

Unnaturally Stubborn: Illinois’ Reluctance in *Krywin v. Chicago Transit Authority* to Do Away with the Natural Accumulation Rule, and the Resulting Impact upon the Duty of Common Carriers

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I. INTRODUCTION

It is a well-established common law rule that a stranger generally owes no duty to assist or rescue another, or to take active steps for their protec-

tion, safety, or welfare.¹ Of course, as one might expect, there are exceptions to this general rule.² An often-acknowledged situation in which the common law is willing to deviate from this established principle is when there is a pre-existing relationship between the parties.³ The Second Restatement of Torts gives a non-exhaustive list of examples of “special relations” that give rise to a duty to protect another from harm, including innkeeper-guest, business invitor-invitee, custodian-person in custody, and carrier-passenger.⁴ The most relevant of these relationships to the forthcoming analysis is the one that is recognized between a common carrier and its passengers.⁵

A common carrier can be defined as one “whose occupation is transportation of persons or things from place to place for hire or reward,”⁶ and some common examples of these would include busses, airplanes, taxis, and commuter trains.⁷ Illinois courts have adopted the well-recognized principle that the duty of the common carrier, which arises out of this common law special relationship, is “the highest duty of care consistent with the practical operation of [the carrier’s] conveyances.”⁸ In addition, the status of being a common carrier prescribes an even more specific duty, the duty to provide a safe place to “alight,”⁹ meaning to “dismount” or “descend”

1. RESTATEMENT (SECOND) OF TORTS § 314 (1965) (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”); MICHAEL A. MENLOWE & ALEXANDER MCCALL SMITH, *THE DUTY TO RESCUE: THE JURISPRUDENCE OF AID* 5 (1993) (“[I]n the law in English-speaking common law countries there is no general duty to rescue.”). *See, e.g.,* *Yania v. Bigan*, 155 A.2d 343, 345-46 (Pa. 1959) (finding that the defendant had no duty to assist the plaintiff who drowned in a water-filled coal trench, even though the defendant had dared him to jump into it).

2. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 321-23 (1965). There is a generally recognized common law duty to assist a stranger in situations, such as, but not limited to, when one tortiously or innocently causes harm to another, if one has created an unreasonable risk of harm to another, or if one voluntarily undertakes to render services to another. *Id.*

3. MENLOWE, *supra* note 1, at 63 (“This category provides the clearest instances of a legally recognized duty to rescue in common law systems.”).

4. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

5. *Id.*

6. *Cushing v. White*, 172 P. 229, 232 (Wash. 1918).

7. *See generally* *Stupka v. People’s Cab Co.*, 264 A.2d 373 (Pa. 1970); *Gegere v. Chi. & Nw. Ry. Co.*, 220 N.W. 429 (Minn. 1928); *Sheffer v. Springfield Airport Auth.*, 632 N.E.2d 1069 (Ill. App. Ct. 1994); *Jones v. Chi. Transit Auth.*, 565 N.E.2d 46 (Ill. App. Ct. 1990).

8. *Sheffer*, 632 N.E.2d at 1071.

9. *Penn. Co. v. McCaffrey*, 50 N.E. 713, 714 (Ill. 1898).

This relation between a passenger and a railroad company does not cease upon the arrival of a train at the place of the passenger’s destination, but the company is still bound to furnish him an opportunity to safely alight from the train. It is its duty not only to exercise a high degree of care

from something; in this case a vehicle.¹⁰ So, not only must the providers of air, ground, and rail transportation carry their passengers safely to their destinations, but they must also provide them with a reasonable opportunity to leave the conveyance safely.¹¹

Another important and generally recognized legal principle is what is commonly known as the “Massachusetts rule,”¹² or as it has come to be referred to in Illinois, the “natural accumulation rule.”¹³ In direct contrast with the duty of common carriers, instead of prescribing duties that must be followed, this rule specifies situations in which no duty is owed and therefore no action need be taken.¹⁴ Under this rule, “the owner of [a] premises is under no duty to remove a natural accumulation of ice and snow even though he is or should be aware that the accumulation itself is hazardous.”¹⁵

These two legal doctrines came into direct conflict in the Illinois Supreme Court case of *Krywin v. Chicago Transit Authority*, which involved a woman who slipped and fell on an icy Chicago El platform and broke her ankle.¹⁶ The holding of this case established a precedent in Illinois tort law that allows the natural accumulation rule to override the duties of a common carrier to its passengers, more specifically, the duty of providing passengers with a safe place to alight.¹⁷

To fully understand the impact of *Krywin*,¹⁸ imagine a situation where a young man named Paul Passenger is riding the Chicago El home from work one January evening. He has been a Chicago native all of his life and has relied on the public transportation that the city provides for as long as he can remember. It has been snowing and sleeting off and on for the past three days, but at the present time there is no precipitation. The train pulls into his stop, and he prepares to exit. The El platform has some areas that are covered by awnings, and some that are not. In the areas not covered by

while the passenger is upon the train, but also to use the highest degree of care and skill, reasonably practicable, in providing the passenger a safe passage from the train.

Id.

10. WEBSTER'S NEW WORLD DICTIONARY 34 (3d ed. 1994).
11. See, e.g., *Chi. Terminal Transfer R.R. Co. v. Schmelling*, 64 N.E. 714, 717 (Ill. 1902); *Chi. & E. Ill. R.R. Co. v. Jennings*, 60 N.E. 818, 820 (Ill. 1901); *McCaffrey*, 50 N.E. at 714.
12. *Papadopoulos v. Target Corp.*, 930 N.E.2d 142, 145 (Mass. 2010).
13. *Krywin v. Chi. Transit Auth.*, 938 N.E.2d 440, 447 (Ill. 2010).
14. Michael J. Polelle, *Is the Natural Accumulation Rule All Wet?*, 26 LOY. U. CHI. L.J. 631, 649 (1994-1995) (“If taken seriously, the rule favors inaction over action.”).
15. *Hankla v. Burger Chef Sys. Inc.*, 418 N.E.2d 35, 36 (Ill. App. Ct. 1981).
16. *Krywin*, 938 N.E.2d at 440.
17. *Id.* at 452-53 (Freeman, J., dissenting) (“The court today holds that the natural accumulation rule relieves common carriers of the duty to provide passengers a safe place to alight.”).
18. 938 N.E.2d 440.

awnings the floor of the platform is covered by a layer of partially melted snow, underneath which is a thin layer of ice. The city employs a worker named Shane Shovel who is in charge of maintaining several El stations throughout the city. He is currently at this particular El station, but due to his large workload he has not been able to clear most of the ice and snow from the platform. When the train stops, there are accessible exit doors leading both to areas where the floor is covered in ice and snow and to areas where it is clear. There are no signs posted and no verbal warning is given by the conductor advising of the slippery conditions. As Paul attempts to exit the crowded El car, he steps into an area that is not clear of slush and ice. He loses his footing and lands on his tailbone and arm. As a result, he suffers several serious broken bones.

He has minimal health insurance coverage through his job, but the extensive medical treatment, which includes surgery and months of physical therapy, result in excessive charges that are more than he could ever hope to pay. To make matters worse, he is temporarily confined to a wheelchair because of his injury, and therefore he cannot perform the duties required of him at his job. As a result, he is fired. With mounting medical bills and no means to pay them, he turns to a local attorney for some assistance. After hearing his story, the attorney explains to him that because of the Illinois Supreme Court's recent ruling in *Krywin*¹⁹ he has no recourse against the city.

This *Note* will address four main issues arising out of the *Krywin* decision. First, it will consider whether it is a divergence from common law precedent set both by Illinois courts and other courts throughout the nation that have dealt with similar issues. Second, it will examine the *Krywin* court's reliance on the "known or obvious dangers" doctrine²⁰ as a means of justifying its holding, and whether this reliance is a sound legal argument. Third, this *Note* will consider if the decision in this case is in conflict with the statutory language and the legislative intent of Illinois' Local Governmental and Governmental Employees Tort Immunity Act.²¹ Finally, it will address the concerns created for future accident victims in Illinois that will have no recourse or remedy because of the decision in *Krywin*, and whether the reasoning used by the Court justifies the fact that these concerns will now be ignored.

In Part II, this *Note* will look at the historical development of both the duty of common carriers and the natural accumulation rule, starting with their inception and development throughout the country as a whole, and

19. *Id.*

20. *Krywin*, 938 N.E.2d at 454-55 (Freeman, J., dissenting); RESTATEMENT (SECOND) OF TORTS § 343A (1965).

21. 745 ILL. COMP. STAT. 10/2-101 (2008).

then focusing on the role that they have played in the shaping of Illinois common law. Next, Part III will summarize *Krywin v. Chicago Transit Authority*²² and gives a brief outline of the important facts, legal arguments and holdings of the case. Next, Part IV will consider the reasoning and analysis offered by both the majority and the dissent, and then discusses the merits of the Court's final holding. Finally, Part V will consider the impact of the *Krywin* decision on tort litigation in Illinois and the various problems for future plaintiffs that the decision has created.

