842-43 (App. Div. 2014); *Wald v. City of New York*, 982 N.Y.S.2d 534, 535 (App. Div. 2014); *Godino v. Kipel Assocs., Inc.*, 965 N.Y.S.2d 155, 156 (App. Div. 2013); *Lindsay v. City of Mount Vernon*, 970 N.Y.S.2d 704, 704-05 (App. Div. 2013); *Albano v. Suffolk Cnty.*, 952 N.Y.S.2d 245, 245-46 (App. Div. 2012); *Cuebas v. City of Yonkers*, 948 N.Y.S.2d 688, 688 (App. Div. 2012); *Romano v. Vill. of Mamaroneck*, 954 N.Y.S.2d 593, 594-95 (App. Div. 2012); *Forbes v. City of New York*, 926 N.Y.S.2d 309, 309 (App. Div. 2011); *Glaser*, 803 N.Y.S.2d at 669-70.

33. *E.g.*, *Amabile v. City of Buffalo*, 715 N.E.2d 104, 105-06 (N.Y. 1999); *Poirer v. City of Schenectady*, 648 N.E.2d 1318, 1320 (N.Y. 1995); *Lipari*, 983 N.Y.S.2d at 853; *Adamson v. City of New York*, 961 N.Y.S.2d 402, 402-03 (App. Div. 2013); *Albano*, 952 N.Y.S.2d at 245-46; *Loiaconi v. Vill. of Tarrytown*, 829 N.Y.S.2d 191, 192 (App. Div. 2007); *Provenzano v. City of New York*, 915 N.Y.S.2d 29, 30 (App. Div. 2010); *Bradley v. City of New York*, 832 N.Y.S.2d 257, 259 (App. Div. 2007); *Forbes*, 926 N.Y.S.2d at 309; *see D’Ambrosio v. City of New York*, 435 N.E.2d 366, 370 (N.Y. 1982).

34. HIGH. § 139(2); TOWN § 65-a(1)-(2); VILLAGE § 6-628; SECOND CLASS CITIES § 244; *e.g.*, *Mullins v. Town of Clarkstown*, 583 N.Y.S.2d 652, 653 (App. Div.), *appeal denied*, 602 N.E.2d 233 (N.Y. 1992); *Porter v. Callahan*, 510 N.Y.S.2d 251, 252 (App. Div. 1986).

35. *E.g.*, *Williams v. Thomas*, 977 N.Y.S.2d 810, 811 (App. Div. 2013), *leave to appeal denied*, 9 N.E.3d 369 (N.Y. 2014); *Morrison v. Apostolic Faith Mission of Portland*, 974 N.Y.S.2d 568, 569 (App. Div. 2013); *Winder v. Exec. Cleaning Servs., LLC*, 936 N.Y.S. 687 (App. Div. 2012); *Steuer v. HSBC Bank USA, N.A.*, 920 N.Y.S.2d 510, 512 (App. Div. 2011).

36. *See* HIGH. § 139(2); SECOND CLASS CITIES § 244; TOWN § 65-a(1)-(2); *Gordon v. Am. Museum Natural History*, 492 N.E.2d 774, 775 (N.Y. 1986); *Kenney*, 940 N.Y.S.2d at 132; *Napolitano*, 884 N.Y.S.2d at 486; *Uhlinger v. Gloversville Enlarged Sch. Dist.*, 796 N.Y.S.2d 437, 438 (App. Div. 2005).

37. *Gordon*, 492 N.E.2d at 775; *Dennehy-Murphy v. Nor-Topia Serv. Ctr., Inc.*, 876 N.Y.S.2d

notice often presents questions of fact, such as whether the alleged condition should have been observed,³⁸ whether it lasted for a long enough time to impute obligations upon the property owner to correct the condition,³⁹ and whether any corrective measures that might have been actually undertaken were sufficient.⁴⁰

Actual and constructive notice of a premises condition, or the affirmative creation of the condition, does not necessarily have to be directed to the property owner herself.⁴¹ Multi-family dwellings, apartment houses, and commercial premises, such as those that exist in urban settings, are typically operated by managing agents and occupied by tenants. The creation of a dangerous premises condition by an owner, managing agent, or tenant, and actual or constructive notice of such condition, may, generally speaking, raise contractual issues as to which of those parties bear the duty of care, and the ultimate liability, for plaintiffs' damages incurred at the property.⁴² The ultimate liability may

512, 513 (App. Div. 2009); *see, e.g.*, *Piacquadio v. Recine Realty Corp.*, 646 N.E.2d 795, 796 (N.Y. 1994); *Negri v. Stop & Shop Inc.*, 480 N.E.2d 740, 741 (N.Y. 1985); *Bogart v. F.W. Woolworth Co.*, 249 N.E.2d 771, 772 (N.Y. 1969); *Friedman v. 1753 Realty Co.*, 986 N.Y.S.2d 175, 178 (App. Div. 2014); *Hamilton v. Picardo*, 988 N.Y.S.2d 306, 307 (App. Div.), *leave to appeal denied*, 20 N.E.3d 659 (N.Y. 2014); *Heyward v. Shanne*, 980 N.Y.S.2d 202, 204 (App. Div. 2014); *Ingram v. Costco Wholesale Corp.*, 985 N.Y.S.2d 272, 273 (App. Div. 2014); *McGrath v. George Weston Bakeries, Inc.*, 986 N.Y.S.2d 644, 646-47 (App. Div. 2014); *Moore v. Great Atl. & Pac. Tea Co.*, 985 N.Y.S.2d 605, 605-06 (App. Div. 2014); *Williams v. Yang Qi Nail Salon, Inc.*, 979 N.Y.S.2d 625, 627 (App. Div. 2014); *Dennis v. Lakhani*, 958 N.Y.S.2d 170, 172 (App. Div. 2013); *Kudrina v. 82-04 Lefferts Tenants Corp.*, 973 N.Y.S.2d 364, 364-65 (App. Div. 2013); *Morrison*, 974 N.Y.S.2d at 569; *Rendon v. Broadway Plaza Assocs. Ltd.*, 971 N.Y.S.2d 575, 576 (App. Div. 2013); *Acevedo v. N.Y.C. Transit Auth.*, 947 N.Y.S.2d 599, 600 (App. Div. 2012); *Patrick v. Grimaldi*, 954 N.Y.S.2d 698, 700 (App. Div. 2012); *Spinoccia v. Fairfield Bellmore Ave., LLC*, 943 N.Y.S.2d 601, 601-02 (App. Div. 2012); *Alami v. 215 E. 68th Street, L.P.*, 931 N.Y.S.2d 647, 649 (App. Div. 2011); *Rizos v. Galini Seafood Rest.*, 933 N.Y.S.2d 703, 704 (App. Div. 2011); *Stever*, 920 N.Y.S.2d at 512; *Anderson v. Weinberg*, 894 N.Y.S.2d 292, 293 (App. Div. 2010); *Drago v. DeLuccio*, 913 N.Y.S.2d 747, 748 (App. Div. 2010); *Nelson v. Cunningham Assocs., L.P.*, 908 N.Y.S.2d 713, 714-15 (App. Div. 2010); *Pommerenck v. Nason*, 914 N.Y.S.2d 826, 828 (App. Div. 2010); *Tsai v. Duane Reade, Inc.*, 883 N.Y.S.2d 89, 89-90 (App. Div. 2009); *Cintron v. N.Y.C. Transit Auth.*, 877 N.Y.S.2d 446, 447-48 (App. Div. 2009); *Ensher v. Charlton*, 884 N.Y.S.2d 187, 187 (App. Div. 2009); *Raczes v. Home*, 892 N.Y.S.2d 258, 259-60 (App. Div. 2009); *Starling v. Suffolk Cnty. Water Auth.*, 881 N.Y.S.2d 149, 150 (App. Div. 2009); *Verma v. City of New York*, 879 N.Y.S.2d 540, 541 (App. Div. 2009); *Denker v. Century 21 Dep't Stores, LLC*, 866 N.Y.S.2d 681, 682 (App. Div. 2008); *Iannuzzi v. Town of Wallkill*, 864 N.Y.S.2d 470, 471 (App. Div. 2008); *Khamis v. CG Foods, Inc.*, 856 N.Y.S.2d 132, 133 (App. Div. 2008); *Rubin v. Cryder House*, 834 N.Y.S.2d 316, 317 (App. Div. 2007).

38. *E.g.*, *Rodriguez v. Binghamton Hous. Auth.*, 955 N.Y.S.2d 680, 681-82 (App. Div. 2012).

39. *E.g.*, *Stevenson v. Saratoga Performing Arts Ctr., Inc.*, 981 N.Y.S.2d 877, 879-80 (App. Div. 2014); *Serna v. 898 Corp.*, 934 N.Y.S.2d 704, 704 (App. Div. 2011); *Uhlinger*, 796 N.Y.S.2d at 438-39.

40. *E.g.*, *Wynn v. T.R.I.P. Redevelopment Assocs.*, 745 N.Y.S.2d 97, 103 (App. Div. 2002).

41. *See, e.g.*, *Durkin v. IDI Constr.*, 694 N.Y.S.2d 550, 554 (App. Div. 1999).

42. *See, e.g.*, *Picchione v. Sweet Constr. Corp.*, 875 N.Y.S.2d 42, 46-47 (App. Div. 2009).

lie with the managing agent or tenant if the management contract or lease between the parties contains a provision by which the managing agent or tenant agrees to indemnify and hold the property owner harmless for acts or omissions that cause an occurrence at the property.⁴³ Such hold harmless and indemnity agreements are valid and enforceable under New York General Obligations Law section 5-322.1⁴⁴ on the condition that they do not exonerate any party for her own negligent acts or omissions; and conversely, provisions that exonerate a party from liability for her own negligence are void and unenforceable as against the public policy of the state.⁴⁵

When ice is the dangerous or defective premises condition complained of by an injured plaintiff, the same principles apply. As with other forms of premises conditions, cases are legion in New York as to whether alleged icy conditions at premises were created by property owners, actually noticed to the property owners without remedy, constructively noticed to the property owners without remedy, or were the proximate causes of claimed injuries and damages.⁴⁶

B. Five Qualifiers: The Defenses of Latency, Trivial Defects, Open and Obvious Conditions, Storms in Progress, and Lack of Duty

Considerations of premises liability are subject to five qualifiers for liability to be ultimately established against the property owner or managing agent. One qualifier is that the alleged dangerous or defective condition be observable rather than latent.⁴⁷ A property owner cannot be expected to observe and remedy a condition that is not observable upon reasonable inspection because of its latency.⁴⁸

43. See, e.g., *id.*; *Vital v. City of New York*, 842 N.Y.S.2d 363, 364 (App. Div. 2007); *Lago v. Krollage*, 554 N.Y.S.2d 633, 634-35 (App. Div. 1990), *aff'd*, 575 N.E.2d 107 (N.Y. 1991); *Pellegrino v. Walker Theater, Inc.*, 511 N.Y.S.2d 372, 374 (App. Div. 1987).

44. NEW YORK GEN. OBLIG. LAW § 5-322.1 (McKinney 2012).

45. *Id.* § 5-322.1(1); e.g., *Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co.*, 680 N.E.2d 1200, 1205 (N.Y. 1997); *Brown v. Two Exch. Plaza Partners*, 556 N.E.2d 430, 433-34 (N.Y. 1990); *Leibel v. Flynn Hill Elevator Co.*, 809 N.Y.S.2d 519, 520 (App. Div. 2006); *Cavanaugh v. 4518 Assocs.*, 776 N.Y.S.2d 260, 263 (App. Div. 2004); *Carriere v. Whiting Turner Contracting*, 750 N.Y.S.2d 633, 635 (App. Div. 2002); *Padro v. Bertelsman Music Grp.*, 718 N.Y.S.2d 296, 298 (App. Div. 2000).

46. *Hoffman v. Brown*, 971 N.Y.S.2d 130, 131-32 (App. Div. 2013); *McGough v. Cryan, Inc.*, 976 N.Y.S.2d 135, 137 (App. Div. 2013); *Schnell v. Fitzgerald*, 945 N.Y.S.2d 390, 391 (App. Div. 2012); *Spindell v. Town of Hempstead*, 938 N.Y.S.2d 325, 327 (App. Div. 2012); *McMahon v. Gold*, 910 N.Y.S.2d 561, 563 (App. Div. 2010); *Applegate v. Long Island Power Auth.*, 862 N.Y.S.2d 86, 86 (App. Div. 2008); *Lal v. Ng*, 823 N.Y.S.2d 429, 430 (App. Div. 2006).

47. *McGough*, 976 N.Y.S.2d at 137; *Hoffman*, 971 N.Y.S.2d at 131-32; *Schnell*, 945 N.Y.S.2d at 391; *Spindell*, 938 N.Y.S.2d at 327; *McMahon*, 910 N.Y.S.2d at 563; *Applegate*, 862 N.Y.S.2d at 86; *Lal*, 823 N.Y.S.2d at 430.

48. See *McGough*, 976 N.Y.S.2d at 137; *Hoffman*, 971 N.Y.S.2d at 131-32; *Spindell*, 938

A second qualifier pertains to “trivial defects.” The trivial defect defense is borne of the notion that some premises conditions are so minor or routine that they should not be actionable.⁴⁹ The defendant bears the burden of establishing that the alleged dangerous or defective condition is trivial and does not constitute a trap or nuisance, a defense that the plaintiff may then seek to defeat by raising questions of fact or ultimately establishing that the defect is *not* trivial.⁵⁰ There is no “minimum dimension test” or *per se* rule for determining triviality, as courts must, instead, examine on a case-by-case basis the width, depth, elevation, irregularity, and appearance of the defect, and the time, place, and circumstance of the injury.⁵¹ Examples of trivial defects include, but are not limited to: door saddles;⁵² minor sidewalk elevation differentials;⁵³ a slight height difference in pavement;⁵⁴ and minor holes in pathways.⁵⁵

N.Y.S.2d at 327; *Applegate*, 862 N.Y.S.2d at 86; *Gramazio v. 370 Lexington Ave., LLC*, 836 N.Y.S.2d 84, 85 (App. Div. 2007); *Lal*, 823 N.Y.S.2d at 430; *Curiale v. Sharrotts Woods, Inc.*, 781 N.Y.S.2d 47, 49 (App. Div. 2004); *see also McMahon*, 910 N.Y.S.2d at 563 (explaining that the defect in a deck was latent and not readily observable).

