

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL LAINE,

Plaintiff-Below,  
Appellant

v.

SPEEDWAY, LLC,

Defendant-Below,  
Appellee.

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No.: 149, 2017

Court Below: Superior Court  
of the State of Delaware  
C.A. No.: K15C-12-008 WLW

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**APPELLANT'S REPLY BRIEF**

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## REPLY ARGUMENT II

### **THE SUPERIOR COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT HOLDING THAT THE CONTINUING STORM DOCTRINE APPLIED TO THE FACTS OF THIS CASE.**

Plaintiff's sole contention is that the facts of the case do not warrant the lower Court in concluding that a "storm" was in existence sufficient to invoke the Doctrine. What is a storm sufficient to have the Court relieve the landowner of his duty to the public has never been defined in any case in our State. Admittedly such a decision is factually dependent but, still, ground rules are desperately needed lest the duty of the landowner is relieved for every weather related event.

The starting point for such ground rules obviously should be the origin of the Doctrine, Young v. Saroukos, 185 A.2d 274 (Del. Super. 1962). There the weather was seven to eight inches of snow; temperatures in the low 20's; and high winds with gusts measuring 38 to 50 mph. *Id.* at 275. Compare the facts to the weather of the case at bar. The last weather reading at 0658 hours before Plaintiff fell at 7:15 a.m. showed rain; 32°F.; precipitation of insufficient magnitude to measure. (A-102-103) These readings, which are not contested, did not show ice or freezing rain before Plaintiff fell. (A-102-103) This is a dramatic departure from the facts of Young where the obvious intent of the Doctrine was to protect the landowner and employees from injury in making fruitless attempts to remediate the severe weather conditions uncontrollable due to the severity of the storm.

In our case, Defendant had two employees on duty at 5:00 a.m. (A-70-71) Defendant's business opened at 6:00 a.m. and proceeded with customers on the premises as normal all day long. (A-96) The local school district was open all day and Plaintiff drove all day, transporting elderly and disabled persons for the Modern Maturity Center. (A-96) These facts do not measure up to the requirements of a storm sufficient to satisfy the Doctrine.

Defendant has cited two cases where a determination was made that there was an ongoing storm on January 10, 2014, the date of our accident. (See Appellee's Answering Brief, pages 12, 13.) In Buchanan v. TD Bank, N.A., et al., Del. Super. Ct., No. K15-C-12-020 (RBY), Young, R. (April 7, 2017) (B378-B407), the Plaintiff did not contest the issue of a storm being in progress but defended the Summary Judgment Motion on other grounds. In Vicks v. Justison Landing Apartments, 2016 Del. Super. LEXIS 17, 4 (Del. Super. Ct.), April 28, 2016, Plaintiff's case was dismissed for failure to file suit within the statute of limitations and no weather facts are stated for the apartment complex in New Castle County other than the statement that the Plaintiff slipped on ice and Defendant did not owe Plaintiff any duty to remove snow or ice because a winter storm was ongoing. *Id.* at 2.

The Delaware Supreme Court has not taken a position on interpreting the Doctrine with the sole exception of affirming the Superior Court's decision in Cash

v. East Coast Property Management, Inc., 7 A.3d 484 (Del. 2010) (without opinion). Cash involved a slip and fall on a patch of ice during a day where the weather was described as a “misty drizzle” throughout the entire day. Cash v. East Coast Property Management, Inc., 2010 Del. Super. LEXIS 235 (Del. Super. Ct., June 8, 2010) at 3. Summary judgment was granted with the conclusion that “a landowner has no legal duty to begin ice removal until precipitation has stopped, regardless of the severity of the storm.” *Id.* at 4.

Cash and our case are the only two cases found where a rain event was considered a “storm” sufficient to invoke the defense of the Doctrine. The lower court in our case stated that “falling precipitation was sufficient to invoke the continuing storm doctrine” (Ex. A β9, pg.4).