This *Note* argues that the reasoning the majority in *Krywin* used to come to its conclusion was flawed. The Court ignored past precedent and the intent of the legislature, and as a result Illinois remains one of a small minority of states²³ still clinging to the archaic idea of the natural accumulation rule which offers an exemption from a duty where it is obvious that a duty should be imposed. This ruling gives too much weight to the "unreasonable burden"²⁴ placed on municipalities to deal with the problem of naturally occurring hazards, while ignoring the plight of its citizens who could be injured through no fault of their own and have no recourse for compensation.

II. THE HISTORY OF THE COMMON LAW AND LEGISLATION LEADING UP TO *KRYWIN*

A. THE DUTY OF COMMON CARRIERS

A general characteristic that all common carriers share is their accessibility to the public.²⁵ Another is that they generally perform their services in exchange for compensation.²⁶ Some jurisdictions also have an additional requirement that, in order to be classified as a common carrier, a business

22. 938 N.E.2d 440.

23. See Polelle, *supra* note 14, at 648 n.98 ("Only seven states, Illinois, Kentucky, Massachusetts, Missouri, Nebraska, New York, and Ohio, apply the natural accumulation rule in all types of cases."); see also Papadopoulos, 930 N.E.2d at 156. In the summer of 2010, the Supreme Judicial Court of Massachusetts unanimously rejected the "Massachusetts rule," which is the equivalent of the natural accumulation rule, bringing the number of states that now apply the rule in all types of cases from seven to six. *Id.*

24. *Krywin*, 938 N.E.2d at 451.

25. See *Lazor v. Banas*, 174 A. 817, 819 (Pa. Super. Ct. 1934) ("[W]e have uniformly held that the test of a common carrier is one who undertakes to carry for hire all persons indifferently who apply for it."); *Merch. Parcel Delivery v. Pa. Pub. Util. Comm'n*, 28 A.2d 340, 344 (Pa. Super. Ct. 1942) ("[T]he definitions found in the cases stress the all-important factor that a common carrier is one that holds itself out and undertakes to carry the goods of all persons indifferently, or of all who choose to employ it, and one that invites the custom of the public indiscriminately.").

26. See *Cushing*, 172 P. at 232.

must be regulated, or subject to governmental supervision via a license or permit.²⁷

Common carriers are regarded by the common law as having a "special relation" with their passengers (much like a business invitor has to an invitee) which gives rise to a duty to take reasonable action to aid or protect them.²⁸ The responsibilities, however, do not end there.²⁹ Starting as early as the 1850's, with the case of *Sprague v. Smith*,³⁰ courts around the nation have held that common carriers owe a higher degree of care to their passengers than just reasonableness.³¹ One explanation that has been offered for this is that the relationship between carrier and passenger is a contractual one.³² The contract can be interpreted as being implied or as being in fact, with the offer and acceptance being "the carrier promising, so far as within its control, safe passage, in return for the payment of the fare by the passenger."³³ Another explanation is that usually the activities of a common carrier in some way serve the public, and therefore imposition of additional legal duties is justified.³⁴ This idea goes hand-in-hand with the aforementioned generally shared trait of common carriers that they are usually operating under licenses or permits and therefore indirectly subject to governmental supervision.³⁵

27. A. Bob Jordan, *Negligence: Ski Lifts-Common Carriers-Highest Degree of Care*, 1 WASHBURN L.J. 316, 317 (1960-1962). See, e.g., *Indianapolis Traction & Terminal Co. v. Lawson*, 143 F. 834, 837 (7th Cir. 1906); *Lazor*, 174 A. at 819.

28. See RESTATEMENT (SECOND) OF TORTS § 314A (1965).

29. See Jordan, *supra* note 27, at 316 ("[A] different degree of care is, in the absence of statutory modification, required of common carriers . . . toward their patrons than is required of other business ventures.").

30. 29 Vt. 421 (1857) ("[Common carriers must] exercise the *utmost care* that no injury befall those who entrust themselves to their custody.") (emphasis added).

31. See, e.g., *Retkowski v. Balt. Transit Co.*, 160 A.2d 791, 795 (Md. 1960) ("[C]ommon carriers of passengers . . . are bound to exercise the *highest degree of care* which is consistent with the nature of their undertaking.") (emphasis added); *Simpson v. Gray Line Co.*, 358 P.2d 516, 518 (Or. 1961) ("The jury was correctly instructed in the case at bar that a common carrier owes its passengers the *highest degree of care* and skill practicable for it to exercise.") (emphasis added).

32. *Bowen v. Ill. Cent. R.R. Co.*, 136 F. 306, 310 (8th Cir. 1905).

The relation between carrier and passenger in the first place is contractual. From the moment the passenger comes to purchase his ticket and enters the train to the end of his journey he passes measurably under the control and direction of the agents and servants of the carrier, upon whom the law imposes the correlative duty of protecting him against insults, assaults, and injuries perpetrated by them, or others on the train, in so far as they can reasonably do so.

Id.

33. Jordan, *supra* note 27, at 317.

34. *Id.*

35. *Id.*

Whatever reason is given in various jurisdictions for applying this requirement of a heightened degree of care over mere reasonableness, the underlying reasoning that they all share is they are all related to “public convenience and necessity requiring safe passage.”³⁶ The reason that Illinois courts have generally used to explain this is that it is “due to the unique control [a common carrier] possesses over its passengers' safety.”³⁷ Accordingly, this reasoning and this standard of care were also mentioned in the *Krywin* case.³⁸

B. THE COMMON CARRIER'S DUTY TO PROVIDE A SAFE PLACE TO ALIGHT

To “alight” means “to dismount from a horse, descend from a vehicle, etc.” or “to settle or stay after descending.”³⁹ Most courts have assigned a duty to common carriers to provide their passengers with a safe place to alight as part of the aforementioned pre-existing duty to provide the highest degree of care.⁴⁰ Early cases that dealt with the coupling of these two ideas focused on railroad cars and their passengers⁴¹ (as does the present-day *Krywin* case).⁴² As time progressed, and modern technology advanced, courts began to affirm that this duty extended to all types of common carriers, including busses,⁴³ airplanes, and boats.⁴⁴

36. *Id.* at 318.

37. *Sheffer v. Springfield Airport Auth.*, 632 N.E.2d 1069, 1071 (Ill. App. Ct. 1994). *See, e.g., Rotheli v. Chi. Transit Auth.*, 130 N.E.2d 172, 175 (Ill. 1955); *Jones v. Chi. & Nw. Transp. Co.*, 563 N.E.2d 1120, 1121 (Ill. App. Ct. 1990); *Shoemaker v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 543 N.E.2d 1014, 1017 (Ill. App. Ct. 1989); *Serritos v. Chi. Transit Auth.*, 505 N.E.2d 1034, 1038 (Ill. App. Ct. 1987).

38. *Krywin v. Chi. Transit Auth.*, 938 N.E.2d 440, 447 (Ill. 2010) (“[D]ue to the unique control a common carrier has over its passengers' safety, it owes those passengers the highest duty of care consistent with the practical operation of its conveyances.”).

39. *Alight* *Definition*, [DICTIONARY.COM, http://dictionary.reference.com/browse/alight](http://dictionary.reference.com/browse/alight) (last visited Oct. 12, 2010).

40. *See, e.g., Katamay v. Chi. Transit Auth.*, 289 N.E.2d 623, 625 (Ill. 1972) (holding that the heightened duty that is applied to common carriers “does not terminate until the passenger has alighted from the train and left the place where passengers are discharged”); *Fagan v. Atl. Coast Line R.R. Co.*, 115 N.E. 704, 707 (N.Y. 1917) (“The relation of passenger and carrier does not, under ordinary conditions, terminate until the passenger has had a reasonable opportunity to safely alight and pass from the station premises of the carrier.”).

41. *See, e.g., Penn. Co. v. McCaffrey*, 50 N.E. 713, 714 (Ill. 1898); *McDonald v. Ill. Cent. R.R. Co.*, 55 N.W. 102 (Iowa 1893); *Denver & Rio Grande R.R. Co. v. Hodgson*, 31 P. 954 (Colo. 1892).

42. *See Krywin*, 938 N.E.2d 440.

43. *See, e.g., Parker v. City & Cnty. of S.F.*, 323 P.2d 108, 112 (Cal. Dist. Ct. App. 1958) (holding in an action involving the plaintiff's injury while exiting a bus “that the duty ends when the passenger is discharged into a relatively safe space, not merely that he alights safely from the bus if he is discharged into a dangerous area”).

This reasoning was adopted by the Illinois courts as well, starting with the general safety concern regarding train passengers at the time of the industrial revolution,⁴⁵ and then later becoming more inclusive as more modes of mass transportation developed over time.⁴⁶ The Court in *Krywin* acknowledged that this duty still existed,⁴⁷ but decided, however, that this widely acknowledged and time-tested obligation was overruled in situations where the natural accumulation rule took effect.⁴⁸

C. THE NATURAL ACCUMULATION RULE'S DEVELOPMENT THROUGH THE COMMON LAW

It is probably no coincidence that the natural accumulation rule finds its origins in Massachusetts,⁴⁹ a state that is like Illinois in that it is subjected to yearly assaults by Mother Nature of snow, ice, sleet, and freezing rain. The concept first appeared in the context of the lessor-lessee dynamic in the nineteenth century Massachusetts Supreme Court case, *Woods v. Naumkaeg Steam Cotton Co.*⁵⁰ The court in that case held that "there was no duty on the part of the [landlord] to the [tenant] to remove from the steps the ice and snow which naturally accumulated thereon."⁵¹ This rationale was then later extended to not only include the landlord-tenant relationship, but the relationship between a municipality and its citizens as well.⁵² Then it was further expanded to include the invitor-invitee relationship.⁵³ What came to be known commonly throughout most of the legal community as

44. See, e.g., *Stewart v. Loughman*, 80 A.2d 715, 717 (Pa. 1951) (In a case involving an injury to a passenger by a propeller while exiting an airplane the court held that the duty of providing a safe place to alight extended to all "land or water carrier for hire . . .").