49. *See Grundstrom v. Papadopoulos*, 986 N.Y.S.2d 167, 168 (App. Div. 2014); *Rogers v. 575 Broadway Assocs., L.P.*, 939 N.Y.S.2d 517, 518 (App. Div. 2012); *Kehoe v. City of New York*, 930 N.Y.S.2d 252, 253 (App. Div. 2011); *Aguayo v. N.Y.C. Hous. Auth.*, 897 N.Y.S.2d 239, 240 (App. Div. 2010); *Bolloli v. Waldbaum, Inc.*, 896 N.Y.S.2d 400, 402 (App. Div. 2010); *James v. Newport Gardens, Inc.*, 896 N.Y.S.2d 116, 118 (App. Div. 2010); *Berry v. Rocking Horse Ranch Corp.*, 868 N.Y.S.2d 270, 271 (App. Div. 2008); *Hahn v. Wilhelm*, 865 N.Y.S.2d 240, 241 (App. Div. 2008); *Portanova v. Kantlis*, 833 N.Y.S.2d 652, 653 (App. Div. 2007); *Shohet v. Shaaya*, 844 N.Y.S.2d 317, 317-18 (App. Div. 2007); *Mishaan v. Tobias*, 821 N.Y.S.2d 640, 641 (App. Div. 2006); *Outlaw v. Citibank, N.A.*, 826 N.Y.S.2d 642, 644 (App. Div. 2006); *Velez v. Inst. of Design & Constr., Inc.*, 782 N.Y.S.2d 755, 756 (App. Div. 2004); *Smith v. A.B.K. Apartments, Inc.*, 725 N.Y.S.2d 672, 673 (App. Div. 2001); *Riser v. N.Y.C. Hous. Auth.*, 688 N.Y.S.2d 645, 646 (App. Div. 1999); *see also Hon. John C. Cherundolo, 2010-2011 Survey of New York Law: Tort Law*, 62 SYRACUSE L. REV. 791, 842-44 (2012) (explaining how trivial a defect must be in order for a defendant to be entitled to summary judgment).

50. *See Hardsog v. Price Chopper Operating Co.*, 952 N.Y.S.2d 802, 803-04 (App. Div. 2012); *Castle v. Six Flags, Inc.*, 917 N.Y.S.2d 386, 388 (App. Div. 2011); *Schenpanksi v. Promise Deli, Inc.*, 931 N.Y.S.2d 650, 652 (App. Div. 2011); *Aguayo*, 897 N.Y.S.2d at 240; *Losito v. JP Morgan Chase & Co.*, 899 N.Y.S.2d 375, 376-77 (App. Div. 2010); *Alig v. Parkway Parking of N.Y., Inc.*, 829 N.Y.S.2d 242, 243 (App. Div. 2007); *Trionfero v. Vanderhorn*, 774 N.Y.S.2d 612, 613-14 (App. Div. 2004); *Lamarre v. Rensselaer Cnty. Plaza Assocs.*, 758 N.Y.S.2d 182, 183 (App. Div. 2003); *see also Werner v. Health*, 947 N.Y.S.2d 264, 265 (App. Div. 2012) (holding that the defendant’s submissions satisfied the burden); *Richardson v. JAL Diversified Mgmt.*, 901 N.Y.S.2d 676, 677-78 (App. Div. 2010) (holding that the defendant established the alleged defect was trivial).

51. *Trincere v. Cnty. of Suffolk*, 688 N.E.2d 489, 490 (N.Y. 1997); *Torres v. City of New York*, 972 N.Y.S.2d 582, 584 (App. Div. 2013); *Turuseta v. Wyassup-Laurel Glen Corp.*, 937 N.Y.S.2d 240, 242-43 (App. Div. 2012); *Freas v. Tilles Ctr.*, 931 N.Y.S.2d 708, 709 (App. Div. 2011); *Milewski v. Wash. Mut., Inc.*, 931 N.Y.S.2d 336, 339 (App. Div. 2011).

52. *E.g., Cruz v. N.Y.C. Hous. Auth.*, 879 N.Y.S.2d 483, 484 (App. Div. 2009).

53. *E.g., Rosello v. City of New York*, 883 N.Y.S.2d 531, 532-33 (App. Div. 2009).

54. *E.g., Murray v. City of New York*, 790 N.Y.S.2d 696, 697 (App. Div. 2005).

55. *See Kojtari v. State*, 723 N.Y.S.2d 87, 87-88 (App. Div. 2001).

A third qualifier regards premises conditions that are “open and obvious,” and not inherently dangerous.⁵⁶ Like triviality, the concept of “open and obvious” is a defense that is raised by defendants for potentially defeating a plaintiff’s negligence claims.⁵⁷ Unlike triviality, the “open and obvious” defense has nothing to do with the *size* of the dangerous or defective condition, but its *visibility* to the plaintiffs.⁵⁸ The open and obvious nature of a defect is typically not a complete defense to the plaintiff’s action, but, instead, merely raises an issue of the plaintiff’s comparative negligence in not observing, and then avoiding, the obvious danger.⁵⁹ Examples of open and obvious premises conditions include, but are not necessarily limited to: sloping ground⁶⁰ and stationary objects, like a pipe and valve;⁶¹ a clothing rack;⁶² and a fence gate.⁶³

A fourth qualifier, which is unique to weather-related premises conditions, is that property owners will not be held liable for dangerous

56. See, e.g., *Zastenichick v. Knollwood Country Club*, 955 N.Y.S.2d 640, 642 (App. Div. 2012); *Clark v. AMF Bowling Ctrs., Inc.*, 921 N.Y.S.2d 273, 273-74 (App. Div. 2011); *Bradley v. DiPaterio Mgmt. Corp.*, 913 N.Y.S.2d 244, 246 (App. Div. 2010); *Errett v. Great Neck Park Dist.*, 837 N.Y.S.2d 701, 702 (App. Div. 2007); *Westbrook v. WR Activities-Cabrera Mkts.*, 773 N.Y.S.2d 38, 41 (App. Div. 2004); *Cupo v. Karfunkel*, 767 N.Y.S.2d 40, 41-43 (App. Div. 2003); *Grgich v. City of New York*, 770 N.Y.S.2d 91, 91-92 (App. Div. 2003).

57. See, e.g., *Zastenichick*, 955 N.Y.S.2d at 642; *Clark*, 921 N.Y.S.2d at 273-74; *Bradley*, 913 N.Y.S.2d at 245-46; *Errett*, 837 N.Y.S.2d at 702; *Westbrook*, 773 N.Y.S.2d at 40-41; *Cupo*, 767 N.Y.S.2d at 41-43; *Grgich*, 770 N.Y.S.2d at 91-92.

58. See, e.g., *Zastenichick*, 955 N.Y.S.2d at 642; *Westbrook*, 773 N.Y.S.2d at 41; *Cupo*, 767 N.Y.S.2d at 43; *Grgich*, 770 N.Y.S.2d at 91-92. For a list of cases determining whether a defect is trivial, see *Torres v. City of New York*, 972 N.Y.S.2d 582, 584 (App. Div. 2013), *Turusetta v. Wyassup-Laurel Glen Corp.*, 937 N.Y.S.2d 240, 242-43 (App. Div. 2012), and *Freas v. Tilles Ctr.*, 931 N.Y.S.2d 708, 709 (App. Div. 2011).

59. See *Zastenichick*, 955 N.Y.S.2d at 642; *Clark*, 921 N.Y.S.2d at 273-74; *Bradley*, 913 N.Y.S.2d at 246; *Cortez v. Ne. Realty Holdings, LLC*, 911 N.Y.S.2d 151, 153-54 (App. Div. 2010); *Pastore v. Town of Harrison*, 868 N.Y.S.2d 543, 544 (App. Div. 2008); *Ruiz v. Hart Elm Corp.*, 844 N.Y.S.2d 80, 82 (App. Div. 2007); *Fairchild v. J. Crew Grp., Inc.*, 800 N.Y.S.2d 735, 736-37 (App. Div. 2005); *Femenella v. Pellegrini Vineyards, LLC*, 792 N.Y.S.2d 122, 122 (App. Div. 2005); *Murphy v. Kulka Constr. Corp.*, 789 N.Y.S.2d 260, 261 (App. Div. 2005); *DiVietro v. Gould Palisades Corp.*, 771 N.Y.S.2d 527, 529-30 (App. Div. 2004); *Luksch v. Blum-Rohl Fishing Corp.*, 771 N.Y.S.2d 136, 137 (App. Div. 2004); *Miehl v. Blue Ridge Homeowners Ass’n*, 775 N.Y.S.2d 541, 541 (App. Div. 2004); *Westbrook*, 773 N.Y.S.2d at 42; *Cupo*, 767 N.Y.S.2d at 43; *DeGruccio v. 863 Jericho Tpk. Corp.*, 767 N.Y.S.2d 274, 274-75 (App. Div. 2003); *Grgich*, 770 N.Y.S.2d at 91-92; *MacDonald v. City of Schenectady*, 761 N.Y.S.2d 752, 755 (App. Div. 2003); *Tulovic v. Chase Manhattan Bank, N.A.*, 767 N.Y.S.2d 44, 46 (App. Div. 2003); see also *Cherundolo*, *supra*, note 49, at 839-42 (analyzing cases to determine whether a plaintiff can recover in a trip-and-fall case when the condition is open and obvious).

60. E.g., *Errett*, 837 N.Y.S.2d at 703.

61. E.g., *Hecht v. 281 Scarsdale Corp.*, 770 N.Y.S.2d 643, 643 (App. Div. 2004).

62. E.g., *Kaufmann v. Lerner N.Y., Inc.*, 838 N.Y.S.2d 181, 181 (App. Div. 2007).

63. E.g., *Atanasoff v. Elmont Union Free Sch. Dist.*, 795 N.Y.S.2d 726, 726 (App. Div. 2005).

water, snow, and ice conditions in existence while a storm causing the condition is still in progress, as the duty to ameliorate the storm-related conditions triggers only when a reasonable time has elapsed from the cessation of the storm.⁶⁴ The “storm in progress” defense is sound, as property owners should not be expected to continuously remedy water, snow, or ice conditions if ongoing weather events would render remedial measures fruitless. A lull in a storm does not impose a duty upon the property owner to remove the snow or ice before the storm ceases in its entirety.⁶⁵ But, if a storm has passed and precipitation has tailed off to

64. See *Solazzo v. N.Y.C. Transit Auth.*, 843 N.E.2d 748, 749 (N.Y. 2005); *Mandel v. City of New York*, 380 N.E.2d 173, 174 (N.Y. 1978); *Korthals v. LCB Capital, LLC*, 983 N.Y.S.2d 181, 181-82 (App. Div. 2014); *Xie v. Yong*, 974 N.Y.S.2d 113, 114 (App. Div. 2013), *appeal denied*, 23 N.Y.3d 906 (N.Y. 2014); *Smith v. Christ’s First Presbyterian Church of Hempstead*, 941 N.Y.S.2d 211, 212 (App. Div. 2012); *O’Neil v. Ric Warrensburg Assocs.*, 933 N.Y.S.2d 768, 769 (App. Div. 2011); *Wood v. Schenectady Mun. Hous. Auth.*, 909 N.Y.S.2d 587, 588 (App. Div. 2010); *Boynton v. Eaves*, 888 N.Y.S.2d 253, 254-55 (App. Div. 2009); *Marchese v. Skenderi*, 856 N.Y.S.2d 680, 681 (App. Div. 2008); *Mosquera v. Orin*, 852 N.Y.S.2d 421, 422 (App. Div. 2008); *Brierley v. Great Lakes Motor Corp.*, 837 N.Y.S.2d 451, 452 (App. Div. 2007); *Brinson v. Geneva Hous. Auth.*, 844 N.Y.S.2d 799, 799 (App. Div. 2007); *Pippo v. City of New York*, 842 N.Y.S.2d 367, 368 (App. Div. 2007); *Baia v. Allright Parking Buffalo, Inc.*, 811 N.Y.S.2d 843, 844 (App. Div. 2006); *Gray v. City of New York*, 825 N.Y.S.2d 481, 482-83 (App. Div. 2006); *Martin v. Wagner*, 816 N.Y.S.2d 243, 244-45 (App. Div. 2006); *Thompson v. Menands Holding, LLC*, 820 N.Y.S.2d 172, 173 (App. Div. 2006); *Wheeler v. Grande’vie Senior Living Cmty.*, 819 N.Y.S.2d 188, 189 (App. Div. 2006); *Sanders v. Wal-Mart Stores, Inc.*, 780 N.Y.S.2d 417, 418 (App. Div. 2004); *Campagnano v. Highgate Manor of Rensselaer, Inc.*, 749 N.Y.S.2d 595, 596 (App. Div. 2002); *Howard v. J.A.J. Realty Enters. Ltd.*, 726 N.Y.S.2d 159, 161 (App. Div. 2001); *Chapman v. Pounds*, 702 N.Y.S.2d 160, 161 (App. Div. 2000); *Lyons v. Cold Brook Creek Realty Corp.*, 700 N.Y.S.2d 603, 604 (App. Div. 2000); *Mikolajczyk v. M.C. Morgan Contractors, Inc.*, 709 N.Y.S.2d 283, 284 (App. Div. 2000); *Petrowski v. Abraham*, 695 N.Y.S.2d 466, 467 (App. Div. 1999); *Wood v. Converse*, 693 N.Y.S.2d 742, 743-44 (App. Div. 1999); *Rothschild v. Faber Homes, Inc.*, 668 N.Y.S.2d 793, 795 (App. Div. 1998); *Ruck v. ISS Int’l Serv. Sys. Inc.*, 653 N.Y.S.2d 210, 211 (App. Div. 1997); *Siegel v. Molino*, 653 N.Y.S.2d 759, 759 (App. Div. 1997); *Jensen v. Roohan*, 649 N.Y.S.2d 100, 100-01 (App. Div. 1996); *Jornov v. Ace Suzuki Sales & Serv. Inc.*, 648 N.Y.S.2d 800, 801 (App. Div. 1996); *Lopez v. Picotte Cos.*, 635 N.Y.S.2d 818, 819 (App. Div. 1996); *Zima v. N. Colonie Ctr. Sch. Dist.*, 639 N.Y.S.2d 558, 559 (App. Div. 1996); *Fusco v. Stewart’s Ice Cream Co.*, 610 N.Y.S.2d 642, 642 (App. Div. 1994); *Cerra v. Perk Dev.*, 602 N.Y.S.2d 277, 277 (App. Div. 1993); *Drake v. Prudential Ins. Co.*, 545 N.Y.S.2d 731, 732 (App. Div. 1989); *Ramirez-Perez v. 12422 Queens Blvd. LLC*, No. 30503, 2013 WL 2493732, at *7 (N.Y. Sup. Ct. June 6, 2013); *Hall v. King-Holder*, No. 12066, 2011 WL 2581773, at *6 (N.Y. Sup. Ct. June 27, 2011).