It is respectfully submitted that the Court should provide direction to the Superior Court for an interpretation of what a “storm” is under the Doctrine. Current lower court decisions have widely extended the “storm” facts of the origin of the Doctrine laid down in Young. This expansion was noted in the well-considered opinion of Elder v. Dover Downs, Inc., 2012 Del. Super. LEXIS 300 (Del. Super. Ct. January 2, 2012), where the Court stated:

Although not usually outcome determinative, the Court finds it important to note the expanse of the Cash and the tension that could arise from mixing an analysis of duty and breach of duty in these cases. For instance, a situation may arise in which opposing parties reasonably argue over when a snowstorm ceased and the amount of time that passed after cessation before the landowner began clearing the snow. Those issues are disputes of fact for a jury and have no place in the determination of whether the landowner owed a duty to the business invitee, a

question of law for the Court to determine. Instead, a landowner's duty to a business invitee to clear snow always exists but that duty may be discharged reasonably as a matter of law under certain circumstances. Where the facts are contested and various inferences may be reasonably drawn from them regarding the start and end of a snowstorm, it must be left to the jury to determine whether, under the conditions presented, the landlord's conduct in failing to clear the snow was reasonable.

*Id.* at 6.

Plaintiff asks the Court to consider the weather conditions of the cases relied upon by the Defendant and to compare them to the weather conditions of the case at bar.

In *Elder* it was a snowstorm commencing at 10:00 a.m. on June 30, 2010, and lasting until the early hours of the following morning. *Elder, id.* at 3. In *Demby v. The Del. Racing Ass'n*, 2016 Del. Super. LEXIS 54, 3 (Del. Super. Ct. Jan. 28, 2016), plaintiff fell on black ice on December 14, 2013, with weather conditions alternating between light snow, freezing rain, and heavy rain from 2:40 p.m. throughout the time when plaintiff fell at 8:41 p.m., and conditions continued at least until midnight. In *Kovach v. Brandywine Innkeepers, Ltd.*, 2001 Del. Super. LEXIS 373 (Del. Super. Ct. Oct. 1, 2001), the weather was heavy snowfall causing plaintiff to fall on a snowy, icy surface. *Id.* at 3. In *Day v. Wilcox Landscaping, Inc., et al*, 2017 Del. Super. LEXIS 97 (Del. Super. Ct. Feb. 28, 2017), a winter storm began at 9:00 a.m. on January 21, 2014, and ended before midnight, accumulating 11 inches of snow. Plaintiff decided to walk to her car to go home before the storm worsened, but she fell on a sheet of ice in the parking lot.



*Id.* at 2. In Saienni v. 3 Mill Park Court, LLC, 2016 Del. Super. LEXIS 606 (Del. Super. Ct. Nov. 28, 2016), New Castle County was subject to snow and freezing fog on January 6, 2015, beginning at 6:07 a.m. and ending at 3:15 p.m., with plaintiff falling due to ice and snow accumulations at 2:30 p.m. *Id.* at 1. In granting summary judgment based upon the Doctrine, the Court aptly stated regarding the duty of the owner of commercial property to maintain it in a manner safe for commercial visitors as follows:

That duty to maintain the property in such a manner is suspended, however, when the weather reaches unsafe conditions at which point the landowner is allowed sufficient time after the weather conditions subside to clear the area of the dangers brought about by the weather conditions.

*Id.* at 1 (Emphasis supplied).

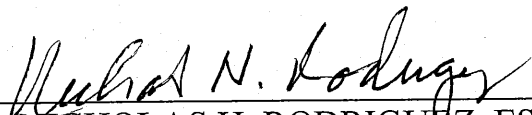
In conclusion, it is respectfully submitted that the non-freezing-rain event that took place in the case at bar should not be allowed to rise to the level of a continuing storm, and the case should be allowed to proceed to the jury.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiff's Opening Brief, Plaintiff respectfully requests this Court to reverse the lower court decision granting summary judgment based upon the Continuing Storm Doctrine and permit Plaintiff to proceed to trial.

Respectfully submitted,

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