45. See, e.g., *Chi. Terminal Transfer R.R. Co. v. Schmelling*, 64 N.E. 714 (Ill. 1902); *McCaffrey*, 50 N.E. at 715 ("In leaving the train, the passenger has a right to assume that the company will not expose him to any danger which by the exercise of due care can be avoided, and that the company has done its duty in the matter of providing him safe landing.").

46. See, e.g., *Sheffer v. Springfield Airport Auth.*, 632 N.E.2d 1069 (Ill. App. Ct. 1994). Although the verdict for the plaintiff was reversed on appeal, the court still found that the duty of common carriers to provide a safe place to alight applied to the situation where a passenger is exiting an airplane onto a tarmac. *Id.*

47. *Krywin*, 938 N.E.2d at 447 ("Thus, the CTA had a duty to provide plaintiff with a safe place to alight from its train.").

48. *Id.* at 450.

49. See *Woods v. Naumkaeg Steam Cotton Co.*, 134 Mass. 357 (1882).

50. *Id.*

51. *Id.* at 361.

52. See, e.g., *Spillane v. City of Fitchburg*, 58 N.E. 176 (Mass. 1900); *Reedy v. St. Louis Brewing Ass'n*, 61 S.W. 859 (Mo. 1901).

53. See, e.g., *Brandert v. Scottsbluff Nat'l Bank & Trust Co.*, 235 N.W.2d 864, 866 (Neb. 1975); *Sherman v. Platte Cnty.*, 642 P.2d 787, 789 (Wyo. 1982).

the “Massachusetts rule”⁵⁴ eventually grew to excuse all landowners, not just landlords and business inviters, from liability for failing to remove natural accumulations of ice and snow from their property.⁵⁵

1. Case Law in Illinois

When this legal doctrine was adopted by the Illinois courts the concepts were the same,⁵⁶ but they eventually came to be referred to as the “natural accumulation rule.”⁵⁷ When the court in *Krywin* cited the rule to support its holding the relevant language had evolved in Illinois to say, “[u]nder the natural accumulation rule, a landowner or possessor of real property has no duty to remove natural accumulations of ice, snow, or water from its property.”⁵⁸

However, the adoption of this rule did not leave plaintiffs in Illinois without recourse.⁵⁹ There were still two strategies that, if used effectively, could avoid the natural accumulation rule.⁶⁰ Plaintiffs could still attempt to prove that the hazard caused by the ice and snow was artificial and not a natural accumulation.⁶¹ This method proved to be exceedingly difficult, however, because the various courts throughout the state had differing opinions on what was natural and what was artificial.⁶² For example, in *Strappelli v. City of Chicago*,⁶³ the Illinois Supreme Court held that partially melted snow and ice on public areas that had been subject to foot traffic and then re-frozen, causing them to be jagged and bumpy with footprints, did not qualify as unnatural.⁶⁴ Conversely, in the First Appellate District, the

54. Papadopoulos v. Target Corp., 930 N.E.2d 142, 145 (Mass. 2010).

55. *Id.* at 151.

56. See, e.g., *Graham v. City of Chi.*, 178 N.E. 911, 912 (Ill. 1931) (“[A] city is not liable for injuries resulting from the general slipperiness of its streets and sidewalks due to the presence of ice and snow which have accumulated as a result of natural causes.”); *Erasmus v. Chi. Hous. Auth.*, 407 N.E.2d 1031, 1033 (Ill. App. Ct. 1980) (“The property owner, then, has no duty to remedy a natural accumulation of snow.”).

57. *Smalling v. LaSalle Nat’l Bank of Chi.*, 433 N.E.2d 713, 716 (Ill. App. Ct. 1982).

58. *Krywin v. Chi. Transit Auth.*, 938 N.E.2d 440, 447 (Ill. 2010).

59. See *Polelle*, *supra* note 14, at 632.

60. *Id.*

61. *Id.*

62. See *Hankla v. Burger Chef Sys. Inc.*, 418 N.E.2d 35, 36 (Ill. App. Ct. 1981) (“The parties have not cited, nor have we found, an Illinois court which has detailed the differences between natural and unnatural accumulations.”); *Watson v. J.C. Penney Co.*, 605 N.E.2d 723, 727 (Ill. App. Ct. 1992) (Knecht, J., dissenting) (“[N]o one understands the difference between a natural accumulation of ice and snow, and an unnatural accumulation.”).

63. 20 N.E.2d 43 (Ill. 1939).

64. *Id.* at 44.

court held that if a foreign substance becomes part of the mixture of natural accumulation, then it ceases to be natural and becomes artificial.⁶⁵ Furthermore, adding to the inconsistency was the decision from the Third District, which held that chunks of ice or snow that fall from man-made structures, such as tall buildings, are not unnatural unless they were the result of building defects.⁶⁶

The second option available to plaintiffs to attempt to get around the natural accumulation rule was to “show that the landowner voluntarily and gratuitously undertook to remove the natural accumulation of precipitation and did so negligently.”⁶⁷ This, however, was an avenue that Illinois courts seemed unwilling to take.⁶⁸ Several decisions in the various appellate courts throughout the state reinforced the idea that a defendant who attempts to remove a natural accumulation, but does so negligently (which “arguably makes the condition more dangerous” than it was to begin with),⁶⁹ will not be held liable for any accidents that consequently occur.⁷⁰ The common underlying rationale behind these decisions seems to be that it is a better policy to encourage land owners to make an attempt at snow removal (regardless of whether it actually makes conditions safer, and even if their negligence arguably makes conditions more dangerous), rather than to discourage them from doing anything at all for fear of potential liability.⁷¹

65. See *Swartz v. Sears, Roebuck & Co.*, 636 N.E.2d 642, 649 (Ill. App. Ct. 1993) (holding that an otherwise natural accumulation is artificial when combined with oil and grease); *Johnson v. Sears, Roebuck & Co.*, 542 N.E.2d 841, 843 (Ill. App. Ct. 1989) (holding that an otherwise natural accumulation is artificial when combined with garden soil).

66. *Bansch v. Donnelly*, 396 N.E.2d 869, 872 (Ill. App. Ct. 1979).

67. *Polelle*, *supra* note 14, at 641.

68. *Id.* at 645 (“[T]he law is well-established [in Illinois] that a defendant who removes an overlay of snow but leaves a natural ice formation underneath, cannot be liable for falls on the ice.”).

69. *Polelle*, *supra* note 14, at 645 (“The risk of falling on slick, exposed ice, particularly when there is inadequate lighting, is probably greater than when snow covers the ice and provides greater traction.”). *But see Wells v. Great Atl. & Pac. Tea Co.*, 525 N.E.2d 1127, 1133 (Ill. App. Ct. 1988) (“There is absolutely no evidence in the record to indicate that the parking lot was more dangerous after it was plowed than before it was plowed and that allegation will be summarily dismissed.”).

70. See *Graf v. St. Luke’s Evangelical Lutheran Church*, 625 N.E.2d 851, 854 (Ill. App. Ct. 1993); *Webb v. Morgan*, 531 N.E.2d 36, 39 (Ill. App. Ct. 1988); *Eichler v. Plitt Theatres, Inc.*, 521 N.E.2d 1196, 1201 (Ill. App. Ct. 1988); *Wells*, 525 N.E.2d at 1131; *Erasmus*, 407 N.E.2d at 1033; *Anderson v. Davis Dev. Corp.*, 241 N.E.2d 222, 224 (Ill. App. Ct. 1968).

71. See *Riccitelli v. Sternfeld*, 109 N.E.2d 921, 922 (Ill. App. Ct. 1952) (“In one sense, a dangerous situation is created, but much less dangerous than would be created if no one undertook to do anything The general assumption is that the industry displayed by citizens removing snow after a snowfall is desirable, if not necessary.”); *Polelle*, *supra* note 14.

Needless to say, attempting to use either of these two avoidance strategies could prove to be quite frustrating, making the natural accumulation rule a very high hurdle for plaintiffs in Illinois.