65. See *Mazzella v. City of New York*, 899 N.Y.S.2d 291, 293 (App. Div. 2010); *Boynton*, 888 N.Y.S.2d at 255; *Grinnell v. Phil Rose Apartments, LLC*, 876 N.Y.S.2d 527, 529 (App. Div. 2009); *DeStefano v. City of New York*, 838 N.Y.S.2d 599, 600 (App. Div. 2007); *Menands Holding*, 820 N.Y.S.2d at 173; *Baia*, 811 N.Y.S.2d at 844; *Martin*, 816 N.Y.S.2d at 244-45; *Sanders*, 780 N.Y.S.2d at 418; *Dowden v. Long Island R.R.*, 759 N.Y.S.2d 544, 545 (App. Div. 2003); *Ioelle v. Wal-Mart Stores, Inc.*, 736 N.Y.S.2d 130, 132 (App. Div. 2002); *Powell v. MLG Hillside Assocs.*, 737 N.Y.S.2d 27, 29 (App. Div. 2002); *Camacho v. Garcia*, 709 N.Y.S.2d 738, 738 (App. Div. 2000); *Ruck*, 653 N.Y.S.2d at 211; *Kurtz v. Betz Funeral Home*, 653 N.Y.S.2d 212, 213 (App. Div. 1997); *Jensen*, 649 N.Y.S.2d at 101; *Lopez*, 635 N.Y.S.2d at 819; *Espinoza v. Schmidt*, No. 15192, 2013 WL 5976381, at *4 (N.Y. Sup. Ct. Nov. 6, 2013); *Ramirez-Perez*, 2013

such an extent that there is no longer any appreciable additional accumulation, then the rationale for continued remedial delay abates, and the storm in progress rule no longer applies.⁶⁶

A fifth qualifier regards the absence of privity between a plaintiff and a defendant snow removal contractor. It is not unusual for property owners to retain the services of snow removal contractors to remove snow and ice from paved surfaces at their premises and to treat the surfaces with sand, salt, or other compounds. There are instances when snow and ice removal services may be negligently performed by the contractors.⁶⁷ In such instances, the contractual duty flows from the snow removal contractors to the property owners or their managing agents, but no privity exists between the contractors and the injured plaintiffs.⁶⁸ This absence of duty complicates the considerations of tort liability.

In New York, snow removal contractors will generally have no liability toward plaintiffs injured as a result of the negligent performance of their duties, pursuant to the leading Court of Appeals case of *Espinal v. Melville Snow Contractors, Inc.*⁶⁹ There are, however, three “*Espinal* exceptions” where contractors may be held liable to injured plaintiffs despite the absence of any formal duty flowing from the contractors to the plaintiffs. These exceptions are: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm;⁷⁰ (2) where the specific plaintiff detrimentally relies upon the continued performance of the

WL 2493732, at *7; *Zone v. State*, 863 N.Y.S.2d 318, 320 (Ct. Cl. 2008); see also *First Presbyterian*, 941 N.Y.S.2d at 212 (explaining that a property owner will not be held liable until an adequate period of time has passed following the cessation of a storm).

66. *Powell v. MLG Hillside Assocs.*, 737 N.Y.S.2d at 29; see, e.g., *Cheung v. N.Y.C. Transit Auth.*, 964 N.Y.S.2d 596, 597 (App. Div. 2013); *Mazzella*, 899 N.Y.S.2d at 293; *Espinoza*, 2013 WL 5976381, at *4.

67. See, e.g., *Williams v. Sebert Landscape Co.*, 946 N.E.2d 971, 975 (Ill. App. Ct. 2011) (explaining that creating or aggravating an unnatural accumulation of snow or ice constitutes a negligent act).

68. See Hon. John C. Cherundolo, *2011-2012 Survey of New York Law*, 63 SYRACUSE L. REV. 923, 985-87 (2013).

69. 773 N.E.2d 485, 487 (N.Y. 2002); see *Church ex rel. Smith v. Callanan Indus., Inc.*, 782 N.E.2d 50, 52 (N.Y. 2002); *Sarisohn v. Plaza Realty Servs., Inc.*, 971 N.Y.S.2d 115, 117 (App. Div. 2013); *Gushin v. Whispering Hills Condo. I*, 946 N.Y.S.2d 202, 204 (App. Div. 2012); *Foster v. Herbert Slepoy Corp.*, 905 N.Y.S.2d 226, 228 (App. Div. 2010); *Wheaton v. E. End Commons Assocs., LLC*, 854 N.Y.S.2d 528, 530 (App. Div. 2008); *Baratta v. Home Depot USA, Inc.*, 756 N.Y.S.2d 605, 607 (App. Div. 2003); *Javurek v. Gardiner*, 731 N.Y.S.2d 475, 476 (App. Div. 2001); *Murphy v. M.B. Real Estate Dev. Corp.*, 720 N.Y.S.2d 175, 176 (App. Div. 2001); *Pavlovich v. Wade Assocs.*, 710 N.Y.S.2d 615, 616 (App. Div. 2000); *Girardi v. Bank of N.Y. Co.*, 671 N.Y.S.2d 321, 322 (App. Div. 1998).

70. See *Espinal*, 773 N.E.2d at 487-88. This *Espinal* exception was based upon the prior Court of Appeals’ holding of *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928).

contracting party's duties;⁷¹ or (3) where the snow removal contract comprehensively and exclusively displaces the property owner from all snow and ice-related maintenance obligations.⁷² An example of the launching of a force or instrumentality of harm is when the contractor's negligent snow or ice removal exacerbates the dangerous condition.⁷³ An example of detrimental reliance is when the plaintiff can point to a history of prior interaction and contact with the contractor, giving rise to reliance upon the contractor's continuing future performance.⁷⁴ The comprehensive displacement of the property owner's maintenance obligations, while perhaps self-explanatory, requires an examination of the language of the snow removal contract between the property owner and the contractor.⁷⁵ Property owners will not be found to have been exclusively displaced when they retain in the contract the right to review and approve of the contractor's performance⁷⁶ or when the contractor's responsibilities are triggered only under certain defined conditions.⁷⁷

C. *Prior Written Notice Requirements Peculiar to Municipal Liability*

Ice cases involve any surface where persons may travel including, but not necessarily limited to: roadways;⁷⁸ parking lots;⁷⁹ city sidewalks;⁸⁰ driveways;⁸¹ residential walkways;⁸² and outdoor stairs.⁸³ In matters involving snow or ice upon municipal highways, bridges, culverts, and sidewalks, mere constructive notice of the condition is typically insufficient for establishing liability as a matter of law, as

71. See *Espinal*, 773 N.E.2d at 488. This *Espinal* exception was based upon the prior Court of Appeals' holding of *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 556 N.E.2d 1093 (N.Y. 1990); see also RESTATEMENT (SECOND) OF TORTS § 324A(c) (1965) (explaining scenarios of liability to third persons).

72. See *Espinal*, 773 N.E.2d at 488. This *Espinal* exception was based upon the prior Court of Appeals' holding of *Palka v. Servicemaster Management Services Corp.*, 634 N.E.2d 189 (N.Y. 1994).

73. See *Cornell v. 360 W. 51st St. Realty, LLC*, 857 N.Y.S.2d 124, 125-26 (App. Div. 2008); *Prenderville v. Int'l Serv. Sys., Inc.*, 781 N.Y.S.2d 110, 113-14 (App. Div. 2004); *Dappio v. Port Auth. of N.Y.*, 749 N.Y.S.2d 150, 151 (App. Div. 2002); *Genen v. Metro-N. Commuter R.R.*, 690 N.Y.S.2d 213, 215, 217 (App. Div. 1999).

74. See, e.g., *Boyd v. J. Hall, Ltd.*, 763 N.Y.S.2d 149, 151 (App. Div. 2003).

75. See *Mahaney v. Neuroscience Ctr.*, 814 N.Y.S.2d 175, 177 (App. Div. 2006); *Hopps v. Pengate Handling Sys. of N.Y., Inc.*, 763 N.Y.S.2d 856, 858 (App. Div. 2003).

76. See *Parker v. Rust Plant Servs., Inc.*, 780 N.Y.S.2d 230, 232 (App. Div. 2004).

77. See *Kozak v. Broadway Joe's*, 745 N.Y.S.2d 139, 141 (App. Div. 2002).

78. E.g., *Greveling v. State*, 937 N.Y.S.2d 782, 783 (App. Div. 2012).

79. E.g., *Javid v. Scalfmore Constr.*, 985 N.Y.S.2d 893, 893 (App. Div. 2014).

80. E.g., *Wright v. Rezendez*, 934 N.Y.S.2d 874, 874 (App. Div. 2011).

81. E.g., *Paucar v. Solaro*, 975 N.Y.S.2d 658, 658 (App. Div. 2013).

82. E.g., *McKenzie v. City of New York*, 984 N.Y.S.2d 32, 33 (App. Div. 2014).

83. E.g., *Dillard v. N.Y.C. Hous. Auth.*, 977 N.Y.S.2d 226, 227 (App. Div. 2013).

actual prior written notice is, instead, statutorily required as a condition precedent to county, city, town, or village liability.⁸⁴ Notably, while the state's Second Class Cities Law,⁸⁵ Town Law,⁸⁶ and Village Law⁸⁷ expressly extend prior written notice protections to city, town, and village "sidewalks,"⁸⁸ New York Highway Law section 139(2)⁸⁹ omits sidewalks from the scope of the prior written notice requirements for counties.⁹⁰ Local municipalities have routinely added to their statutes parallel ordinances requiring prior written notice of ice and snow conditions upon highways, bridges, culverts, and sidewalks.⁹¹ Prior written notice requirements are a condition imposed upon plaintiffs in exchange for the municipalities' waiver of sovereign immunity, and are a means of limiting the costs of municipal liability to taxpayers.⁹² Prior written notice of ice or snow conditions must be affirmatively pleaded in the plaintiff's complaint against the municipal defendant, and then proven, for liability to be established in favor of the plaintiff.⁹³

84. N.Y. HIGH. LAW § 139(2) (McKinney 2014); N.Y. TOWN LAW § 65-a(2) (McKinney 2013); N.Y. VILLAGE LAW § 6-628 (McKinney 2011); N.Y. SECOND CLASS CITIES LAW § 244 (McKinney 1994); *Napolitano v. Suffolk Cnty. Dep't of Pub. Works*, 884 N.Y.S.2d 484, 486 (App. Div. 2009); *Farrell v. City of New York*, 854 N.Y.S.2d 470, 471-72 (App. Div. 2008); *Wall v. Niskayuna*, 788 N.Y.S.2d 520, 521 (App. Div. 2005); *Cox v. Cnty. of Allegany*, 701 N.Y.S. 207, 208 (App. Div. 1999); *see Lugo ex rel. Lugo v. Cnty. of Essex Inc.*, 687 N.Y.S.2d 475, 478 (App. Div. 1999); *Mullins v. Town of Clarkstown*, 583 N.Y.S.2d 652, 653 (App. Div. 1992); *Schmalenberger v. Town of Brookhaven*, 279 N.Y.S.2d 390, 391 (App. Div. 1967); *see also Cherundolo*, *supra* note 49, at 827-31 (discussing the limitations of prior written notice requirements); Lewis J. Lubell, Comment, *Prior Written Notice Statutes in New York State: The Resurrection of Sovereign Immunity*, 10 *TOURO L. REV.* 705, 716-24 (1994) (analyzing the constitutionality of prior written notice statutes). *See generally* Kenneth E. Pitcoff & Anna J. Ervolina, *Groninger v. Vill. of Mamaroneck: Prior Written Notice Laws Are Applicable to Municipal Parking Lots*, N.Y. ST. B. ASS'N J., Mar./Apr. 2012, at 42, 42-44 (discussing the Court of Appeals' treatment of prior written notice laws).

85. SECOND CLASS CITIES § 244.

86. TOWN § 65-a(2).

87. VILLAGE § 6-628.

88. TOWN § 65-a(2); VILLAGE § 6-628; SECOND CLASS CITIES § 244.

89. HIGH. § 139(2).

90. *Id.*

91. For examples from around the state, *see* MONROE COUNTY, N.Y., CODE § 351-2 (2015); TOWN OF HUNTINGTON, N.Y., CODE § 174-3 (2015); TOWN OF NEW PALTZ CODE, N.Y., CODE § 118-1 (2015); TOWN OF NIAGARA, N.Y., CODE § 212-1 (2015); ULSTER COUNTY, N.Y., CODE § 258-2 (2015); WESTCHESTER COUNTY, N.Y., CODE OF ORDINANCES § 780-01 (2015); ERIE COUNTY, N.Y., ERIE COUNTY PRIOR WRITTEN NOTICE LOCAL LAW OF 2004 § 3 (2004).

92. *See Katz v. City of New York*, 661 N.E.2d 1374, 1376 (N.Y. 1995); *Patane v. City of New York*, 727 N.Y.S.2d 114, 116 (App. Div. 2001).

93. *See Katz*, 661 N.E.2d at 1376; *Poirer v. City of Schenectady*, 648 N.E.2d 1318, 1319-20 (N.Y. 1995); *Doremus v. Inc. Vill. of Lynbrook*, 222 N.E.2d 376, 377 (N.Y. 1966); *Farnsworth v. Vill. of Potsdam*, 651 N.Y.S.2d 748, 749 (App. Div. 1997); *Sewell v. City of New York*, 656 N.Y.S.2d 916, 916 (App. Div. 1997); *Gigante v. Town of Hempstead*, 588 N.Y.S.2d 413, 414 (App. Div. 1992).

Two exceptions to prior written notice requirements exist that allow for liability in the absence of such notice: first, where the municipality affirmatively “creates” a condition (including snow and ice hazards); and second, where the municipality derives a “special use” from the area where the condition arises.⁹⁴ These exceptions make sense, because if a municipality’s peculiar use of an area causes a dangerous or defective condition, or if a municipality affirmatively creates a dangerous or defective condition, the municipality is on self-notice of the need to undertake remedial measures, and any requirement for written notice from the citizenry would be redundant.

Courts have grappled with the difficulty of drawing a line between when a municipality has, or has not, “created” a dangerous or defective condition as to take an action outside the scope of prior written notice requirements. A line of cases developed over the course of several decades that recognized a distinction between a municipality’s acts of *commission* that affirmatively cause and create a condition, for which prior written notice is not required as a precedent to liability, and acts of *omission* that passively result in a condition over time, for which prior written notice is required.⁹⁵ More recently, in *Yarborough v. City of New York*,⁹⁶ wherein the plaintiff sought damages for injuries sustained from a trip and fall in a pothole, the Court of Appeals determined that the city could not be held liable for *creating* the defect, as the pothole “developed over time with environmental wear and tear,” which is not the type of affirmative conduct required of the municipality in the absence of prior written notice of the condition.⁹⁷ The language of *Yarborough* suggested that, as recently as 2008, the Court of Appeals was continuing to define the municipal “creation” of defects by application of an affirmative/passive dichotomy. Further, in *Oboler v.*

94. *E.g.*, *Amabile v. City of Buffalo*, 715 N.E.2d 104, 106 (N.Y. 1999); *Cebron v. Tuncoglu*, 970 N.Y.S.2d 826, 833 (App. Div. 2013); *Magee v. Town of Brookhaven*, 945 N.Y.S.2d 177, 179 (App. Div. 2012); *Danis v. Inc. Vill. of Atl. Beach*, 903 N.Y.S.2d 251, 251-52 (App. Div. 2010); *Denio v. City of New Rochelle*, 895 N.Y.S.2d 727, 728 (App. Div. 2010); *Stallone v. Long Island R.R.*, 894 N.Y.S.2d 65, 66 (App. Div. 2010); *Lincourt v. Vill. of W. Winfield*, 864 N.Y.S.2d 825, 826 (App. Div. 2008); *see supra* notes 31-33 and accompanying text.

