

WINTER 2014 NEWSLETTER

PREMISES LIABILITY LITIGATION UPDATE

By Gerald B. Lotzer

***Callahan v. Vitesse Aviation Services, LLC*, No. 05-11-00914-CV, 2013 Tex. App. LEXIS 40950 (Tex. App.–Dallas Mar. 29, 2013, no pet.).**

This is an appeal of a premise liability lawsuit brought by appellant Daniel J. Callahan against appellee Vitesse Aviation Services, LLC as a result of the trial court granting Vitesse's Motion for Summary Judgment. The Court affirmed in part and reversed and remanded in part.

Appellee Vitesse Aviation Services, LLC ("Vitesse") leased a private terminal at Dallas Love Field Airport from which it operated a facility for private aircraft. On January 27, 2009, appellant Daniel J. Callahan ("Callahan"), an attorney from California, flew in a private jet to Dallas, Texas, to attend a deposition. The jet landed at Love Field and was stored and refueled at the Vitesse's facility. On the night of January 27, an ice storm hit the Dallas area. On the afternoon of January 28, as Callahan was walking to the jet for a return flight to California, he slipped and fell on a patch of ice injuring himself.

In April 2010, Callahan brought a premises liability lawsuit against Vitesse for injuries arising out of the slip and fall that occurred at Dallas Love Field. Vitesse filed a Motion for Summary Judgment on December 10, 2010. At that time the motion was based on the premises liability claim alleged in Callahan's First Amended Petition, which was filed several months before Vitesse's Motion for Summary Judgment. On April 4, 2011, Callahan filed a response to Vitesse's Motion for Summary Judgment which included Callahan's Fifth Amended Petition, which was filed on the same date and which added a "negligence per se" claim based on alleged violation of the Code of Federal Regulations or, alternatively, the Dallas City Code. As part of Callahan's response, he also moved to strike the Affidavit of David Peaper, the General Manager for Vitesse, which was offered in support of Vitesse's Motion for Summary Judgment.

The trial court granted Callahan's Motion to Strike Peaper's Affidavit ruling that it could not be considered as Summary Judgment evidence. The trial court subsequently granted Vitesse's Motion for Summary Judgment and dismissed Callahan's causes of action with prejudice. The Court's order did not specifically refer to any of Callahan's claims. Callahan subsequently appealed the Court's decision.

Callahan raised four issues on appeal: (1) the trial court erred by granting summary judgment because Vitesse failed to negate the duty element of Callahan's premises liability claim in that it provided no evidence Callahan slipped and fell on naturally-occurring ice; (2) the trial court erred by applying the natural-accumulation rule without considering the "unique facts of this case, including that this slip and fall occurred on a secure airport tarmac"; (3) the court erred by granting summary judgment because Vitesse was required by contract and federal aviation regulations to remove snow and ice from the tarmac; and (4) the trial court erred by granting

summary judgment because the Summary Judgment Motion did not address Callahan's "negligence per se" claims.

The Court held that although Vitesse's summary judgment evidence was struck by the Court, the evidence provided and Callahan's response to Vitesse's motion was proper summary judgment evidence on which both parties could rely, and the trial court could consider this evidence in making its summary judgment ruling. Having therefore determined what evidence the Court could consider with respect to the Motion for Summary Judgment, the Court then turned its attention to whether that evidence conclusively established Vitesse's entitlement to summary judgment. The Court reviewed the various standards and determined that Vitesse moved for summary judgment based only on the negligence/premises liability claim raised in Callahan's First Amended Petition which was the pleading on file at the time Vitesse moved for summary judgment. Summary judgment may only be granted based on grounds expressly asserted in the summary judgment motion. *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011). Generally, a movant who does not amend or supplement its pending motion for summary judgment to address newly added claims alleged in a subsequent petition is not entitled to summary judgment on those claims. In such a case, the portion of the summary judgment purporting to be final must generally be reversed because the judgment grants more relief than requested in the motion.

With respect to the issue that the trial court erred by granting summary judgment because Vitesse did not establish Callahan slipped and fell on "naturally occurring" ice; the trial court applied the "natural accumulation" rule; and that Vitesse was required by its contract with the City of Dallas and by Federal Aviation regulations to remove snow and ice from the airport tarmac, the Court addressed all three issues together. The Court held that "[N]aturally occurring ice that accumulates without the assistance or involvement of unnatural contact is not an unreasonably dangerous condition sufficient to support a premises liability claim." *Scott & White Mem'l Hosp. v. Fair*, 310 S.W.3d 411, 412 (Tex. 2010). A natural accumulation of ice is one that accumulates as a result of an act of nature and an unnatural accumulation refers to causes and factors other than inclement weather conditions, to causes other than meteorological forces of nature. *Fair*, at 415. Salting, shoveling, or applying a chemical deicer to a natural ice accumulation does not transform it into an unnatural one. *Id.* at 419. "To find otherwise would punish business owners who, as a courtesy to invitees, attempt to make their premises safe." (*Id.* at 419.) Furthermore, ice that melts and later refreezes is still deemed a natural accumulation. *Id.* at 418. Callahan did not present any controverting summary judgment evidence that the ice resulted from something other than the winter storm. The summary judgment evidence established that the ice in question was a naturally occurring accumulation that did not pose an unreasonable risk of harm. The burden then shifted to Callahan to provide summary judgment evidence that the ice did not accumulate naturally. He did not do so. The Court went on to examine laws in other states and stated that the law in Texas remains that a natural accumulation of ice is not unreasonably dangerous for purposes of premises liability and that they are not free to abrogate or modify established precedence.

The remaining question is whether Vitesse's Motion for Summary Judgment was broad enough to reach all of the negligence allegations contained in count one of Callahan's Fifth Amended Petition which both parties agreed was properly before the Court. The Court of

Appeals concluded that the trial court did not err by granting summary judgment as to the negligence allegations that Vitesse negligently maintained its tarmac; negligently failed to remove ice and other hazards; failed to properly inspect its premises; and failed to properly warn passengers utilizing its fixed base operation/aircraft terminal. The Court felt that they were all virtually identical to claims asserted in the First Amended Petition which were precluded by the general rule that naturally occurring ice does not, as a matter of law, constitute an unreasonably dangerous condition.