2. *The Restatement's Role in Illinois' Application of the Natural Accumulation Rule*

Section 343A of the Second Restatement of Torts outlines what it refers to as the “[k]nown or [o]bvious [d]angers” doctrine,⁷² or, as it has come to be known in Illinois and other states, the “open and obvious” rule.⁷³ According to the Restatement, a landowner will not be responsible for injuries which occur to invitees on his or her land if the danger which caused the injuries was known to the invitees or would have been known or obvious to a reasonable person.⁷⁴ An example of the application of this doctrine can be found in the Massachusetts Supreme Court case of *O’Sullivan v. Shaw*,⁷⁵ in which the court found that the defendants were not liable for injuries sustained to one of their house guests after he dove head-first into the shallow end of their swimming pool.⁷⁶ There is, however, an important exception to this rule. A possessor of land will not escape potential liability if he or she “should anticipate the harm despite such knowledge or obviousness.”⁷⁷ The comments for Section 343A offer some examples of when this might occur: if the invitee gets distracted and therefore momentarily forgets about the danger,⁷⁸ or if it would be reasonable for the invitee to confront the danger

The Illinois Supreme Court . . . [has] expressed the policy that the law should encourage citizens to take the initiative to remove ice and snow, even if they do so negligently. Therefore, following this policy, it is necessary for the courts to refuse to recognize any duty to remove natural accumulation hazards in order to encourage these private efforts.

Id. at 646.

72. RESTATEMENT (SECOND) OF TORTS § 343A (1965).

73. *Ward v. K Mart Corp.*, 554 N.E.2d 223, 229 (Ill. 1990). *See, e.g., O’Sullivan v. Shaw*, 726 N.E.2d 951, 954-55 (Mass. 2000); *Griebler v. Doughboy Recreational, Inc.*, 466 N.W.2d 897, 898 (Wis. 1991).

74. RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965) (“A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them . . .”).

75. 726 N.E.2d 951.

76. *Id.* at 954-55 (“Landowners are relieved of the duty to warn of open and obvious dangers on their premises because it is not reasonably foreseeable that a visitor exercising . . . reasonable care for his own safety would suffer injury from such blatant hazards.”).

77. RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965).

78. RESTATEMENT (SECOND) OF TORTS § 343A cmt. f (1965).

Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover

because “the advantages of doing so would outweigh the apparent risk.”⁷⁹ Another important caveat to this rule is that owners of public land or of public utilities will be scrutinized even more than private land owners with regard to the anticipation of potential harms from open and obvious dangers.⁸⁰

The Illinois Supreme Court adopted the rationale behind Section 343A of the Restatement in the case of *Ward v. K Mart Corporation*,⁸¹ which involved a customer who ran into a large concrete post on his way out to the parking lot while carrying a large mirror he had just purchased.⁸² The court found that K-Mart was still liable for the plaintiff’s injuries despite the open and obvious nature of the concrete pole.⁸³ In fact, K-Mart had a duty to protect the customer from the dangerous condition the post caused, taking into consideration the burden this placed on the defendant, weighed against the potential for serious harm that may occur.⁸⁴ Additionally, the court recognized that defendants in these situations may not be completely to blame for accidents, and because of the availability of the partial defense of comparative negligence,⁸⁵ the plaintiff may be assigned some of the liability.⁸⁶

The “open and obvious” doctrine is relevant to the discussion of the natural accumulation rule because the Illinois Supreme Court justified its holding in *Krywin* by reaffirming the First District’s argument that requir-

what is obvious, or will forget what he has discovered, or fail to protect himself against it.

Id.

79. *Id.*

80. RESTATEMENT (SECOND) OF TORTS § 343A(2) (1965) (“In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.”).

81. 554 N.E.2d at 231-32.

82. *Id.* at 224.

83. *Id.* at 234.

A rule more consistent with an owner’s or occupier’s general duty of reasonable care, however, recognizes that the “obviousness” of a condition or the fact that the injured party may have been in some sense “aware” of it may not always serve as adequate warning of the condition and of the consequences of encountering it.

Id. at 230 (citing RESTATEMENT (SECOND) OF TORTS § 343A (1965)).

84. *Id.* at 232.

85. *See* 735 ILL. COMP. STAT. ANN. 5/2-1116 (West 1995). The statute requires that the damages awarded by the jury be reduced in proportion to the percentage of fault they assign to the plaintiff. If it is found that the plaintiff is more than fifty percent at fault however, he or she may recover no damages at all.

86. *Ward*, 554 N.E.2d at 232 (“If in fact the entrant was also guilty of negligence contributing to his injury, then that is a proper consideration under comparative negligence principles.”).

ing the Chicago Transit Authority (CTA) to clear all natural accumulations of ice and snow in areas where passengers alight from their trains would be an overwhelming burden.⁸⁷ Justice Freeman suggested in his dissenting opinion that by adopting the lower court's reasoning, the majority held that placing this burden on the CTA would not be justified because citizens of Illinois are accustomed to the hazards of snow and ice due to their exposure to winter weather on a yearly basis, and therefore these are "open and obvious" dangers.⁸⁸ This reasoning is in direct conflict with the court's interpretation and application of Section 343A of the Restatement in *Ward*.⁸⁹

D. RELEVANT LEGISLATION IN ILLINOIS

1. *The Local Governmental and Governmental Employees Tort Immunity Act*

The common law doctrine of sovereign immunity essentially protects the state from any tort claims that its citizens could or would bring against it.⁹⁰ The concept that "the King can do no wrong"⁹¹ was the law of the land in Illinois until 1959, when the Illinois Supreme Court effectively abolished the sovereign immunity doctrine in the case of *Moliter v. Kaneland Community Unit District No. 302*.⁹² *Moliter* involved an injury sustained by a student while riding a school bus.⁹³ The court held that the school district could be held liable for the negligence of its employee, the bus driver.⁹⁴ In 1965, the Illinois legislature responded to this decision by passing the Local

87. *Krywin v. Chi. Transit Auth.*, 938 N.E.2d 440, 451 (Ill. 2010) ("Thus, the appellate court did not err in finding that imposing such a burden on the CTA would be 'overwhelmingly detrimental to the efficient performance of the transit system.'") (quoting *Krywin v. Chi. Trans. Auth.*, 909 N.E.2d 887, 893 (Ill. App. Ct. 2009)).

88. *Krywin*, 938 N.E.2d at 454 (Freeman, J., dissenting).

[T]he holdings are based on the fact that in northern climates, like ours, where ice and snow are a fact of life, people are aware of the hazards posed by such conditions, and it is impractical to require property owners and carriers to remove snow and ice . . . In other words, snow and ice pose dangers that are open and obvious to all who live in climates such as ours.

Id.

89. *See Ward*, 554 N.E.2d at 231-32.

90. *See, e.g., Kinnare v. City of Chi.*, 49 N.E. 536 (Ill. 1898); *Leviton v. Bd. of Educ. of City of Chi.*, 30 N.E.2d 497 (Ill. 1940); *Thomas v. Broadlands Cmty. Consol. Sch. Dist. No. 201*, 109 N.E.2d 636 (Ill. App. Ct. 1953).

91. *Moliter v. Kaneland Cmty. Unit Dist. No. 302*, 163 N.E.2d 89, 91 (Ill. 1959) (citing *Russell v. Men of Devon*, (1788) 100 Eng. Rep. 359 (K.B.)).

92. 163 N.E.2d 89.

93. *Id.*

94. *Id.* at 98.

Governmental and Governmental Employees Tort Immunity Act⁹⁵ for the purposes of providing some protection to local governmental units.⁹⁶ This act essentially “codified the natural accumulation rule with respect to municipalities.”⁹⁷ The Chicago Transit Authority was recognized as a “municipal corporation for public ownership and operation” when it was created by the Metropolitan Transit Authority Act in 1945.⁹⁸ This legislation would seem to make any tort claim brought against the city to be an open and shut case. The Illinois General Assembly was careful to avoid this situation however, because it specifically excluded the CTA and other common carriers from the protection of the Tort Immunities Act in Section 2-101(b).⁹⁹ The Illinois Legislature has made quite clear, with a high level of specificity, its intentions regarding the liability of local government agencies.¹⁰⁰

2. *The Snow Removal Act*

The Illinois General Assembly took the opposite point of view with regard to private citizens when it passed the Snow and Ice Removal Act in 1979.¹⁰¹ This act was the legislature’s attempt to codify the public policy reinforced by the previously mentioned string of cases,¹⁰² in which Illinois courts refrained from assigning liability to private property owners who had made an attempt to clear ice and snow from their property, even though they had possibly done so negligently.¹⁰³ By passing this act, Illinois lawmakers sought to encourage action (rather than inaction for fear of liability) by private citizens when it came to snow and ice removal.¹⁰⁴ It is clear that

95. 745 ILL. COMP. STAT. 10/1-101 (1965).

96. 745 ILL. COMP. STAT. 10/1-101.1(a) (1965) (“The purpose of this Act is to protect local public entities and public employees from liability arising from the operation of government.”). *See also* Catherine Voigt, *The Death of the Special Duty Exception of Statutory Governmental Immunity*, 86 ILL. B.J. 372, 372 (1998).

97. 745 ILL. COMP. STAT. 10/3-105(a) (1965) (“Neither a local public entity nor a public employee is liable for an injury caused by the effect of weather conditions”); *Krywin*, 938 N.E.2d at 453 (Freeman, J., dissenting).

98. 70 ILL. COMP. STAT. 3605/1 (1945).

99. 745 ILL. COMP. STAT. 10/2-101 (1965) (“Nothing in this Act affects the liability, if any, of a local public entity or public employee, based on . . . [o]peration as a common carrier; and this Act does not apply to any entity organized under or subject to the ‘Metropolitan Transit Authority Act’, approved April 12, 1945, as amended . . .”).