95. For cases drawing the distinction between actionable “affirmative” negligence and non-actionable “passive” negligence in the absence of prior written notice, *see Grant v. Inc. Village of Lloyd Harbor*, 579 N.Y.S.2d 746, 748 (App. Div. 1992), *Lang v. County of Sullivan*, 585 N.Y.S.2d 609, 609 (App. Div. 1992), *Buccellato v. Cnty. of Nassau*, 550 N.Y.S.2d 906, 908 (App. Div. 1990), *Palkovic v. Town of Brookhaven*, 560 N.Y.S.2d 850, 851 (App. Div. 1990), *Thompson v. County of Putnam*, 558 N.Y.S.2d 600, 602 (App. Div. 1990), *Camera v. Barrett*, 534 N.Y.S.2d 395, 397 (App. Div. 1988), and *Guest v. City of Buffalo*, 487 N.Y.S.2d 184, 185 (App. Div. 1985).

96. 882 N.E.2d 873 (N.Y. 2008).

97. *Id.* at 874.

City of New York,⁹⁸ wherein the plaintiff tripped and fell upon a depressed manhole cover—which developed over time after the city had re-surfaced the roadway—the Court of Appeals explained that the creation of a defective condition must “*immediately result[]*” from the municipality’s work to exempt the plaintiff from prior written notice requirements.⁹⁹ *Oboler*’s holding has a sound basis, since only an immediate hazard produced by affirmative conduct places the municipality on self-notice of the need to repair.

As clear as *Yarborough* and *Oboler* are in their statement of legal principles, a measure of uncertainty has been introduced by the Court of Appeals in its more recent decision, *San Marco v. Village/Town of Mount Kisco*.¹⁰⁰ In *San Marco*, the defendant Village removed snow from a municipal parking lot and treated the plowed surface with sand and salt on a Friday morning at 4:45 a.m.¹⁰¹ During the day and night that followed, the temperature rose above, and then fell below, freezing, creating what the plaintiff alleged was a snow melt and refreeze condition on the surface of the lot.¹⁰² The plaintiff slipped and fell on black ice in the same municipal lot while walking to work at 8:15 a.m. on the Saturday morning that followed.¹⁰³ The defendant moved for summary judgment on the ground that she had never received prior written notice of the icy condition as required by New York Village Law 6-628¹⁰⁴ and Mount Kisco Code 93-47.¹⁰⁵ The plaintiff argued that prior

98. 864 N.E.2d 1270 (N.Y. 2007).

99. *Id.* at 1271-72; *see also* *Hubbard v. Cnty. of Madison*, 939 N.Y.S.2d 619, 624-25 (App. Div. 2012); *Weed v. Cnty. of Orange*, 920 N.Y.S.2d 100, 102 (App. Div. 2011); *Denio*, 895 N.Y.S.2d at 728; *Stallone*, 894 N.Y.S.2d at 66; *Boice v. City of Kingston*, 874 N.Y.S.2d 319, 321 (App. Div. 2009); *Kagan v. Town of N. Hempstead*, 888 N.Y.S.2d 905, 905-06 (App. Div. 2009); *Bielecki v. City of New York*, 788 N.Y.S.2d 67, 68 (App. Div. 2005). Arguably, *Oboler* overruled *Muszynski v. City of Buffalo*, 277 N.E.2d 414 (N.Y. 1971). In *Muszynski*, the defendant city placed a barrel containing salt on a sidewalk near a crosswalk. *Muszynski v. City of Buffalo*, 305 N.Y.S.2d 163, 163 (App. Div. 1969). The injured plaintiff alleged that city employees negligently re-filled the barrel from time to time in a manner which spilled salt onto the sidewalk, and which created the development of holes in the pavement that ultimately rendered the sidewalk dangerous. *Id.* Over time, the sidewalk condition was never repaired. No prior written notice of the sidewalk condition had been served upon the city. *Muszynski*, 277 N.E.2d at 414. The Court of Appeals determined, for reasons more fully set forth by the Appellate Division, Fourth Department, that the city’s conduct “created” the defective sidewalk condition for which no prior written notice was required for liability. *Id.* *Muszynski* was no longer viable in light of *Oboler*’s subsequent requirement that municipal defect creation be “immediate” to take an action outside of prior written notice requirements. *See* Brian J. Shoot, *Overruling by Implication and the Consequent Burden upon Bench and Bar*, 75 ALB. L. REV. 841, 850-51, 853-55 (2012).

100. 944 N.E.2d 1098 (N.Y. 2010).

101. *Id.* at 1099, 1101.

102. *Id.* at 1099.

103. *Id.*

104. *Id.*

written notice was not required, as the defendant had negligently performed its snow removal efforts in a manner that foreseeably “created” the snow melt and refreeze hazard.¹⁰⁶ Clearly, at the time the defendant performed its snow removal efforts, there was no snow melt and refreeze condition that placed the municipality, in an *Oboler* sense, upon “immediate” notice of any icy condition at the parking lot.¹⁰⁷ Nevertheless, a four-to-three majority of the Court of Appeals, using language that is seemingly inconsistent with *Oboler*, held that:

[P]rior written notice statutes . . . were never intended to and ought not exempt a municipality from liability as a matter of law where a municipality’s negligence in the maintenance of a municipally owned parking facility triggers the foreseeable development of black ice as soon as the temperature shifts.¹⁰⁸

In other words, the “immediacy” of a condition now refers, in essence, to what is *immediately foreseeable to occur in the short-term*, as distinguished from wear-and-tear conditions that develop over an extended time, such as pavement depressions and potholes. The three-judge dissent in *San Marco*, written by Judge Robert Smith, argued that the foreseeability of conditions is irrelevant to prior written notice requirements, and that there is “no logical legal distinction” between road pavement conditions and snow and ice conditions that both form over time.¹⁰⁹ The *San Marco* holding should be recognized for what it truly is—a departure by the Court of Appeals from the prior written notice precedents of *Yarborough* and, especially, *Oboler*, despite the efforts of the court to distinguish *San Marco* on its facts. Departures from precedent yield consequences. The “creation” of alleged snow or ice hazards in actions against municipalities, from alleged negligent or inadequate plowing, sanding, or salting of surfaces, has, in the past, typically resulted in summary judgment in favor of the municipalities, since the inadequacy of maintenance has traditionally been viewed as the “passive” conduct of omission rather than the “active” conduct of commission.¹¹⁰ However, it is predicted here that *San Marco* shall

105. *Id.*

106. *Id.*

107. *See id.*

108. *Id.* at 1100. Another analysis of *San Marco* can be found in the *Albany Law Review*. Shoot, *supra* note 99, at 856.

109. *San Marco*, 944 N.E.2d at 1103-04 (Smith, J., dissenting).

110. *See Yarborough v. City of New York*, 882 N.E.2d 873, 874 (N.Y. 2008); *Oboler v. City of New York*, 864 N.E.2d 1270, 1271-72 (N.Y. 2007); *Ferreira v. Cnty. of Orange*, 825 N.Y.S.2d 122, 124 (App. Div. 2006); *O’Hare v. Baer*, 658 N.Y.S.2d 125, 126 (App. Div. 1997); *Lang v. Cnty. of Sullivan*, 585 N.Y.S.2d 609, 609 (App. Div. 1992); *Grant v. Inc. Vill. of Lloyd Harbor*, 579 N.Y.S.2d 746, 748 (App. Div. 1992); *Buccellato v. Cnty. of Nassau*, 550 N.Y.S.2d 906, 908 (App.

generate a new line of snow and ice litigation, regarding alleged negligent snow and ice removal efforts by municipalities, and other municipal premises condition litigations, contrary to what prior written notice statutes were legislatively enacted to achieve.

D. Statutory Obligations Imposed upon Abutting Property Owners

In common law, while municipalities are liable for the dangerous or defective conditions of public sidewalks,¹¹¹ the owners of private property abutting public sidewalks are not responsible for the condition of the sidewalks, absent the abutting owners' actual creation of a sidewalk defect, their "special use" of the sidewalk, or the existence of a special statutory obligation.¹¹² Some municipalities have, therefore, enacted statutes that impose obligations upon private property owners to maintain municipal sidewalks adjoining their land, including the performance of snow and ice removal.¹¹³ This is particularly true in urban settings, where pedestrian sidewalks are more commonly found in residential or commercial settings than they are in rural communities.

A classic example of a local law imposing a statutory obligation upon private property owners for sidewalk maintenance, including ice and snow removal, is New York Administrative Code section 7-210(a), which became effective September 14, 2003.¹¹⁴ The statute provides that: "It shall be the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition."¹¹⁵ New York Administrative Code section 7-210(b) further

Div. 1990); *Palkovic v. Town of Brookhaven*, 560 N.Y.S.2d 850, 851 (App. Div. 1990); *Thompson v. Cnty. of Putnam*, 558 N.Y.S.2d 600, 601-02 (App. Div. 1990); *Camera v. Barrett*, 534 N.Y.S.2d 395, 397 (App. Div. 1989); *Rodriguez v. Cnty. of Suffolk*, 507 N.Y.S.2d 227, 228 (App. Div. 1986); *Guest v. City of Buffalo*, 487 N.Y.S.2d 184, 185 (App. Div. 1985).

111. See *Vucetovic v. Epsom Downs, Inc.*, 890 N.E.2d 191, 193-94 (N.Y. 2008); *Hausser v. Giunta*, 669 N.E.2d 470, 471 (N.Y. 1996); *Roark v. Hunting*, 248 N.E.2d 896, 898 (N.Y. 1969); *City of Rochester v. Campbell*, 25 N.E. 937, 938 (N.Y. 1890); *Crawford v. City of New York*, 950 N.Y.S.2d 743, 744 (App. Div. 2012); *Khaimova v. City of New York*, 945 N.Y.S.2d 710, 712 (App. Div. 2012); *James v. Blackmon*, 872 N.Y.S.2d 179, 180 (App. Div. 2009).

112. *Abramson v. Eden Farm, Inc.*, 894 N.Y.S.2d 429, 429-30 (App. Div. 2010); *Lin v. Yam*, 879 N.Y.S.2d 172, 173 (App. Div. 2009); *Hohnke v. Lee*, 552 N.Y.S.2d 359, 359 (App. Div. 1990); *Xenakis v. Vorilas*, 560 N.Y.S.2d 872, 872 (App. Div. 1990); *Sheehan v. Rubenstein*, 546 N.Y.S.2d 663, 664 (App. Div. 1989); *Eksouzian v. Levenson*, 527 N.Y.S.2d 444, 445 (App. Div. 1988); *Surowiec v. City of New York*, 527 N.Y.S.2d 478, 479 (App. Div. 1988); *Kaszovitz v. Weiszman*, 493 N.Y.S.2d 335, 338 (App. Div. 1985); *Friedman v. Gearrity*, 308 N.Y.S.2d 800, 802 (App. Div. 1970); see *Lodato v. Town of Oyster Bay*, 414 N.Y.S.2d 214, 214-15 (App. Div. 1979).

113. E.g., CITY OF BUFFALO, N.Y., CODE § 413-50 (2015); SYRACUSE, N.Y., CODE OF ORDINANCES § 24-3 (2015); N.Y.C., N.Y., ADMINISTRATIVE CODE § 7-210 (2010).

114. See ADMINISTRATIVE CODE § 7-210(a).

115. *Id.* Abutting sidewalks expressly include the intersection quadrant of a corner property. *Id.*; see also *Sehnert v. N.Y.C. Transit Auth.*, 942 N.Y.S.2d 871, 871 (App. Div. 2012); *Lanhan v.*

provides that the failure of any property owner to maintain an abutting sidewalk in a reasonably safe condition, including the installation, repair, or replacement of defective sidewalk flags, and the negligent failure to remove snow, ice, or dirt, render the property owner “liable for any injury to property or [for] personal injury.”¹¹⁶ The same statutory subdivision exempts from liability one-, two-, and three-family residences, that are wholly or partially owner-occupied and used exclusively for residential purposes.¹¹⁷ The statute conversely exonerates the City of New York from liability for sidewalk conditions attributable to the negligent repair or maintenance of the abutting property owners, including those of snow and ice.¹¹⁸ As a result, snow- and ice-related actions for personal injuries are litigated against private residential and commercial property owners of the City of New York for accidents occurring upon publicly-owned city sidewalks.¹¹⁹

City of New York, 893 N.Y.S.2d 183, 183 (App. Div. 2010); *Lopez v. Hsu*, No. 3023/09, 2011 WL 3209938, at *3-4 (N.Y. Sup. Ct. July 27, 2011); *Fermin v. City of New York*, No. 11171/08, 2010 WL 3583984, at *4-5 (N.Y. Sup. Ct. Sept. 3, 2010).

116. ADMINISTRATIVE CODE § 7-210(b); *see also Khaimova*, 945 N.Y.S.2d at 712 (holding that the property owner had a duty to maintain the brick walkway parallel to the concrete sidewalk).

117. ADMINISTRATIVE CODE § 7-210(b); *see also Cuapio v. Skrodzki*, 966 N.Y.S.2d 438, 439 (App. Div. 2013) (two-family residence); *Boorstein v. 1261 48th St. Condo.*, 946 N.Y.S.2d 200, 201 (App. Div. 2012) (three-family residence); *Moreno v. Shanker*, 941 N.Y.S.2d 216, 217-18 (App. Div. 2012) (two-family residence); *Gilmartin v. City of New York*, 915 N.Y.S.2d 556, 556 (App. Div. 2011) (one-family residence); *Soussi v. Gobin*, 928 N.Y.S.2d 80, 82 (App. Div. 2011) (two-family residence); *Schwartz v. City of New York*, 903 N.Y.S.2d 93, 94 (App. Div. 2010) (three-family residence); *Braun v. Weissman*, 890 N.Y.S.2d 615, 616 (App. Div. 2009) (one-family residence).

118. *See* ADMINISTRATIVE CODE § 7-210(c); *see also Johnson v. City of New York*, 966 N.Y.S.2d 408, 409 (App. Div. 2013) (holding that New York City was not liable for a defective sidewalk owned by the New York City Housing Authority); *Cohen v. City of New York*, 955 N.Y.S.2d 565, 566 (App. Div. 2012) (finding New York City not liable for an injury that occurred on abutting property).

119. *See, e.g., McKenzie v. City of New York*, 984 N.Y.S.2d 32, 33 (App. Div. 2014); *Schron v. Jean's Fine Wine & Spirits, Inc.*, 979 N.Y.S.2d 684, 684-85 (App. Div. 2014); *Titova v. D'Nodal*, 985 N.Y.S.2d 229, 230 (App. Div. 2014); *Cuapio*, 966 N.Y.S.2d at 439; *David v. Lee*, 967 N.Y.S.2d 80, 81 (App. Div. 2013); *Gyokchyan v. City of New York*, 965 N.Y.S.2d 521, 523 (App. Div. 2013); *Anastasio v. Berry Complex, LLC*, 918 N.Y.S.2d 216, 217 (App. Div. 2011); *Plotits v. Houaphing D. Chaou, LLC*, 915 N.Y.S.2d 626, 627-28 (App. Div. 2011); *Ferguson v. Lam*, 903 N.Y.S.2d 101, 103 (App. Div. 2010); *John v. City of New York*, 909 N.Y.S.2d 142, 143 (App. Div. 2010); *Nicoletti v. City of New York*, 909 N.Y.S.2d 117, 119 (App. Div. 2010); *Lin v. Yam*, 879 N.Y.S.2d 172, 173 (App. Div. 2009); *Bisontt v. Rockaway One Co.*, 850 N.Y.S.2d 621, 622 (App. Div. 2008); *Robles v. City of New York*, 868 N.Y.S.2d 114, 115 (App. Div. 2008); *Crudo v. City of New York*, 839 N.Y.S.2d 232, 233 (App. Div. 2007); *Romero v. ELJ Realty Corp.*, 831 N.Y.S.2d 72, 73 (App. Div. 2007); *Martinez v. City of New York*, 799 N.Y.S.2d 252, 253 (App. Div. 2005); *Wu v. Korea Shuttle Express Corp.*, 808 N.Y.S.2d 82, 83 (App. Div. 2005); *Klotz v. City of New York*, 781 N.Y.S.2d 357, 357-58 (App. Div. 2004).