100. *See Krywin v. Chi. Transit Auth.*, 938 N.E.2d 440, 451 (Ill. 2010) (Freeman, J., dissenting).

101. 745 ILL. COMP. STAT. 75/1 (1979); *see Krywin*, 938 N.E.2d at 453 (Freeman, J., dissenting).

102. *See supra* notes 68-71 and accompanying text.

103. *See Polelle, supra* note 14, at 646.

104. *See* 745 ILL. COMP. STAT. 75/1 (1979).

It is declared to be the public policy of this State that owners and others residing in residential units be encouraged to clean the sidewalks abut-

the Illinois General Assembly had quite different intentions with regard to liability for private landowners, as compared to common carriers like the CTA.¹⁰⁵

III. THE FACTS OF *KRYWIN V. CHICAGO TRANSIT AUTHORITY*

Marianna Krywin, a Chicago resident, was a seventy-six year old Polish immigrant and a former nurse.¹⁰⁶ Prior to the incident in question she did not require any kind of artificial assistance with walking, such as a cane or a walker.¹⁰⁷ On January 13, 2005 she took the CTA red line “El” train to the Sheridan Road Station.¹⁰⁸ Upon exiting the train, Ms. Krywin lost her footing and fell backwards.¹⁰⁹ As a result she fractured the tibia and fibula bones in her left leg, which required her to have surgery and spend nearly a month in the hospital.¹¹⁰ The various other factors that were present on that morning, such as the condition of the platform onto which Ms. Krywin stepped when she exited the train, and the weather on that morning and the relevant period leading up to it, were the subject of various witnesses’ conflicting testimonies.¹¹¹

Anthony Morales was a rail maintenance worker for the CTA, whose duties included the upkeep of several El platforms throughout the city, including the Sheridan Road Station.¹¹² During the winter months, one of his jobs was to remove any ice and snow on the platform and then to spread sand across the entire platform.¹¹³ He did not remember if he was at the Sheridan Station on January 13, but, based on his normal schedule and routine, he would have been there on that very morning.¹¹⁴ Mr. Morales also testified that the station had a small canopy that covered less than half of the platform.¹¹⁵

ting their residences of snow and ice. The General Assembly, therefore, determines that it is undesirable for any person to be found liable for damages due to his or her efforts in the removal of snow or ice from such sidewalks, except for acts which amount to clear wrongdoing.

Id.

105. Compare 745 ILL. COMP. STAT. 75/1 (1979), with 745 ILL. COMP. STAT. 10/2-101 (1965).

106. *Krywin*, 938 N.E.2d at 444.

107. *Id.*

108. *Id.* at 442.

109. *Id.* at 444.

110. *Id.* at 443.

111. *Krywin*, 938 N.E.2d at 442-45.

112. *Id.* at 443.

113. *Id.*

114. *Id.*

115. *Id.*

Patricia Majors was a college student at DePaul University, who frequently rode the red line train to and from work and school.¹¹⁶ On the morning of the incident she was waiting on the southbound platform of the Sheridan Station.¹¹⁷ She testified that it was rainy and cold that morning, and that there was enough slush on the sidewalks that day to come up over the top of her shoes.¹¹⁸ Also, there was a combination of ice and snow on the El platform, and the layer of ice was about one-tenth of an inch thick.¹¹⁹ She did not think that any work had been done by the CTA to the platform with regard to the icy conditions.¹²⁰ Ms. Majors witnessed Ms. Krywin exit the train and immediately fall down.¹²¹ She remembered that it was actually raining at the time because she and another person gave Ms. Krywin their coats to shield her from the precipitation.¹²² Ms. Krywin was lying on a mixture of snow and ice, and there was no sand or salt on the platform at that time.¹²³

Theresa Williams worked as a customer service agent for the CTA, and she was assigned to the Sheridan Road Station on the date of the incident.¹²⁴ She responded to the customer service bell to find that Ms. Krywin had fallen and was complaining that she had hurt her ankle and that it was possibly broken.¹²⁵ Ms. Williams filled out two reports regarding the incident for the CTA, and she also later testified that the red line ran twenty-four hours a day, seven days a week in January 2005.¹²⁶ The reports that Ms. Williams submitted indicated that it was “foggy” and that there was “sleet” on the date of the incident.¹²⁷ Additionally, the area of the platform where Ms. Krywin fell was characterized as “wet.”¹²⁸

Ruben Bonner was the train operator on the day of the incident.¹²⁹ He testified via discovery deposition that after Ms. Krywin had fallen, he observed her on her hands and knees on the platform.¹³⁰ There were eight cars on his train that day, and she had exited from one of the cars toward the rear

116. *Krywin*, 938 N.E.2d at 443.

117. *Id.*

118. *Id.*

119. *Id.* at 444.

120. *Id.*

121. *Krywin*, 938 N.E.2d at 443.

122. *Id.*

123. *Id.* at 443-44.

124. *Id.* at 444.

125. *Id.*

126. *Krywin*, 938 N.E.2d at 444.

127. *Id.* (quoting the CTA incident report prepared by Theresa Williams).

128. *Id.* at 444 (quoting the CTA incident report prepared by Theresa Williams).

129. *Id.*

130. *Id.*

of the train.¹³¹ He testified that he did not remember if it was precipitating at the time of the incident, but that it had snowed recently and that it was cold, and “[t]he surface of the platform was wet and icy.”¹³² Despite these conditions, Mr. Bonner did not testify that he issued any verbal warning over the intercom to the passengers, or that it was the CTA’s policy to do so under such conditions.¹³³

The only testimony that the CTA offered when presenting its defense was that of Diane Senechal.¹³⁴ She was also at the Sheridan Road platform at the time of the incident, but did not actually witness Ms. Krywin fall.¹³⁵ She remembered that it was snowing at the time because she held her umbrella over Ms. Krywin to shield her from the precipitation, and that it had been snowing or sleeting earlier that morning as well.¹³⁶ There was some ice and slush accumulated on that platform, but most of it had drained through the slats on the floor.¹³⁷ She also witnessed someone with a broom on the platform, but they were not sweeping or spreading sand at the time.¹³⁸

Marianna Krywin filed two counts in her initial allegation against the CTA.¹³⁹ First, “that the CTA had a duty to exercise ordinary care in the operation, supervision, and maintenance of the area of ingress and egress where plaintiff fell and that the CTA negligently failed in its duty;”¹⁴⁰ second, “that the CTA had a duty to exercise the highest degree of care in the operation of its trains and in the maintenance of the train stations and alleged that the CTA was guilty of willful and wanton conduct in failing to fulfill that duty.”¹⁴¹

The CTA filed a motion for directed verdict after Ms. Krywin had presented her evidence on the grounds that she had not made a prima facie case for either her negligence or willful and wonton misconduct claims.¹⁴² The trial court granted the motion only in part, finding that the CTA did in fact have a duty to provide Ms. Krywin with a safe place to alight.¹⁴³ Whether

131. *Krywin*, 938 N.E.2d at 443.

132. *Id.*

133. *Id.*

134. *Id.* at 445.

135. *Id.*

136. *Krywin*, 938 N.E.2d at 445.

137. *Id.*

138. *Id.*

139. *Id.* at 442.

140. *Id.*

141. *Krywin*, 938 N.E.2d at 442.

142. *Id.* at 444 (“The motion alleged that, as a matter of law, the CTA had no duty to remove a natural accumulation of ice and snow and no duty to warn of such an accumulation.”).

143. *Id.* at 445 (“[T]his duty existed regardless of the reason for the unsafe area.”).

the CTA had fulfilled this duty or not was a question left for the jury.¹⁴⁴ After deliberations the jury returned a verdict in favor of Ms. Krywin, and awarded her the amount of \$372,141.¹⁴⁵

The CTA appealed this verdict, arguing that the trial court erred when it failed to grant the CTA's motion for directed verdict in the entirety.¹⁴⁶ The appellate court agreed with the CTA and reversed the trial court's ruling.¹⁴⁷ The appellate court determined that the duty of common carriers to provide their passengers with a safe place to alight is overruled by the natural accumulation rule because "imposing a duty on the CTA to inspect every platform every time a train was to discharge or take on passengers would bring the transit system to a standstill."¹⁴⁸

Ms. Krywin made three arguments in her appeal to the Illinois Supreme Court.¹⁴⁹ First, that a common carrier's duties are not negated by the natural accumulation rule; second, that the appellate court "impermissibly expand[ed] the natural accumulation rule" by allowing it to negate the fact finders' determination that "the CTA could have fulfilled its duty to provide a safe place to alight without engaging in ice removal;" third, that the CTA is still guilty of willful and wonton misconduct despite the natural accumulation rule.¹⁵⁰ The Illinois Supreme Court was not persuaded by any of Ms. Krywin's arguments, and affirmed the appellate court's ruling "that the trial court should have directed a verdict in favor of the CTA in its entirety."¹⁵¹

IV. ANALYSIS

A. REPORT

The Illinois Supreme Court began its analysis by reviewing the fundamentals of a negligence claim, and more specifically when a duty is owed.¹⁵² Justice Garman, in delivering the opinion of the court, remained faithful to Justice Cardozo's philosophy first set forth in the famous *Pal-*

144. *Id.*

145. *Id.*

146. *Krywin*, 938 N.E.2d at 445. The CTA argued that they did not owe any duty to Ms. Krywin "to remove the natural accumulation of ice and snow on the platform" and that she had failed to prove that they did. *Id.*

147. *Id.*

148. *Id.* at 446.

149. *Id.*

150. *Krywin*, 938 N.E.2d at 446.

151. *Id.* at 452.

152. *Id.* at 446-47.

sgraf case¹⁵³ by stressing the importance of examining the relationship between the plaintiff and the defendant to determine what obligations arise from it.¹⁵⁴ According to Justice Garman, this inquiry involves a four-part analysis of foreseeability, likelihood of injury, and the magnitude and consequence of placing the burden on the defendant to protect others from the potential harm.¹⁵⁵

The opinion quickly shifts gears however, turning the focus away from duty and towards an in-depth examination of the natural accumulation rule.¹⁵⁶ It is fitting that so little time is spent on duty since the main point of the opinion is to establish an exception from duty where one would normally be applied.

1. *The Majority Opinion*

Justice Garman's attempt to analogize and synthesize prior case law in Illinois with *Krywin* begins with *Mcelligot v. Illinois Central Railroad*,¹⁵⁷ which is a case also involving an unfortunate incident with a train.¹⁵⁸ This case did not involve a passenger on a train, but rather a motorist attempting to stop at railroad crossing intersection.¹⁵⁹ Due to slippery conditions on the road caused by ice and snow, the plaintiff failed to break in time to avoid a fatal collision with a speeding train.¹⁶⁰ The court found in favor of the defendant train company stating that, although the railroad had a duty to maintain the four-foot area surrounding the tracks constituting the train's right-of-way, it (just like the municipality on the rest of the street) could not be held liable for natural accumulations of ice and snow just outside of that area.¹⁶¹

The court next turned to cases which reinforced one of its main contentions in support of the natural accumulation rule: that holding common

153. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 101 (N.Y. 1928) ("Negligence, like risk, is thus a term of relation . . . bodily security is protected, not against all forms of interference or aggression, but only against some.").

154. *Krywin*, 938 N.E.2d at 447 ("The touchstone of the duty analysis is to ask whether the plaintiff and defendant stood in such a relationship to one another that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff.").

155. *Id.* (citing *Marshall v. Burger King Corp.*, 856 N.E.2d 1048, 1057-58 (Ill. 2006)).

156. *Id.* at 447-48.

157. 227 N.E.2d 764 (Ill. 1967).

158. *Krywin*, 938 N.E.2d at 447-48.

159. *Mcelligot*, 227 N.E.2d at 765.

160. *Id.* at 766.

161. *Id.* at 770 ("[W]e hereby hold that the railroad has no greater duty than a municipality to remove or otherwise offset the effect of natural accumulations of snow and ice from that part of its right of way not encompassed by its crossings and approaches . . .").

carriers liable in situations similar to *Krywin* would set a precedent that would impose so much of a burden on potential defendants that the services they currently provide would no longer be viable.¹⁶² Justice Garman cited decisions from the Illinois appellate courts that involved buses and elevators.¹⁶³ These cases supported their verdicts for the defendants by using the argument that holding otherwise would be so impractical and unrealistic that these modern conveniences on which our society has grown to depend would become cripplingly limited.¹⁶⁴

The plaintiff's response to this argument was that no undue burden existed in this case (and therefore there was no need to apply the natural accumulation rule to alleviate such a burden), because the snow and ice on the platform had been there for several days and could have easily been removed.¹⁶⁵ The majority turned to economic reasoning to refute this contention, stating that the "burden" did not refer to the effort required to remove the ice and snow, or the difficulty of doing so, but rather the unreasonableness of requiring the municipality to pay for these services to be rendered.¹⁶⁶ The court went on to add that the natural accumulation rule applies whether or not it is currently precipitating and regardless of how long the accumulation of ice and snow has existed.¹⁶⁷

162. *Krywin*, 938 N.E.2d at 448-49.

163. *Id.*

164. *Id.* (citing *Serritos v. Chi. Transit Auth.*, 505 N.E.2d 1034, 1039 (Ill. App. Ct. 1987) ("Requiring defendant's drivers to remedy a slushy condition on their steps which was brought about by snow being tracked into their vehicles by patrons would bring the transit system to a complete standstill.")(citing *Shoemaker v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 543 N.E.2d 1014, 1017 (Ill. App. Ct. 1989) ("Requiring building operators to carpet lobbies and halls on each elevator stop would place a tremendous burden on them without any assured results.")(citing *Jones v. Chi. Transit Auth.*, 565 N.E.2d 46, 48 (Ill. App. Ct. 1990) ("It would be impractical to require the CTA to replace or retrofit each and every bus so all of its vehicles were equipped with a drainage system to allow water to flow onto the street.")).

165. *Id.* at 449 ("[The plaintiff] argues the evidence showed that there was no ongoing storm in Chicago the day of plaintiff's accident, but that the ice on the platform had been there continuously for three days and that nothing had been done to remedy the condition, although the CTA could have easily done so.")).

166. *Id.* ("[T]he reason for the natural accumulation rule is that it would be unreasonable to require a city to expend funds and perform the labor necessary to keep its walks reasonably free from ice and snow during the winter months.")).

167. *Krywin*, 938 N.E.2d at 449 ("We note that the general rule that property owners have no duty to remove natural accumulations of ice or snow from their property has been applied without regard to any ongoing precipitation . . . or the length of time the natural accumulation has existed . . .") (citation omitted) (citing *Sheffer v. Springfield Airport Auth.*, 632 N.E.2d 1069, 1070 (Ill. App. Ct. 1994) (holding for the defendant even though at the time of the slip and fall the sun was out and the weather was clear) (citing *Frederick v. Prof'l Truck Driver Training Sch., Inc.*, 765 N.E.2d 1143, 1149 (Ill. App. Ct. 2002) ("[A] natural accumulation of ice and snow does not 'logically' transform into an 'unnatural' one simply by the passage of time.")).

Next the court addressed the plaintiff's argument that the CTA had failed to provide her with a safe place to alight.¹⁶⁸ To support her argument, the plaintiff relied on the Illinois First Appellate District case of *Wasserman v. City of Chicago*,¹⁶⁹ in which a bus driver stopped alongside of a large snow bank and a passenger was injured while attempting to exit.¹⁷⁰ The court in that case reversed a summary judgment in favor of the city stressing the heightened degree of care required by common carriers, which includes the duty to provide a safe place to alight.¹⁷¹ The court in *Krywin* dismissed this argument stating that *Wasserman* was distinct from the case at bar because a bus driver has much greater latitude to pick and choose a spot to discharge passengers than does a train operator.¹⁷²

The next argument that the plaintiff made with regard to the duty to provide a safe place to alight was that the CTA did not present any evidence that it was not feasible to allow passengers to disembark from the train at the areas clear of ice and snow under the canopies at the El station.¹⁷³ The court refuted this argument, stating that the burden of proof for this matter rested on the plaintiff and not the defendant,¹⁷⁴ and that she had failed to present any evidence to meet this burden.¹⁷⁵

168. *Id.* at 449-50.

169. 547 N.E.2d 486 (Ill. App. Ct. 1989).

170. *Id.* at 487.

171. *Wasserman*, 547 N.E.2d at 488.

It is well established that a common carrier must exercise the highest degree of care to its passengers, and the passenger-carrier relationship does not terminate until the passenger has had a reasonable opportunity to reach a place of safety. Thus, the duty imposed upon defendant required that its driver provide plaintiff with a safe place to alight from the bus.

Id. (citations omitted).

172. *Krywin*, 938 N.E.2d at 450 ("In any event, it is obvious that a bus driver has a much better opportunity to determine the best place to let his or her passengers off the bus than does a train operator on an eight-car train whose only option is to discharge passengers on a platform.").

173. *Id.* at 450-51.

174. *Krywin*, 938 N.E.2d at 451 (citing *Blue v. Env'tl. Eng'g, Inc.*, 828 N.E.2d 1128, 1142 (Ill. 2005) ("The burden to prove all the elements of a negligence claim remains on the plaintiff throughout the proceedings. It is not the defendant's burden to disprove negligence.")).

175. *Id.*

Plaintiff presented no evidence that it was feasible or even possible to discharge all passengers under the canopy or in some other manner that would have provided passengers with a safe place to alight. Plaintiff cannot escape her burden of proof on the issue of breach of duty by attempting to shift that burden onto the CTA. Contrary to plaintiff's contention, she did not prove that the CTA breached its duty to her to provide a safe place to alight.

Id.