In the absence of a statute or ordinance imposing liability upon abutting property owners for the condition of public sidewalks, the abutting property owner may only be held liable where she, or someone on her behalf, voluntarily undertook snow or ice removal efforts in a manner that makes the naturally-occurring condition more hazardous.¹²⁰

E. Considerations of Summary Judgment Motions and Trials in Snow and Ice Cases

All of the foregoing issues—the creation of a defect, actual notice, constructive notice, latency, the openness and obvious nature of a condition, proximate cause, prior written notice to municipal entities, and statutory obligations or exemptions—are litigated in snow and ice cases either through summary judgment motions¹²¹ or at jury and non-jury trials.¹²² Where a defendant property owner seeks to be exonerated from a premises liability action via summary judgment motion, she has the burden of establishing *prima facie* entitlement to relief by tendering supportive evidence in a form admissible at trial.¹²³ The *prima facie* burden may be established if the property owner tenders evidence that: the owner/agent did not create the alleged dangerous or defective premises condition;¹²⁴ the owner/agent did not have actual or constructive notice of it;¹²⁵ the condition was latent and otherwise not visible or apparent;¹²⁶ the condition was not a proximate cause of the

120. *Schron*, 979 N.Y.S.2d at 685; *David*, 967 N.Y.S.2d at 81; *Marx v. Great Neck Park Dist.*, 939 N.Y.S.2d 518, 520 (App. Div. 2012); *Cangemi v. Burgan*, 916 N.Y.S.2d 135, 136 (App. Div. 2011); *Hilpert v. Vill. of Tarrytown*, 916 N.Y.S.2d 817, 818 (App. Div. 2011); *Martinez v. Khaimov*, 906 N.Y.S.2d 274, 275 (App. Div. 2010); *Ferguson*, 903 N.Y.S.2d at 103; *Braun*, 890 N.Y.S.2d, at 616; *Lin*, 879 N.Y.S.2d at 173; *Robles*, 868 N.Y.S.2d at 115; *Bruzzo v. Cnty. of Nassau*, 854 N.Y.S.2d 774, 775 (App. Div. 2008); *Cruz v. Cnty. of Nassau*, 867 N.Y.S.2d 523, 524 (App. Div. 2008); *Bisontt*, 850 N.Y.S.2d at 622; *Crudo*, 839 N.Y.S.2d at 232.

121. See N.Y. C.P.L.R. § 3212 (McKinney 2005).

122. See N.Y. C.P.L.R. §§ 4101, 4211 (McKinney 2007).

123. See C.P.L.R. § 3212.

124. *Kruger v. Donzelli Realty Co.*, 975 N.Y.S.2d 689, 689 (App. Div. 2013), *appeal denied*, 9 N.E.3d 369 (N.Y. 2014); *Minor v. 1265 Morrison, LLC*, 947 N.Y.S.2d 167, 168 (App. Div. 2012); *Alexander v. N.Y.C. Hous. Auth.*, 933 N.Y.S.2d 357, 358 (App. Div. 2011).

125. *Kruger*, 975 N.Y.S.2d at 689; *Minor*, 947 N.Y.S.2d at 168; *Alexander*, 933 N.Y.S.2d at 358; *Cassone v. State*, 925 N.Y.S.2d 197, 198 (App. Div. 2011); *Gradwohl v. Stop & Shop Supermarket Co.*, 896 N.Y.S.2d 85, 87 (App. Div. 2010).

126. See, e.g., *Garcia v. N.Y.C. Hous. Auth.*, 650 N.Y.S.2d 715, 716 (App. Div. 1996) (snow and ice condition); see also *Lillie v. Wilmore, Inc.*, 938 N.Y.S.2d 396, 397 (App. Div. 2012) (black ice condition); *Carpenter v. J. Giordino, LLC*, 917 N.Y.S.2d 439, 441 (App. Div. 2011) (snow-covered ice condition); *Englerth v. Penfield Cent. Sch. Dist.*, 925 N.Y.S.2d 792, 793 (App. Div. 2011) (ice condition); *Cassone*, 925 N.Y.S.2d at 198 (orange-cone-on-boardwalk condition); *Phillips v. Henry B's, Inc.*, 925 N.Y.S.2d 770, 771 (App. Div. 2011) (black ice condition); *Mullaney v. Royalty Props., LLC*, 916 N.Y.S.2d 545, 546 (App. Div. 2011) (black ice condition); *Gershfeld v. Marine Park Funeral Home, Inc.*, 879 N.Y.S.2d 549, 549-50 (App. Div. 2009) (ice condition);

occurrence;¹²⁷ or that, in the case of municipal liability, the defendant had not received prior written notice of the condition as required by state statute or local ordinance.¹²⁸ If a *prima facie* defense is established, the burden shifts to the injured plaintiff to provide evidence on the contested issue, in admissible form, raising a question of fact requiring trial.¹²⁹ At trial, the burdens of the parties shift in that the plaintiff must establish a *prima facie* case in her favor.¹³⁰ If the plaintiff's evidence is lacking and the defendant moves for a directed verdict, the burden shifts once again where, giving the plaintiff all favorable inferences, the defendant must establish that there is no rational process by which the trier of fact could find in favor of the plaintiff, as a matter of law.¹³¹

Boucher v. Watervliet Shores Assocs., 804 N.Y.S.2d 511, 512 (App. Div. 2005) (ice condition); *Carricato v. Jefferson Valley Mall Ltd.*, 749 N.Y.S.2d 575, 576 (App. Div. 2002) (black ice condition); *Lewis v. Barna Hotel, Corp.*, 745 N.Y.S.2d 627, 628 (App. Div. 2002) (black ice condition).

127. See, e.g., *Valenti v. Exxon Mobil Corp.*, 857 N.Y.S.2d 745, 747 (App. Div. 2008); *Jones v. City of New York*, 735 N.Y.S.2d 573, 574 (App. Div. 2001); *Sega v. Ryder*, 731 N.Y.S.2d 282, 284 (App. Div. 2001); *Perez v. Morse Diesel, Inc.*, 685 N.Y.S.2d 723, 724 (App. Div. 1999); *Lester v. Chmaj*, 674 N.Y.S.2d 222, 224 (App. Div. 1998); *Siewart v. Loudonville Elementary Sch.*, 620 N.Y.S.2d 149, 150 (App. Div. 1994).

128. See, e.g., *Groninger v. Vill. of Mamaroneck*, 950 N.E.2d 908, 911 (N.Y. 2011); *Amabile v. City of Buffalo*, 715 N.E.2d 104, 105-06 (N.Y. 1999); *Magee v. Town of Brookhaven*, 945 N.Y.S.2d 177, 178-79 (App. Div. 2012); *Stallone v. Long Island R.R.*, 894 N.Y.S.2d 65, 66 (App. Div. 2010); *Wohlars v. Town of Islip*, 898 N.Y.S.2d 59, 60 (App. Div. 2010); *Ravina v. Inc. Town of Greenburgh*, 775 N.Y.S.2d 164, 165 (App. Div. 2004); *Frullo v. Inc. Vill. of Rockville Centre*, 711 N.Y.S.2d 185, 186 (App. Div. 2000).

129. E.g., *Alvarez v. Prospect Hosp.*, 501 N.E.2d 572, 574 (N.Y. 1986); *Zuckerman v. City of New York*, 404 N.E.2d 718, 720 (N.Y. 1980); *Indig v. Finkelstein*, 244 N.E.2d 61, 62 (N.Y. 1968); see, e.g., *Imperati v. Kohl's Dep't Stores, Inc.*, 936 N.Y.S.2d 374, 375 (App. Div. 2012); *Wood v. Schenectady Mun. Hous. Auth.*, 909 N.Y.S.2d 587, 588 (App. Div. 2010); *Torosian v. Bigsbee Vill. Homeowners Ass'n*, 848 N.Y.S.2d 452, 454 (App. Div. 2007); *Kasem v. Price-Rite Office & Home Furniture*, 800 N.Y.S.2d 713, 715 (App. Div. 2005).

130. See *Kay v. Metro. St. Ry. Co.*, 57 N.E.2d 751, 752-53 (N.Y. 1900); *Steinmann v. Metro. Life Ins. Co.*, 15 N.Y.S.2d 51, 52 (App. Div. 1939).

131. N.Y. C.P.L.R. § 4401 (McKinney 2007); e.g., *Szczerbiak v. Pilat*, 686 N.E.2d 1346, 1348 (N.Y. 1997); *Bzezi v. Eldib*, 977 N.Y.S.2d 354, 356 (App. Div. 2013); *Porcelli v. N. Westchester Hosp. Ctr.*, 977 N.Y.S.2d 32, 35 (App. Div. 2013); *Aikens-Hobson v. Bruno*, 949 N.Y.S.2d 102, 103-04 (App. Div. 2012); *Figueroa v. City of New York*, 954 N.Y.S.2d 485, 485 (App. Div. 2012); *Liounis v. N.Y.C. Transit Auth.*, 938 N.Y.S.2d 176, 177-78 (App. Div. 2012); *Turusetta v. Wyassup-Laurel Glen Corp.*, 937 N.Y.S.2d 240, 243 (App. Div. 2012); *Delaney v. Delaney*, 919 N.Y.S.2d 912, 912 (App. Div. 2011); *Elnakib v. Cnty. of Suffolk*, 934 N.Y.S.2d 223, 224 (App. Div. 2011); *Ryan v. N.Y.C. Transit Auth.*, 933 N.Y.S.2d 346, 347 (App. Div. 2011); *Sung Kyu-To v. Triangle Equities, LLC*, 923 N.Y.S.2d 628, 630 (App. Div. 2011); *Alicea v. Ligouri*, 864 N.Y.S.2d 462, 464 (App. Div. 2008); *Nichols v. Stamer*, 854 N.Y.S.2d 220, 221 (App. Div. 2008); *Durkin v. Long Island Power Auth.*, 830 N.Y.S.2d 242, 244 (App. Div. 2007); *Guaman v. Indus. City Mgmt.*, 835 N.Y.S.2d 680, 681 (App. Div. 2007); *Pollack v. Klein*, 835 N.Y.S.2d 290, 291 (App. Div. 2007); *Wehr v. Long Island R.R. Co.*, 832 N.Y.S.2d 648, 649 (App. Div. 2007); *Velez v. Goldenberg*, 815 N.Y.S.2d 205, 207 (App. Div. 2006); *Bracco v. Puntillo Ltd.*, 798 N.Y.S.2d 504, 505 (App. Div. 2005); *Farrukh ex rel. Farrukh v. Bd. of Educ.*, 643 N.Y.S.2d 118, 120 (App. Div. 1996). The parallel provision in the federal courts is Federal Rule of Civil Procedure 50(a)(1), where, using

III. REGULAR ICE VERSUS “BLACK ICE”

There is no shortage of litigation by plaintiffs seeking damages for personal injuries sustained as a result of “regular” ice conditions at defendants’ properties, where icy conditions are visible and apparent to an observer.¹³² Indeed, such allegedly dangerous conditions are not, in regard to litigation, different than other conditions routinely disputed in New York State courts, such as holes in sidewalks or parking lots,¹³³

language similar to that of New York, the test is whether “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” FED. R. CIV. P. 50(a)(1). Rule 50(a)(1) also requires giving the non-moving party all favorable inferences. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149-51 (2000); *Harris v. Niagra Mohawk Power Corp.*, 252 F.3d 592, 596-97 (2d Cir. 2001); *Samuels v. Air Transp. Local 504*, 992 F.2d 12, 16 (2d Cir. 1993).

132. *E.g.*, *Austin v. CDGA Nat’l Bank Trust*, 980 N.Y.S.2d 660, 661 (App. Div. 2014); *Harrison v. N.Y.C. Transit Auth.*, 978 N.Y.S.2d 194, 195-96 (App. Div. 2014); *Feola v. City of New York*, 958 N.Y.S.2d 208, 209 (App. Div. 2013); *Stewart v. Sherwil Holding Corp.*, 942 N.Y.S.2d 174, 176 (App. Div. 2012); *Medina v. La Fiura Dev. Corp.*, 895 N.Y.S.2d 98, 99 (App. Div. 2010); *Derosia v. Gasbarre & Szatkowski Ass’n*, 885 N.Y.S.2d 862, 863 (App. Div. 2009); *Anthony v. N.Y.C. Transit Auth.*, 832 N.Y.S.2d 63, 64 (App. Div. 2007); *Uhlinger v. Gloversville Enlarged Sch. Dist.*, 796 N.Y.S.2d 437, 438 (App. Div. 2005); *Mokszki v. Pratt*, 786 N.Y.S.2d 222, 224 (App. Div. 2004); *Dane v. Taco Bell Corp.*, 746 N.Y.S.2d 45, 45 (App. Div. 2002); *Pugliese v. Utica Nat’l Ins. Grp., Inc.*, 743 N.Y.S.2d 790, 791 (App. Div. 2002); *Wimbush v. City of Albany*, 727 N.Y.S.2d 745, 746 (App. Div. 2001); *Pacelli v. Pinsley*, 699 N.Y.S.2d 530, 530 (App. Div. 1999); *Decker v. Smith*, 629 N.Y.S.2d 313, 314 (App. Div. 1995).

133. *San Marco v. Vill./Town of Mount Kisco*, 944 N.E.2d 1098, 1099-1101 (N.Y. 2010); *see, e.g.*, *Pulver v. City of Fulton Dep’t of Pub. Works*, 979 N.Y.S.2d 431, 432 (App. Div. 2014); *Rosario v. City of New York*, 979 N.Y.S.2d 42, 43-44 (App. Div. 2014); *Terilli v. Peluso*, 980 N.Y.S.2d 443, 443-44 (App. Div. 2014); *Corprew v. City of New York*, 965 N.Y.S.2d 108, 109 (App. Div. 2013); *James v. 1620 Westchester Ave., LLC*, 962 N.Y.S.2d 4, 6 (App. Div. 2013); *Vega v. 103 Thayer St., LLC*, 961 N.Y.S.2d 467, 468 (App. Div. 2013), *rev’d*, 16 N.E.3d 1255 (N.Y. 2014); *Wallace v. City of New York*, 970 N.Y.S.2d 237, 238-39 (App. Div. 2013); *Yousef v. Lee*, 959 N.Y.S.2d 440, 440 (App. Div. 2013); *Diaz v. 1100 Wyatt LLC*, 951 N.Y.S.2d 869, 869 (App. Div. 2012); *Anderson v. CD Fleetwood Assocs.*, 917 N.Y.S.2d 895, 895 (App. Div. 2011); *Crandell v. N.Y.C. Transit Auth.*, 915 N.Y.S.2d 553, 553-54 (App. Div. 2011); *Figueroa v. City of New York*, 933 N.Y.S.2d 377, 378-79 (App. Div. 2011); *Harakidas v. City of New York*, 927 N.Y.S.2d 673, 676 (App. Div. 2011); *Laymon v. Allen*, 916 N.Y.S.2d 553, 553 (App. Div. 2011); *Puella v. City of New York*, 934 N.Y.S.2d 169, 169-70 (App. Div. 2011); *Rhodes v. City of New York*, 931 N.Y.S.2d 595, 596-97 (App. Div. 2011); *Vidakovic v. City of New York*, 924 N.Y.S.2d 537, 539 (App. Div. 2011); *Cordova v. Union Tpk. Dev. Corp.*, 904 N.Y.S.2d 908, 909 (App. Div. 2010); *Lanhan v. City of New York*, 893 N.Y.S.2d 183, 183 (App. Div. 2010); *Burko v. Friedland*, 878 N.Y.S.2d 64, 65 (App. Div. 2009); *Davis v. City of Schenectady*, 883 N.Y.S.2d 810, 812 (App. Div. 2009); *Robinson v. Cambridge Realty Co.*, 872 N.Y.S.2d 440, 441-42 (App. Div. 2009); *Antigua v. City of New York*, 860 N.Y.S.2d 626, 627-28 (App. Div. 2008).

raised trip hazards,¹³⁴ negligently shoveled snow,¹³⁵ and weather-related worksite hazards.¹³⁶

Black ice, however, presents special factual and legal challenges to plaintiffs and, conversely, defense grounds for defendants, because black ice conditions are not, by definition, readily observable.

134. *E.g.*, *Donellan v. City of New York*, 977 N.Y.S.2d 326, 327 (App. Div. 2013); *Marchese v. St. Martha's Roman Catholic Church, Inc.*, 965 N.Y.S.2d 557, 558 (App. Div. 2013); *Antoine v. City of New York*, 868 N.Y.S.2d 688, 690 (App. Div. 2008); *Mazerbo v. Murphy*, 860 N.Y.S.2d 289, 290 (App. Div. 2008); *Acosta v. City of New York*, 808 N.Y.S.2d 29, 30 (App. Div. 2005); *Belmonte v. Metro. Life Ins. Co.*, 759 N.Y.S.2d 38, 39-40 (App. Div. 2003); *Alagna v. Marsh & McLennan Cos.*, 693 N.Y.S.2d 132, 133 (App. Div. 1999).

135. *E.g.*, *Gwinn v. Christina's Polish Rest., Inc.*, 986 N.Y.S.2d 182, 183 (App. Div. 2014); *Moore v. Great Atl. & Pac. Tea Co.*, 985 N.Y.S.2d 605, 605 (App. Div. 2014); *Schron v. Jean's Fine Wine & Spirits, Inc.*, 979 N.Y.S.2d 684, 685 (App. Div. 2014); *Titova v. D'Nodal*, 985 N.Y.S.2d 229, 230 (App. Div. 2014); *Yassa v. Awad*, 986 N.Y.S.2d 525, 526 (App. Div. 2014); *Belmonte v. Guilderland Assocs.*, 976 N.Y.S.2d 697, 698 (App. Div. 2013); *Glover v. Botsford*, 971 N.Y.S.2d 771, 772 (App. Div. 2013); *LaGuarina v. Metro. Transit Auth.*, 971 N.Y.S.2d 173, 175 (App. Div. 2013); *Rudloff v. Woodland Pond Condo. Ass'n*, 971 N.Y.S.2d 170, 173 (App. Div. 2013); *Sarisohn v. Plaza Realty Serv. Inc.*, 971 N.Y.S.2d 115, 116-17 (App. Div. 2013); *Silva-Carpanzano v. Schecter*, 963 N.Y.S.2d 389, 390 (App. Div. 2013); *Viera v. Rymdzionek*, 977 N.Y.S.2d 390, 390-91 (App. Div. 2013); *Wright v. Emigrant Sav. Bank*, 976 N.Y.S.2d 697, 697-98 (App. Div. 2013); *Ali v. Vill. of Pleasantville*, 943 N.Y.S.2d 582, 583-84 (App. Div. 2012); *Baker v. Buckpitt*, 952 N.Y.S.2d 666, 668-89 (App. Div. 2012); *Gushin v. Whispering Hills Condo. I*, 946 N.Y.S.2d 202, 203 (App. Div. 2012); *Kantor v. Leisure Glen Homeowners Ass'n*, 944 N.Y.S.2d 640, 641 (App. Div. 2012); *Marx v. Great Neck Park Dist.*, 939 N.Y.S.2d 518, 519-20 (App. Div. 2012); *Mathey v. Metro. Transp. Auth.*, 943 N.Y.S.2d 578, 581-82 (App. Div. 2012); *Proulx v. Energy Nuclear Indian Point 2, LLC*, 949 N.Y.S.2d 178, 179 (App. Div. 2012); *Plotits v. Houaphing D. Chaou, LLC*, 915 N.Y.S.2d 626, 627-28 (App. Div. 2011); *Sabatino v. 425 Oser Ave., LLC*, 930 N.Y.S.2d 598, 600 (App. Div. 2011); *Sarisohn v. 341 Commack Rd., Inc.*, 934 N.Y.S.2d 202, 204 (App. Div. 2011); *Castillo v. N.Y.C. Dep't of Educ.*, 909 N.Y.S.2d 616, 617 (App. Div. 2010); *Foster v. Herbert Slepoy Corp.*, 905 N.Y.S.2d 226, 227-28 (App. Div. 2010); *Pipero v. N.Y.C. Transit Auth.*, 894 N.Y.S.2d 39, 40 (App. Div. 2010); *Schwint v. Bank Street Commons, LLC*, 904 N.Y.S.2d 220, 222 (App. Div. 2010); *Steele v. Lafferty*, 915 N.Y.S.2d 777, 777-78 (App. Div. 2010); *Sut v. City Cinemas Corp.*, 894 N.Y.S.2d 916, 917 (App. Div. 2010); *Boone v. 100 Marcus Drive Assocs.*, 877 N.Y.S.2d 433, 434-35 (App. Div. 2009); *Braun v. Weissman*, 890 N.Y.S.2d 615, 616 (App. Div. 2009); *Cason-Payano v. Damiano*, 871 N.Y.S.2d 110, 111-12 (App. Div. 2009); *Gartmann v. City of New York*, 890 N.Y.S.2d 5, 5-6 (App. Div. 2009); *Groth v. BJ's Wholesale Club, Inc.*, 872 N.Y.S.2d 828, 829-30 (App. Div. 2009); *Lattimore v. First Mineola Co.*, 874 N.Y.S.2d 253, 255-56 (App. Div. 2009); *Martin v. City of New York*, 873 N.Y.S.2d 191, 192 (App. Div. 2009); *Ortiz v. Citibank*, 880 N.Y.S.2d 626, 627-28 (App. Div. 2009); *Rina v. Windemere Home Owners Ass'n*, 887 N.Y.S.2d 231, 231-32 (App. Div. 2009); *Trala v. Affif*, 872 N.Y.S.2d 609, 610-11 (App. Div. 2009); *Elsev v. Clark Trading Corp.*, 871 N.Y.S.2d 439, 440 (App. Div. 2008).

136. *E.g.*, *Jenkins v. Related Cos., L.P.*, 979 N.Y.S.2d 581, 582 (App. Div. 2014); *Carpenter v. J. Giardino, LLC*, 917 N.Y.S.2d 439, 440-41 (App. Div. 2011); *Sheldon v. Henderson & Johnson Co.*, 906 N.Y.S.2d 413, 414 (App. Div. 2010); *Sullivan v. RGS Energy Grp., Inc.*, 910 N.Y.S.2d 776, 777 (App. Div. 2010); *Cohen v. Schachter*, 857 N.Y.S.2d 727, 728-29 (App. Div. 2008); *Constantino v. Kreisler Borg Florman Gen. Constr. Co.*, 707 N.Y.S.2d 487, 487 (App. Div. 2000); *Lawyer v. Hoffman*, 711 N.Y.S.2d 618, 619-20 (App. Div. 2000); *Morra v. White*, 714 N.Y.S.2d 510, 511 (App. Div. 2000).

There is no legal definition of “black ice” in *Black’s Law Dictionary*.¹³⁷ Common English-language dictionaries, likewise, do not tend to define the term. Black ice has been variably, but consistently, characterized in New York decisional law as a condition that is “difficult to see or recognize as ice”¹³⁸ and as a condition which “is, by its very nature, difficult to see.”¹³⁹ There are definitions of “black ice” that appear in scientific sources. The U.S. National Weather Service defines “black ice” as a “[s]lang reference to patchy ice on roadways or other transportation surfaces that cannot easily be seen,” and “[i]n hydrologic terms, transparent ice formed in rivers and lakes.”¹⁴⁰

Black ice is not merely a slang term, but is a scientific reality in the lives of people that encounter it. Unlike “regular ice,” black ice forms when rain, mist, or fog deposits ice upon warmer paved surfaces in cold weather.¹⁴¹ The latent heat from the pavement slows the normal rate of freezing, so that droplets of water combine with each other before they freeze.¹⁴² The process forces air bubbles from the water, so that the ice sheet that forms is clear or almost completely clear.¹⁴³ The transparency of the ice causes it to take on whatever color is beneath its surface, making the ice difficult to see by walkers, drivers, and bikers.¹⁴⁴ It can more easily form on bridges and elevated roadways because wind simultaneously cools its surfaces from both the upper side and the underside, making it cooler than other sections of nearby roadways.¹⁴⁵ Black ice tends to form at night or during early morning when temperatures are at their lowest, and before the sun has had a chance to warm paved surfaces and melt the ice.¹⁴⁶ Black ice may even form with a matte appearance that makes a paved surface beneath look clear and

137. BLACK’S LAW DICTIONARY 192 (9th ed. 2009).

138. See *Golonka v. Saratoga Teen & Recreation of Saratoga Springs Inc.*, 672 N.Y.S.2d 472, 474 (App. Div. 1998) (adopting a definition of “black ice” provided by the plaintiff in deposition testimony).

139. See *Vincent v. Landi*, 957 N.Y.S.2d 503, 505 (App. Div. 2012) (quoting *Martin v. RP Assocs.*, 830 N.Y.S.2d 816, 818 (App. Div. 2007)); see also *Cardinale v. Watervliet Hous. Auth.*, 754 N.Y.S.2d 728, 729 (App. Div. 2003) (quoting *Lewis v. Bama Hotel Corp.*, 745 N.Y.S.2d 627, 628 (App. Div. 2002)) (describing black ice as “ice that is difficult to see”).

140. *Black Ice*, NAT’L WEATHER SERVICE, <http://w1.weather.gov/glossary/index.php?letter=6> (last visited Apr. 12, 2015).

141. *What Is Black Ice?*, *supra* note 1.

142. *Id.*

143. *Id.*

144. See *id.*

145. *Id.* For this reason, it is not uncommon on major highways for signs to warn motorists “Bridge Ices Before Road,” or “Bridge May Be Icy,” or similar nomenclature at approaches to bridges.

146. See *id.*

dry.¹⁴⁷ The thinness of black ice means that once temperatures rise or the condition is exposed to sunlight, the ice readily melts, as a result of which black ice is typically a short-term, transient condition.¹⁴⁸

For defendants, black ice cases do not lend themselves to the defense that the condition is “open and obvious,” as any argument that such a condition is open and obvious is logically inconsistent. Indeed, no reported case has been found where any defendant has argued that a black ice condition alleged by the plaintiff was “open and obvious.” Likewise, no reported case has been found where any defendant has argued that the alleged existence of black ice qualifies for the “trivial defect” defense. Further, since black ice conditions are transient, no cases are reported where any municipality has received prior written notice of its presence as to allow the imposition of potential liability upon the municipality. The focus of property owners in defending black ice slip-and-fall cases has, therefore, and necessarily, been on the absence of an affirmative creation of the condition, and the absence of prior actual or constructive notice of it.¹⁴⁹

Some plaintiffs might be tempted to describe an ice condition in deposition testimony, or at trial, as “black ice,” in the mistaken belief that it more easily excuses their potential contributory negligence in not seeing and avoiding the hazard. Any such plaintiffs are too clever, as the description of a premises condition as “black ice” renders it more difficult for them to establish the primary negligence of the property owners that they sue.

Indeed, plaintiffs who become injured as a result of slipping on black ice face peculiar difficulties in establishing liability on the part of defendant property owners, particularly with regard to issues of defect creation and prior notice. Rarely, if ever, would property owners affirmatively “create” a black ice condition at their premises.¹⁵⁰ The transparency of black ice makes it unlikely that actual notice of the condition could ever be given to the property owner in advance of an

147. *See id.*

148. *See id.*

149. *See, e.g., id.*

150. *See* *Tedesco v. Northfork S. Corp.*, No. 00-CV-0172, 2002 WL 1628874, at *3 (W.D.N.Y. June 6, 2002); *Cuillo v. Fairfield Prop. Servs., L.P.*, 977 N.Y.S.2d 353, 354 (App. Div. 2013); *Edwards v. Mantis, LLC*, 964 N.Y.S.2d 235, 236 (App. Div. 2013); *Cantwell v. Fox Hill Cmty. Ass’n*, 930 N.Y.S.2d 459, 459-60 (App. Div. 2011); *Morelli v. Con Edison*, 866 N.Y.S.2d 730, 732 (App. Div. 2008); *Robinson v. Trade Link Am.*, 833 N.Y.S.2d 243, 244 (App. Div. 2007); *Killeen v. Our Lady of Mercy Med. Ctr.*, 827 N.Y.S.2d 19, 20 (App. Div. 2006); *Makaron v. Luna Park Hous. Corp.*, 809 N.Y.S.2d 520, 521 (App. Div. 2006); *Zabbia v. Westwood, LLC*, 795 N.Y.S.2d 319, 321 (App. Div. 2005); *Carricato v. Jefferson Valley Mall Ltd.*, 749 N.Y.S.2d 575, 576 (App. Div. 2002); *Golonka v. Saratoga Teen & Recreation of Saratoga Springs Inc.*, 672 N.Y.S.2d 472, 474 (App. Div. 1998).

accident.¹⁵¹ Similarly, the transparency and transience of black ice renders constructive notice of the condition to property owners unlikely.¹⁵² Thus, plaintiffs face a conundrum when trying to prove that the condition was affirmatively created or actually or constructively noticed to defendant property owners, since black ice is, by definition, a condition that is not readily observable by anyone. Conversely, property owners defending actions involving black ice, as distinguished from other premises defect theories, enjoy a built-in advantage in potentially defeating plaintiffs' claims, since black ice is not observable to them or their agents.