Next the majority addressed the plaintiff's claim that the CTA was guilty of willful and wanton misconduct because they knew about the icy conditions on the platform for a minimum of two days before the incident and did nothing to provide safe exit from their trains.¹⁷⁶ The court held that willful and wanton misconduct is simply an "aggravated form of negligence,"¹⁷⁷ and not a "separate and independent tort."¹⁷⁸ Therefore, since the plaintiff had failed to prove the necessary elements of her negligence claim, she likewise could not support an argument for willful and wanton misconduct.¹⁷⁹

Although the "open and obvious" dangers doctrine¹⁸⁰ is only mentioned by name in the dissenting opinion,¹⁸¹ the majority seems to lay the foundation for its holding on the concepts it presents. While admitting that the conditions presented by snow and ice are dangerous, the fact that they have long been known and acknowledged as an inevitable consequence of our climate makes it unreasonable to impose a duty to remedy such conditions.¹⁸²

2. *The Dissenting Opinion*

Justice Freeman began his counterargument to the majority opinion by examining the relevant legislation in Illinois.¹⁸³ Specifically, he referred to the Local Governmental and Governmental Employees Tort Immunity Act.¹⁸⁴ This Act provides a shield against liability for most governmental

176. *Id.* at 451-52 (explaining that plaintiff relies on evidence that CTA had several employees like Anthony Morales whose duties included spreading sand on the platforms, and the testimony of Patricia Majors that the icy conditions had existed for at least two days, and, at the time of the incident, there was no sand on the platform).

177. *Id.* at 452 (citing *Sparks v. Starks*, 856 N.E.2d 575, 577 (Ill. App. Ct. 2006)).

178. *Krywin*, 938 N.E.2d at 452 (citing *Ziarko v. Soo Line R.R. Co.*, 641 N.E.2d 402, 405 (Ill. 1994)).

179. *Id.*

180. *See supra* note 74.

181. *Krywin*, 938 N.E.2d at 454 (Freeman, J., dissenting).

182. *Id.* at 450 (quoting *Trevino v. Flash Cab Co.*, 651 N.E. 2d 723, 728 (Ill. App. Ct. 1995)).

In so holding, we recognize the dangers posed by natural accumulations of snow and ice. The absence of a duty to remove them "does not rest upon the notion that the conditions presented by such accumulations are safe. To the contrary, the hazards presented have always been acknowledged, but the imposition of an obligation to remedy those conditions would be so unreasonable and impractical as to negate the imposition of a legal duty to do so."

Id.

183. *Id.* at 453.

184. 745 ILL. COMP. STAT. 10/2-101 (2008).

agencies in Illinois.¹⁸⁵ Justice Freeman pointed out, however, that although the CTA does qualify as a governmental agency, it was intentionally excluded from the protection of the Act as evidenced by specific language stating so.¹⁸⁶ Therefore, the dissent argued that the majority's holding is in direct conflict with the clear intention of the legislature with regard to this matter.¹⁸⁷

Justice Freeman next turned his attention to the relevant case law in Illinois, which has set a precedent with regard to the application of the natural accumulation rule to common carriers.¹⁸⁸ He began this analysis by discrediting the relevance of *Mcelligot v. Illinois Central Railroad*,¹⁸⁹ which was a case that the majority gave significant weight to in its opinion.¹⁹⁰ He effectively distinguished *Mcelligot* from *Krywin* by pointing out that the plaintiff in that case was not a passenger on the train in question, but rather a motorist.¹⁹¹ It is this status as a passenger which invokes the common carrier's heightened duty of care.¹⁹²

The dissenting opinion next turned its attention to the "open and obvious" rule as outlined in Section 343 of the Second Restatement of Torts.¹⁹³ Although the Restatement is not governing law in Illinois, the principles of Section 343 were effectively adopted into the state's common law precedent in the case of *Ward v. K Mart Corporation*.¹⁹⁴ The significance of *Ward* when applied to *Krywin* is not its adoption of the "open and obvious" rule itself, but rather the exception to the rule. This exception being that despite the obviousness of a dangerous condition, a landowner may still be responsible for warning those invited onto his or her property of the hazard.¹⁹⁵ This line of reasoning undercuts the majority's stance that it is unreasonable to place the burden of snow and ice removal on landowners

185. See *supra* Part II.D.1.

186. See *supra* note 99.

187. *Krywin*, 938 N.E.2d at 453 (Freeman, J., dissenting) ("The legislature's action indicates its intent that the CTA not receive the benefit of the natural accumulation rule, although other local governmental agencies do [Thus] [t]he General Assembly's action therefore forecloses the court's holding today.").

188. *Id.* at 453-54.

189. 227 N.E.2d 764.

190. *Krywin*, 938 N.E.2d at 447-48.

191. *Id.* at 454 n.1 (Freeman, J., dissenting) ("This is somewhat misleading in that the plaintiff's decedent in that case was not the carrier's passenger. Rather, he was driving a car which slid on a street which belonged to the carrier as part of its right of way.").

192. *Id.* (citing *Katamay*, 289 N.E.2d at 625-26 ("[T]hat status of being a passenger triggers the common carrier's duty to the highest degree of care for the safety of an individual.")).

193. *Id.* at 454-56.

194. See *id.* at 454-55.

195. See *supra* note 83.

because the dangers of such conditions should be obvious to those accustomed to the winter climate in Illinois.¹⁹⁶

According to Justice Freeman, *Ward* set the precedent in Illinois that to comply with the duty of reasonable care afforded to business invitees, business owners must be mindful of those who may not recognize an open and obvious danger or be unable to avoid the consequences of encountering it.¹⁹⁷ This does not mean, however, that all landowners will automatically be completely liable for injuries occurring on their property.¹⁹⁸ According to *Ward*, whether or not a condition was sufficiently obvious as to not require a warning is a question for the trier of fact.¹⁹⁹ Additionally, a plaintiff may be found to be contributorily negligent, alleviating the defendant of full responsibility.²⁰⁰

According to Justice Freeman, the advantages of the Illinois Supreme Court adhering to the previous precedent it set in *Ward* rather than effectively abolishing it (as the majority opinion in *Krywin* does) are twofold.²⁰¹ First, those who own and occupy land are best situated to provide protection to those who will be routinely entering the premises,²⁰² and second, the precedent “encourage[s] landowners to repair defects, rather than to keep them ‘open and obvious’ in order to avoid liability under the [the majority’s] approach.”²⁰³

The dissenting opinion then went on to cite cases in jurisdictions with similar (or worse) winter weather conditions to Illinois that take the Restatement’s view, as opposed to the pro-natural-accumulation-rule stance taken by the majority.²⁰⁴ The first of these is *Kremer v. Carr’s Food Center, Inc.*, which comes from the snowy state of Alaska.²⁰⁵ The case involved a

196. See *supra* note 182 and accompanying text.

197. *Krywin*, 938 N.E.2d at 454-55 (Freeman, J., dissenting) (“In the wake of *Ward* a business owner’s duty of reasonable care for conditions on its premises extends to those whom it should expect will not realize the danger or will fail to protect themselves against it.”).

198. See *Ward v. K Mart Corp.*, 554 N.E.2d 223, 233-34 (Ill. 1990).

199. *Id.* at 234 (“Whether in fact the condition itself served as adequate notice of its presence or whether additional precautions were required to satisfy the defendant’s duty are questions properly left to the trier of fact.”).

200. *Id.* (“The trier of fact may also consider whether the plaintiff was in fact guilty of negligence contributing in whole or in part to his injury, and adjust the verdict accordingly.”).

201. *Krywin*, 938 N.E.2d at 455 (Freeman, J., dissenting).

202. *Id.* (“[O]ccupiers of premises are generally in a better position in modern society to protect the public from hazards than are invitees who must go into public places as part of daily life.”).

203. *Id.*

204. *Id.* at 455-56.

205. 462 P.2d 747 (Alaska 1969).

customer who slipped and fell on an icy patch in a store parking lot.²⁰⁶ Despite undoubtedly having more extreme, and most certainly more dangerous, winter weather conditions than Illinois, the Alaska Supreme Court remained true to similar ideas adopted by the *Ward* court from Section 343 of the Restatement, rather than invoking the protection of the natural accumulation rule.²⁰⁷ Although it is arguably the most qualified state in the union to do so, Justice Freeman points out that the Alaska Supreme Court refused to use inclement weather as an excuse.²⁰⁸

Additionally, Justice Freeman cited cases from two other cold-weather states (Michigan and Maine) that, similar to Alaska, prefer the policy of the Restatement over that of the natural accumulation rule.²⁰⁹ In *Quinlivan v. Great Atlantic & Pacific Tea Co.*, the Supreme Court of Michigan “reject[ed] the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability.”²¹⁰ Also, in *Isaacson v. Husson College*, the Maine Supreme Court took a similar view.²¹¹

Next, Justice Freeman took a different angle in his argument to refute the majority opinion’s reasoning of an undue burden.²¹² Three lines of reasoning were given which make the assertion that the burden on the CTA

206. *Id.* at 748.

207. *Id.* at 749-50.

Section 343 is controlling here. A jury could have found: (a) that Carr's possessed the parking lot and knew the condition of its surface, (b) that Carr's should have realized that this condition involved an unreasonable risk of harm to its business invitees, (c) that Carr's should have expected that its business invitees would not discover or realize the danger, or should have anticipated that they would fail to protect themselves against a danger they did discover or realize, or should otherwise have anticipated harm to invitees despite the fact that the danger was known or obvious to them, and (d) that Carr's failed to exercise reasonable care to protect business invitees, such as Kremer, from the dangerous surface conditions in its parking lot.