How might plaintiffs resolve the conundrum?

IV. DISCRETE LITIGATION STRATEGIES FOR ESTABLISHING THE NECESSARY ELEMENTS OF ACTIONS INVOLVING BLACK ICE

Preliminarily, lawyers and litigants must recognize that, in the end, the ability of plaintiffs to establish liability in their favor when injured by encounters with black ice is simply, and necessarily, more difficult than it is in typical ice cases. In many actions, there is simply no way to avoid that reality.

151. See, e.g., *Cuillo*, 977 N.Y.S.2d at 354; *Edwards*, 964 N.Y.S.2d at 236; *Spinoccia v. Fairfield Bellmore Ave., LLC*, 943 N.Y.S.2d 601, 601-02 (App. Div. 2012); *Cantwell*, 930 N.Y.S.2d at 459-60; *Phillips v. Henry B's, Inc.*, 925 N.Y.S.2d 770, 771 (App. Div. 2011); *Slates v. N.Y.C. Hous. Auth.*, 914 N.Y.S.2d 12, 13 (App. Div. 2010); *Wilkowski v. Big Lots Stores, Inc.*, 890 N.Y.S.2d 227, 228 (App. Div. 2009); *Christal v. Ramapo Cirque Homeowners Ass'n*, 857 N.Y.S.2d 729, 730 (App. Div. 2008); *Kaplan v. DePetro*, 858 N.Y.S.2d 304, 306 (App. Div. 2008); *Morelli*, 866 N.Y.S.2d at 732; *Robinson*, 833 N.Y.S.2d at 244; *Killeen*, 827 N.Y.S.2d at 20; *Makaron*, 809 N.Y.S.2d at 521; *Stoddard v. G.E. Plastics Corp.*, 784 N.Y.S.2d 195, 197 (App. Div. 2004); *Cardinale v. Watervliet Hous. Auth.*, 754 N.Y.S.2d 728, 729 (App. Div. 2003); *Carricato*, 749 N.Y.S.2d at 576; *Smith v. Smith*, 735 N.Y.S.2d 630, 632 (App. Div. 2001); *Smith v. State*, 688 N.Y.S.2d 774, 777 (App. Div. 1999); *Dunkleman v. Meadows of Highland Home Owners Ass'n*, 643 N.Y.S.2d 447, 447 (App. Div. 1996); *Dhanraj v. Prasad*, No. 8255/2012, 2014 WL 2745911, at *6 (N.Y. Sup. Ct. June 9, 2014).

152. See *Richards v. Pathmark Stores, Inc.*, No. 07-CV-1790, 2008 WL 3165582, at *7 (S.D.N.Y. Aug. 6, 2008); *Tedesco*, 2002 WL 1628874, at *3-4; *Cuillo*, 977 N.Y.S.2d at 354; *Edwards*, 964 N.Y.S.2d at 236; *Spinoccia*, 943 N.Y.S.2d at 601-02; *Lillie v. Wilmore, Inc.*, 938 N.Y.S.2d at 396, 397 (App. Div. 2012); *Cantwell*, 930 N.Y.S.2d at 459-60; *Henry B's Inc.*, 925 N.Y.S.2d at 771; *Mullaney v. Royalty Props., LLC*, 916 N.Y.S.2d 545, 546 (App. Div. 2011); *Slates*, 914 N.Y.S.2d at 13; *Wilkowski*, 890 N.Y.S.2d at 228; *Morelli*, 866 N.Y.S.2d at 732; *Simon v. Maimonides Med. Ctr.*, 859 N.Y.S.2d 373, 374 (App. Div. 2008); *DePetro*, 858 N.Y.S.2d at 306; *Christal*, 857 N.Y.S.2d at 730; *Gilbert v. Evangelical Lutheran Church in Am.*, 842 N.Y.S.2d 644, 645 (App. Div. 2007); *Robinson*, 833 N.Y.S.2d at 244; *Killeen*, 827 N.Y.S.2d at 20; *Makaron*, 809 N.Y.S.2d at 521; *Stoddard*, 784 N.Y.S.2d at 197; *Murphy v. 136 N. Blvd. Assocs.*, 757 N.Y.S.2d 582, 583 (App. Div. 2003); *Cardinale*, 754 N.Y.S.2d at 729; *Carricato*, 749 N.Y.S.2d at 576; *Smith*, 735 N.Y.S.2d at 632; *La Duke v. Albany Motel Enters. Inc.*, 724 N.Y.S.2d 507, 509 (App. Div. 2001); *Golonka*, 672 N.Y.S.2d at 474; *Dunkleman*, 643 N.Y.S.2d at 447; *Dhanraj*, 2014 WL 2745911, at *6.

Nevertheless, four potential strategies are suggested here for plaintiffs seeking to establish the necessary elements for tort liability in actions involving black ice. The relevance of any single strategy to any action will depend upon the particular facts of each case.

One strategy, which relates to the issue of proving actual or constructive notice, regards the question of whether, on a case-by-case basis, the icy condition is black ice at all, or regular ice more readily visible to the human eye through the reasonable use of senses. In *Talamas v. Metropolitan Transportation Authority*,¹⁵³ the plaintiff sought damages for injuries sustained as a result of a slip and fall upon ice while the plaintiff was exiting a train onto a Long Island train platform.¹⁵⁴ During her deposition, the plaintiff explained that the black ice condition alleged to have been present upon the surface of the train platform was merely described by that term “because it was dark,” rather than because the ice was necessarily transparent.¹⁵⁵ Similarly, in *Wright v. Emigrant Savings Bank*,¹⁵⁶ the plaintiff’s categorization of “black ice” was not consistent with her description of the ice itself, which she recalled as “black grayish” and “dirty snow,” and which rendered it capable of visual observation subject to at least constructive notice.¹⁵⁷ If questions of fact arise over whether an icy condition is ice that is typical, visible, and apparent rather than of the black ice variety, issues of prior notice to the property owner might be more easily resolved in favor of the plaintiff. Plaintiffs’ attorneys should take care to explain to their clients the difference between black ice and typical ice, so that the proper verbiage is used in pleadings, bills of particulars, and testimonies at depositions and trials. Obviously, plaintiffs’ attorneys cannot write the facts of the cases that are filed at the courthouses, but they may appropriately guard against their clients’ use of inexact terms that cause them unnecessary complications.

A second strategy involves whether there is actual or constructive notice of the black ice condition to the defendant property owner, notwithstanding the transparency of the ice itself. This strategy might appear rarely because, as discussed, black ice is, by definition, not readily apparent to the human eye, and therefore, is not typically the

153. 993 N.Y.S.2d 102 (App. Div. 2014).

154. *Id.* at 102.

155. The plaintiff’s deposition testimony is not reflected in the Appellate Division’s slip decision, but was contained in the record on appeal. The relevant portion of the deposition transcript is also available through the public litigation records maintained by the Supreme Court, Queens County, which initially decided the defendants’ motion for summary judgment prior to the appeal of the decision and order based on the “storm in progress” defense.

156. 976 N.Y.S.2d 47 (App. Div. 2013).

157. *Id.* at 48.

subject of actual or constructive notice to the property owner or an owner's agent.¹⁵⁸ The number of black ice cases where plaintiffs have successfully raised questions of fact sufficient to defeat the summary judgment motions of defendant property owners are few and far between—indeed, only a handful in number at the appellate level during the past two decades. Nevertheless, they provide insight as to how plaintiffs' attorneys succeed in avoiding the dismissal of their clients' complaints.

One such case is *Walters v. Costco Wholesale Corp.*,¹⁵⁹ wherein the Appellate Division, Second Department, found questions of fact requiring a trial based upon evidence of precipitation, an affidavit of a meteorologist regarding fluctuating and freezing temperatures, deposition testimony of the defendant's on-site manager that the icy condition was visible to him immediately after the plaintiff's accident, and an incident report that another person had fallen in the same vicinity forty-five minutes earlier.¹⁶⁰ Similarly, in the black ice case of *Pomeroy v. Gelber*,¹⁶¹ the Appellate Division, Third Department, found questions of fact about constructive notice sufficient to defeat the defendant's motion for summary judgment, based upon the deposition testimony of two witnesses that the accident site had "a little bit of frost" and "water slush," and an affidavit from a meteorologist stating an opinion that the ice upon which the plaintiff fell had been present for several hours before the occurrence.¹⁶² In another black ice case from the Appellate Division, Third Department, *Torosian v. Bigsbee Village Homeowners Ass'n*,¹⁶³ the court found questions of fact as to constructive notice based upon a meteorologist's affidavit and climatological records describing melting and refreezing temperatures, deposition testimony of a witness that ice was present at the accident location the night prior to the plaintiff's fall, and photographs depicting ice at the same location the day after the accident.¹⁶⁴ In the black ice case of *Bullard v. Pfohl's Tavern, Inc.*,¹⁶⁵ the Appellate Division, Fourth Department, found, based

158. See *supra* notes 153-57 and accompanying text.

159. 858 N.Y.S.2d 269 (App. Div. 2008).

160. *Id.* at 270-71. The Appellate Division case makes no specific mention of affidavits from expert meteorologists. However, the published decision and order from the Supreme Court, Schenectady County, which was later appealed, references the plaintiff's submission of an affidavit by expert meteorologist Howard Altschule. *Torosian v. Bigsbee Vill. Homeowners Ass'n*, No. 2004-2038, 2007 WL 5601109, at *2 (N.Y. Sup. Ct. Apr. 6, 2007).

161. 985 N.Y.S.2d 183 (App. Div. 2014).

162. *Id.* at 185-86.

163. 848 N.Y.S.2d 452 (App. Div. 2007).

164. *Id.* at 454.

165. 784 N.Y.S.2d 265 (App. Div. 2004).

upon an affidavit of a meteorologist proffered by the plaintiff, that a three-and-a-half hour period of misty air, falling temperatures, and a slippery sidewalk raised a question of fact as to whether the defendant property owner was on constructive notice of the black ice condition that formed at the accident site, along with a witness affidavit describing slippery conditions.¹⁶⁶

The reader might notice a pattern in *Bullard*, *Pomeroy*, *Torosian*, and *Walters*. In each of these black ice cases from the Second, Third, and Fourth Departments, the plaintiffs' papers submitted in opposition to summary judgment were supported by affidavits of experts in the field of meteorology attesting to falling or fluctuating temperatures and overall weather conditions conducive to black ice, and depositions or affidavits of witnesses describing the condition of the accident sites prior to or at the time of the plaintiffs' incidents.¹⁶⁷ These cases demonstrate the extent to which court decisions regarding the necessary elements of premises liability are truly *sui generis*. More crucially, they demonstrate the value to plaintiffs of careful and detailed lawyering in obtaining and using helpful testimonies by fact witnesses through depositions or affidavits, and by providing the courts with evidence from expert meteorologists supporting the plaintiffs' claims regarding the existence and duration of the slippery premises conditions.

A third strategy for prosecuting black ice actions recognizes that liability may be imposed upon property owners for recurring dangerous or defective conditions.¹⁶⁸ Liability for ice conditions is included within

166. *Id.* at 265-66. Nevertheless, the *Bullard* court failed to explain how it arrived at its conclusion, given the plaintiff's allegation that the condition on which she slipped and fell was expressly alleged to be in the form of "black ice." *Id.*

167. See *supra* notes 159-66. Research has not revealed the existence of reported cases from the First Department that are consistent or inconsistent with the principles stated. In *Bullard*, the lay witness affidavit describing slippery conditions had not been submitted in support of the defendant's motion for summary judgment, rather as part of the plaintiff's opposition to the motion. 784 N.Y.S.2d at 265.

168. See, e.g., *Molina v. N.Y.C. Transit Auth.*, 981 N.Y.S.2d 510, 511 (App. Div. 2014); *Glockenberg v. Costco Wholesale Corp.*, 973 N.Y.S.2d 360, 362 (App. Div. 2013); *Willis v. Galileo Cortlandt, LLC*, 964 N.Y.S.2d 576, 578 (App. Div. 2013); *Halpern v. Costco Warehouse/Costco Wholesale*, 943 N.Y.S.2d 567, 568 (App. Div. 2012); *Santana v. State*, 938 N.Y.S.2d 157, 158 (App. Div. 2012); *Lehr v. Mothers Work, Inc.*, 903 N.Y.S.2d 345, 345 (App. Div. 2010); *Maurer v. Tops Markets, LLC*, 895 N.Y.S.2d 617, 620 (App. Div. 2010); *Georgiou v. 32-42 Broadway LLC*, 878 N.Y.S.2d 889, 889 (App. Div. 2009); *Kohout v. Molloy Coll.*, 876 N.Y.S.2d 505, 507-08 (App. Div. 2009); *Wesolek v. Jumping Cow Enters., Inc.*, 857 N.Y.S.2d 859, 861 (App. Div. 2008); *Bido v. 876-822 Realty, LLC*, 839 N.Y.S.2d 54, 55 (App. Div. 2007); *Bray v. McGillicuddy's Tap House, Ltd.*, 838 N.Y.S.2d 262, 264 (App. Div. 2007); *Brown v. Linden Plaza Hous. Co.*, 829 N.Y.S.2d 571 (App. Div. 2007); *Batista v. KFC Nat'l Mgmt. Co.*, 801 N.Y.S.2d 336, 337 (App. Div. 2005); *Irizarry v. 15 Mosholu Four, LLC*, 806 N.Y.S.2d 534, 535 (App. Div. 2005); *Roussos v. Ciccotto*, 792 N.Y.S.2d 501, 503 (App. Div. 2005); *Mullin v. 100 Church LLC*, 784 N.Y.S.2d 545, 546-47 (App. Div. 2004); *Diaz v. Parsons Props., Inc.*, 766 N.Y.S.2d 102, 103 (App. Div. 2003);

the universe of litigated torts, where the ice is alleged to be a recurring condition. Examples of the causes of recurring ice conditions include, but are not limited to: leaky or defective gutters;¹⁶⁹ areas under roofs with no gutters;¹⁷⁰ water or snow melt from roofs or awnings that refreezes below;¹⁷¹ defective water drains;¹⁷² negligently-directed down spouts;¹⁷³ dripping machinery;¹⁷⁴ dripping merchandise;¹⁷⁵ water accumulations upon steps;¹⁷⁶ and defective highway designs.¹⁷⁷ It is not beyond the realm of possibility that even black ice conditions may recur at particular premises under conducive circumstances.¹⁷⁸

When a defendant property owner is on actual notice of the existence of a particular recurring condition, the defendant may then be charged with constructive notice of each specific recurrence of the condition that follows.¹⁷⁹ Thus, where there is actual notice of

Fielding v. Rachlin Mgmt. Corp., 766 N.Y.S.2d 381, 382 (App. Div. 2003); Garcia v. U-Haul Co., 755 N.Y.S.2d 900, 900 (App. Div. 2003); Uhlich v. Canada Dry Bottling Co., 758 N.Y.S.2d 650, 651 (App. Div. 2003); Coletta v. City of New York, 737 N.Y.S.2d 862, 863 (App. Div. 2002); Freund v. Ross-Rodney Hous. Corp., 738 N.Y.S.2d 612, 613 (App. Div. 2002); Benn v. Mun. Hous. Auth. for the City of Yonkers, 713 N.Y.S.2d 544, 544-45 (App. Div. 2000); Endres v. Mingles Rest., Ltd., 706 N.Y.S.2d 32, 33 (App. Div. 2000); McDuffie v. Fleet Fin. Grp., Inc., 703 N.Y.S.2d 510, 511 (App. Div. 2000); Smith v. P&J Edwards, Inc., 705 N.Y.S.2d 579, 580 (App. Div. 2000); Carlos v. New Rochelle Mun. Hous. Auth., 692 N.Y.S.2d 428, 428 (App. Div. 1999); Pidgeon v. Metro-N. Commuter R.R., 670 N.Y.S.2d 833, 834 (App. Div. 1998); Cherundolo, *supra* note 49, at 838-39.

169. *E.g.*, Phillips v. Henry B's, Inc., 925 N.Y.S.2d 770, 771 (App. Div. 2011); Hughey v. RHM-88, LLC, 912 N.Y.S.2d 175, 176-77 (App. Div. 2010); Mondello v. DiStefano, 792 N.Y.S.2d 177, 178 (App. Div. 2005).

170. *E.g.*, Vincent v. Landi, 957 N.Y.S.2d 503, 505 (App. Div. 2012); Knight v. Sawyer, 762 N.Y.S.2d 458, 459 (App. Div. 2003); Loguidice v. Fiorito, 678 N.Y.S.2d 225, 225 (App. Div. 1998).

171. *E.g.*, Campone v. Pisciotto Servs., Inc., 930 N.Y.S.2d 62, 63 (App. Div. 2011); Tamhane v. Citibank, N.A., 877 N.Y.S.2d 78, 80 (App. Div. 2009); Pasqua v. Handels-En Productiemaatschappij De Schouw, B.V., 841 N.Y.S.2d 296, 297 (App. Div. 2007).

172. *E.g.*, Anderson v. Great E. Mall, L.P., 902 N.Y.S.2d 283, 284 (App. Div. 2010).

173. *E.g.*, Schmidt v. DiPerno, 808 N.Y.S.2d 413, 414 (App. Div. 2006).

174. *E.g.*, Alvarez v. Waldbaum Inc., No. 104306/07, 2009 WL 4667540, at *2 (N.Y. Sup. Ct. Dec. 4, 2009).

175. *E.g.*, Erikson v. J.I.B. Realty Corp., 783 N.Y.S.2d 661, 663 (App. Div. 2004).

176. *E.g.*, Sewitch v. LaFrese, 839 N.Y.S.2d 114, 115 (App. Div. 2007); Welch v. Riverbay Corp., 709 N.Y.S.2d 58, 59 (App. Div. 2000).

177. *See, e.g.*, Rooney v. State, 488 N.Y.S.2d 468, 470 (App. Div. 1985); Fincher v. State, 241 N.Y.S.2d 504, 505-06 (App. Div. 1963).

178. *See, e.g.*, Vincent v. Landi, 957 N.Y.S.2d 503, 505 (App. Div. 2012); Phillips v. Henry B's, Inc., 925 N.Y.S.2d 770, 771 (App. Div. 2011); *see also* Smith v. State, 688 N.Y.S.2d 774, 776-77 (App. Div. 1999) (finding an absence of proof of a recurring condition).

179. Rachlin v. Michaels Arts & Crafts, 988 N.Y.S.2d 741, 742 (App. Div. 2014); Glockenberg v. Costco Wholesale Corp., 973 N.Y.S.2d 360, 362 (App. Div. 2013); Willis v. Galileo Cortlandt, LLC, 964 N.Y.S.2d 576, 578 (App. Div. 2013); Halpern v. Costco Warehouse/Costco Wholesale, 943 N.Y.S.2d 567, 568 (App. Div. 2012); Amendola v. City of New York, 932 N.Y.S.2d 172, 174 (App. Div. 2011); Black v. Kohl's Dep't Stores, Inc., 914 N.Y.S.2d 469, 471

recurrence, the plaintiff's burden is automatically and necessarily lessened in proving notice of the condition at the accident site on the specific date of an occurrence. Proof of prior notice of a recurring condition—such as snow, ice, or black ice forming from a faulty structure or device that receives no repair over time—is more easily established for plaintiffs than proving actual or constructive notice of a single specific ice condition in existence at a given hour of a given day. Liability for black ice and other conditions cannot be established through mere speculation that a recurring ice condition exists.¹⁸⁰ However, if the facts of an action support the argument that the plaintiff's ice-related accident was a product of a recurring condition and is provable, plaintiffs' attorneys should take full advantage of its more general notice standard in defeating defendants' applications for summary judgment, and in presenting evidence to the trier of fact at trials.

The fourth strategy that plaintiffs may pursue in prosecuting black ice cases, in factually-appropriate circumstances, is that which was successfully used in *San Marco*—alleging snow removal in a manner which negligently and foreseeably would lead to snow melt and

(App. Div. 2011); *Phillips*, 925 N.Y.S.2d at 771; *Roman v. Met-Paca II Assocs., L.P.*, 925 N.Y.S.2d 447, 448 (App. Div. 2011); *Anderson v. Great E. Mall, L.P.*, 902 N.Y.S.2d 283, 284 (App. Div. 2010); *Bush v. Mechanicville Warehouse Corp.*, 895 N.Y.S.2d 212, 214 (App. Div. 2010); *Edwards v. Great Atl. & Pac. Tea Co.*, 895 N.Y.S.2d 723, 723 (App. Div. 2010); *Maurer v. Tops Mkts., LLC*, 895 N.Y.S.2d 617, 620 (App. Div. 2010); *Milano v. Staten Island Univ. Hosp.*, 903 N.Y.S.2d 78, 79 (App. Div. 2010); *Carmona v. 40-25 Hampton, LLC*, 883 N.Y.S.2d 716, 716 (App. Div. 2009); *Kohout v. Molloy Coll.*, 876 N.Y.S. 505, 507-08 (App. Div. 2009); *Hutchinson v. Med. Data Res., Inc.*, 865 N.Y.S.2d 221, 222 (App. Div. 2008); *Wesolek v. Jumping Cow Enters., Inc.*, 857 N.Y.S. 859, 861 (App. Div. 2008); *Brown v. Linden Plaza Hous. Co.*, 829 N.Y.S.2d 571, 571-72 (App. Div. 2007); *Hale v. Wilmore, Inc.*, 827 N.Y.S.2d 387, 388 (App. Div. 2006); *Perlongo v. Park City 3 & 4 Apartments, Inc.*, 818 N.Y.S.2d 158, 160 (App. Div. 2006); *Batista v. KFC Nat'l Mgmt. Co.*, 801 N.Y.S.2d 336, 337 (App. Div. 2005); *Roussos v. Ciccotto*, 792 N.Y.S.2d 501, 503 (App. Div. 2005); *Dorsa v. Nat'l Amusements, Inc.*, 776 N.Y.S.2d 583, 584 (App. Div. 2004); *Cappolla v. City of New York*, 755 N.Y.S.2d 100, 102 (App. Div. 2003); *Garcia v. U-Haul Co.*, 755 N.Y.S.2d 900, 900 (App. Div. 2003); *Clark v. Chau Shing Wong*, 740 N.Y.S.2d 443, 444 (App. Div. 2002); *Coletta v. City of New York*, 737 N.Y.S.2d 862, 863 (App. Div. 2002); *Freund v. Ross-Rodney Hous. Corp.*, 738 N.Y.S.2d 612, 613 (App. Div. 2002); *LaPorta v. Wilmore, Inc.*, 748 N.Y.S.2d 83, 84 (App. Div. 2002); *Manzione v. Wal-Mart Stores, Inc.*, 744 N.Y.S.2d 466, 467 (App. Div. 2002); *Lowe v. Spada*, 722 N.Y.S.2d 820, 822-23 (App. Div. 2001); *Nieves v. ISS Cleaning Servs. Grp.*, 726 N.Y.S.2d 456, 457 (App. Div. 2001); *Smith v. Funnel Equities, Inc.*, 723 N.Y.S.2d 194, 195 (App. Div. 2001); *Benn v. Mun. Hous. Auth. for City of Yonkers*, 714 N.Y.S.2d 544, 545 (App. Div. 2000); *Lustgarten v. Oceanside Union Free Sch. Dist.*, 716 N.Y.S.2d 889, 889 (App. Div. 2000); *Osorio v. Wendell Terrace Owners Corp.*, 714 N.Y.S.2d 116, 117 (App. Div. 2000); *Morales v. Jolee Consolidators, Inc.*, 569 N.Y.S.2d 699, 700 (App. Div. 1991).

180. See *Quintana v. TCR, Tennis Club of Riverdale, Inc.*, 897 N.Y.S.2d 68, 69 (App. Div. 2014); *Carpenter v. J. Giardino, LLC*, 917 N.Y.S.2d 439, 442 (App. Div. 2011); *Tamhane v. Citibank, N.A.*, 877 N.Y.S.2d 78, 81 (App. Div. 2009); *Zanki v. Cahill*, 768 N.Y.S.2d 471, 472 (App. Div. 2003), *aff'd*, 812 N.E.2d 1257 (N.Y. 2004).

refreeze conditions as soon as temperatures fluctuate.¹⁸¹ Notably, the hazard described in *San Marco* was black ice, yet the decision from the Court of Appeals allowed the action to proceed, despite the absence to the municipality of prior written notice of the condition.¹⁸²

It is worth noting that where a defendant's summary judgment motion is concerned, the defendant bears the initial burden of proving that she did not create the alleged black ice condition, nor have actual or constructive notice of it.¹⁸³ To meet that *prima facie* burden of proof, the defendant must address, by affidavit or other evidence, what is alleged in the plaintiffs' complaint and bill of particulars—whether the theory of the case is based upon an affirmative creation of the icy condition, actual notice of it, constructive notice of it, recurrence of the condition, or any combination of the foregoing. For instance, a defendant's failure in an actual or constructive notice case to identify when an accident area had been last inspected prior to the plaintiff's accident renders the defendant unable to establish the absence of prior notice.¹⁸⁴ Thus, even if a plaintiff's description of black ice is such that the condition was not visible or apparent at the time of an accident, this weakness in the plaintiff's action is not reached in the summary judgment context until and unless the defendant first establishes in her moving papers the absence of creation, actual or prior notice, or recurrence.¹⁸⁵ In opposing defendants' motions for summary judgment in black ice cases, the plaintiffs' attorneys should carefully evaluate whether the defendants' submissions establish *prima facie*, through admissible evidence, that the defendant did not create the condition, or have actual or constructive notice of it or its recurrent nature, as relevant to the specific allegations raised by the plaintiffs' complaints and bills of particulars. The plaintiff

181. See *San Marco v. Vill./Town of Mount Kisco*, 944 N.E.2d 1098, 1099 (N.Y. 2010).

182. *Id.* at 1101.

183. See *supra* notes 123-25 and accompanying text.

184. See *Clark v. Cumberland Farms, Inc.*, No. 12-CV-0158, 2014 WL 2778947, at *6-7 (N.D.N.Y. June 19, 2014); *Wright v. Emigrant Sav. Bank*, 976 N.Y.S.2d 47, 48 (App. Div. 2013); *Spector v. Cushman & Wakefield, Inc.*, 928 N.Y.S.2d 9, 10 (App. Div. 2011).

185. See *Cumberland Farms*, 2014 WL 2778947, at *7; *Ayotte v. Gervasio*, 619 N.E.2d 400, 401 (N.Y. 1993); *Alvarez v. Prospect Hosp.*, 501 N.E.2d 572, 574 (N.Y. 1986); *Winegrad v. N.Y. Univ. Med. Ctr.*, 476 N.E.2d 642, 643-44 (N.Y. 1985); *Zuckerman v. City of New York*, 404 N.E.2d 718, 720 (N.Y. 1980); *Friends of Animals v. Associated Fur Mfrs., Inc.*, 390 N.E.2d 298, 299 (N.Y. 1979); *Indig v. Finkelstein*, 244 N.E.2d 61, 62 (N.Y. 1968); *Wright*, 976 N.Y.S.2d at 48; *Spector*, 928 N.Y.S.2d at 10; *Morales v. Coram Materials Corp.*, 853 N.Y.S.2d 611, 619 (App. Div. 2008); *Westchester Med. Ctr. v. Allstate Ins. Co.*, 846 N.Y.S.2d 202, 203 (App. Div. 2007); *Diaz v. Silver Bell Co.*, 794 N.Y.S.2d 354, 355 (App. Div. 2005); *Citibank, N.A. v. Joffe*, 696 N.Y.S.2d 190, 191 (App. Div. 1999); *Hamilton v. City of New York*, 691 N.Y.S.2d 108, 108-09 (App. Div. 1999); *Somers Realty Corp. v. Big "V" Props., Inc.*, 540 N.Y.S.2d 677 (App. Div. 1989).

must produce admissible evidence of her own, in opposition to summary judgment, only if the defendant's *prima facie* burden is met.

V. CONCLUSION

Plaintiffs seeking to recover damages for personal injuries sustained as a result of accidents involving black ice should be under no illusions. Actions involving black ice are simply more difficult to successfully prosecute than actions involving visible and apparent ice, given the well-worn legal requirement that property owners create, or have actual or constructive notice of, the ice condition.¹⁸⁶ Black ice is typically created naturally, rather than by the affirmative conduct of property owners or their agents.¹⁸⁷ Prior notice of black ice is typically absent because of the transparent and transient nature of the black ice conditions.¹⁸⁸ As a result, defendant property owners have built-in legal advantages in defending actions arising out of black ice conditions via summary judgment motions and during trials. Black ice cases are undeniably more difficult for plaintiffs to bring than other forms of premises condition cases.

That said, in the limited instances where plaintiffs are able to successfully defeat defendants' summary judgment motions by raising questions of fact, they are aided in given instances by: (1) arguments that the ice condition is not black ice at all;¹⁸⁹ (2) affidavits of both fact witnesses and expert meteorologists describing the long-standing presence of the icy condition relative to the issue of constructive notice;¹⁹⁰ (3) evidence that the defendant property owners were on notice of a recurring condition proximately related to the incidents complained of;¹⁹¹ or (4) recent developments in decisional authority that allow claims against municipalities for negligent snow removal resulting in snow melt and refreeze, despite the absence of prior written notice to the municipality.¹⁹² The additional challenges faced by plaintiffs in prosecuting black ice actions most assuredly call upon the highest level of experience, preparedness, and ingenuity of the plaintiffs' bar in marshaling the necessary evidence on behalf of their clients.

186. See *supra* Part II.A.

187. See *supra* notes 141-47 and accompanying text.

188. See *supra* notes 139-41 and accompanying text.

189. See *supra* notes 154-58 and accompanying text.

190. See *supra* notes 159-67 and accompanying text.

191. See *supra* notes 168-81 and accompanying text.

192. See *supra* notes 182-85 and accompanying text.