Id.

208. *Krywin*, 938 N.E.2d at 456 (Freeman, J., dissenting) (“The court noted that the ‘mere fact’ that ‘snow and ice conditions prevail for many months throughout various locations in Alaska’ was not ‘in and of itself sufficient rationale for the insulation of the possessor of land from liability to his business invitee.’”) (quoting *Kremer*, 462 P.2d at 752).

209. *Id.*

210. 235 N.W.2d 732, 740 (Mich. 1975).

211. 297 A.2d 98, 106-07 (Me. 1972)

But the defendant asserts, as a bar to recovery as a matter of law, plaintiff's own negligence or fault in encountering an obvious danger Mere knowledge of an icy condition before passing over it does not establish negligence on the part of a business invitee. The test is, whether the plaintiff, knowing of the icy condition, reasonably believed, or had a right to believe, that he could use the pathway safely by the exercise of reasonable care.

212. *Krywin*, 938 N.E.2d at 456 (Freeman, J., dissenting).

would actually be quite low, especially when compared in proportion to the high risk of potential severe injuries that passengers face.²¹³ First, the CTA already has employees in place, like Anthony Morales, whose duties include checking on the safety of the platforms.²¹⁴ Second, applying the reasoning from *Ward*,²¹⁵ a simple warning such as an announcement from the conductor or an easily visible sign could be seen by a fact finder to have fulfilled the duty owed by the CTA, instead of undertaking the overwhelming burden of clearing all of the ice and snow from every El platform in Chicago.²¹⁶ Finally, the CTA would not be held strictly liable every time someone slipped and fell, the partial defense of comparative liability could be used to assign fault proportionally.²¹⁷

Finally, the dissent made one more argument citing previous precedent set by the Illinois Supreme Court in the case of *Marshall v. Burger King Corporation*.²¹⁸ The case involved an injury sustained by the plaintiff when an automobile crashed through the wall of a Burger King restaurant.²¹⁹ The Court decided that it was a question for the jury to decide if the defendant, as a business invitor, had breached its duty of care to the plaintiff, as a business invitee, by not taking precautions to guard against this type of accident.²²⁰

A. ANALYSIS

1. *Why the Majority Opinion is Wrong*

The majority opinion is wrong in this case first because it ignores the specific intentions of the legislature.²²¹ The Illinois General Assembly spelled out in no uncertain terms that it did not wish for the Tort Immunity Act to apply to organizations such as the CTA,²²² and that the protection provided by the Snow Removal Act was intended for private citizens.²²³ As Justice Freeman points out in his dissent, the court in *Krywin* is making its own public policy, which is a responsibility that on previous occasions it

213. *Id.*

214. *Id.*

215. *See supra* notes 198-200.

216. *Krywin*, 938 N.E.2d at 456 (Freeman, J., dissenting).

217. *Id.*

218. 856 N.E.2d 1048

219. *Id.* at 1051.

220. *Id.* at 1054 (“[W]hether a defendant breached the duty and whether the breach was the proximate cause of the plaintiff’s injuries are factual matters for the jury to decide, provided there is a genuine issue of material fact regarding those issues.”).

221. *See supra* note 187.

222. *Id.*

223. *See supra* Part II.D.2.

has deferred to the legislature.²²⁴ Justice Freeman also makes the argument that the reason the CTA was left out of this legislation is because often citizens are encouraged by government officials to use public transportation during dangerous weather conditions instead of attempting to drive themselves.²²⁵ The decision in *Krywin* directly undermines this intention because now if people follow the safety advice of public officials by staying off of the roads, they will have no recourse if they are injured by natural accumulations of ice and snow while using public transportation.²²⁶ Not only is it, by its own admission, not the place of the Illinois Supreme Court to make such policy decisions, the result of the decision is contradictory and counterproductive.

Additionally, the majority opinion in this case is wrong because it misuses or misinterprets prior precedent set by Illinois courts with regard to the matter at issue. First of all, the majority's reliance on *Mcelligot* is completely misguided considering that the relationship between the plaintiff and the common carrier in that case is completely different than in *Krywin*.²²⁷ Tort law precedent, and both the majority and minority opinions, makes it abundantly clear that the relationship between the plaintiff and defendant is key in determining liability.²²⁸ Secondly, the cases that the majority presents to support its argument that abolishing the natural accumulation rule would create an overwhelming burden on public transportation²²⁹ are effectively countered by the arguments made by the dissent which presents scenarios that would not be over-burdensome at all, especially compared with the seriousness of the potential injuries at risk.²³⁰ Additionally, the majority's reliance on the concepts of the "open and obvious" doctrine²³¹ are refuted by Section 343A of the Restatement,²³² and precedent set by courts in other jurisdictions with similar winter weather which give no credence to the idea that just because people are used to ice and snow they

224. *Krywin*, 938 N.E.2d at 457 (Freeman, J., dissenting) (citing *Boub v. Twp. of Wayne*, 702 N.E.2d 535, 542-43 (Ill. 1998) ("By its actions today, the court has indicated that it can better form the public policy of this state than can the General Assembly, even though this court regularly states that it is the General Assembly that is the branch of government uniquely suited for that role.")).

225. *Krywin*, 938 N.E.2d at 457 (Freeman, J., dissenting).

226. *Id.* ("Today's decision ignores the protection that the General Assembly has seen fit to give the users of the CTA and puts those citizens who follow officials' directions in potential harm's way with no recourse for the damages they might incur if injured on an icy CTA platform.").

227. *See supra* notes 191-92.

228. *See supra* notes 3-5 and accompanying text.

229. *See supra* notes 162-64.

230. *See supra* notes 212-17.

231. *See supra* note 88 and accompanying text.

232. *See supra* Part II.C.2.

should be responsible if they hurt themselves on it.²³³ Finally, the majority ignores its own precedent set in *Marshall*, regarding duties owed to business invitees.²³⁴ Justice Freeman puts it quite eloquently in his dissent by stating that “[i]f Burger King has a duty to protect its diners from an airborne car, then the CTA should also have a duty protect its passengers from icy conditions on its train platforms.”²³⁵

Finally, the majority opinion is wrong because it offers no recourse for persons who suffer painful, debilitating, and expensive injuries through no fault of their own. If the holding in *Krywin* continues to be good law, then people in similar situations to our hypothetical “Paul Passenger” will simply be told that they are out of luck even though because of happenstance, misfortune, and most importantly negligence they have suffered a crushing blow to both their physical and financial well-being. The future of tort litigation in Illinois, whenever a common carrier is involved looks quite grim as long as the holding in *Krywin* is still good law.

2. *Why the Dissenting Opinion is Right*

Not only is Justice Freeman’s dissenting opinion correct because it effectively refutes every argument presented by the majority,²³⁶ but also because it offers an alternative that is a flexible compromise which is in stark contrast with the majority’s black and white, zero liability stance. The philosophy offered by the dissent draws from Section 343 of the Restatement and *Ward* only requires that a common carrier take precautions toward “those whom it should expect will not realize [a] danger or will fail to protect themselves against it.”²³⁷ Elderly people like Ms. Krywin who depend on public transportation for their livelihood are the perfect example of those whom the CTA should anticipate will require additional measures and whom the dissenting opinion takes into account. Furthermore, the remedies that Justice Freeman suggests are not an overwhelming burden,²³⁸ and would take quite a stretch of the imagination to envision them “bring[ing] the transportation system to a standstill.”²³⁹ Finally, the comparative fault doctrine mentioned by the dissent would ensure that the CTA would not be

233. See *supra* notes 204-08 and accompanying text.

234. See *supra* note 220.

235. *Krywin*, 938 N.E.2d at 457 (Freeman, J., dissenting) (citing J. Powell, *Marshall v. Burger King Corp.: Making a Mess of “Duty” For Businesses in Illinois*, 28 N. ILL. U. L. REV. 95, 95 n.1 (2007)).

236. See *supra* Part IV.A.2.

237. *Krywin*, 938 N.E.2d at 454-55 (Freeman, J., dissenting).

238. See *supra* notes 214-17 and accompanying text.

239. See *supra* note 164.

overwhelmed by a flood of meritless cases involving everyone who slipped and fell while using public transportation.²⁴⁰

Justice Freeman's dissent in *Krywin* both gives proper weight to the authority of the legislature and of prior precedent, while offering a realistic and fair solution to the problem presented that is not without support both in the law and in the real world.

V. CONCLUSION

The precedent set by the Illinois Supreme Court in *Krywin v. Chicago Transit Authority* is one which should be overturned. First, because of its divergence from common law precedent set both by Illinois courts and other courts throughout the nation that have dealt with similar issues. Second, because of its reliance on the "known or obvious dangers" doctrine as a means of justifying its holding, and the direct conflict this presents with established policies in Illinois. Third, because of its inconsistency with the statutory language and the legislative intent behind Illinois' Local Governmental and Governmental Employees Tort Immunity Act and other Illinois laws. Finally, because the concerns created for future accident victims in Illinois with no recourse or remedy are not justified by the reasoning offered in *Krywin*. As a result of *Krywin*, these concerns will now be ignored.

THEODORE RICHGELS*

240. See *supra* notes 85-86.

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