

New Jersey Supreme Court Distinguishes *Luchejko* and Holds Community Association Is Not Immune from Liability for Failure to Clear Ice and Snow from Private Sidewalks

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Photos Courtesy CAI-NJ.



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On August 12, 2015, the New Jersey Supreme Court held in *Qian v. Toll Brothers Inc.*, that community associations are *not* immune from liability for their failure to adequately clear snow and ice from sidewalks within the community. The report of this decision in newspapers and by others has caused concern for community associations, since it appears to impose liability that associations did not previously have. However, this Supreme Court ruling is consistent with pre-existing law as it pertains to privately owned community sidewalks. Indeed, the lower court rulings in *Qian* surprised many practitioners and the decision by the Supreme Court was not a surprise.

The key to understanding the *Qian* decision is appreciating the distinction between public and privately owned sidewalks. Typically, community association governing documents provide that the association is specifically responsible for the maintenance, repair and replacement of common elements or common property. This responsibility includes the clearing of snow from common element walkways and sidewalks. If an association is negligent in discharging that responsibility, it is potentially liable to an individual who is injured as the result of that negligence. The most common example is a situation in which a person slips, falls and is injured, allegedly because the snow or ice was not properly cleared from a sidewalk. There are countless claims made on an annual basis alleging this type of negligence.

However, suppose an association consists of one or more buildings which are located on a public sidewalk, not common property? The law in New Jersey has long been that the *commercial* owner of property adjacent to a public sidewalk is liable for injuries to a person injured on that sidewalk as the



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result of the owner's negligence. However, there has been a clear public policy in New Jersey for over thirty years that such liability will not be imposed on residential homeowners whose property fronts on a public sidewalk. In 2011, the New Jersey Supreme Court was faced with deciding whether a condominium association was "commercial" or "residential" in the context of sidewalk

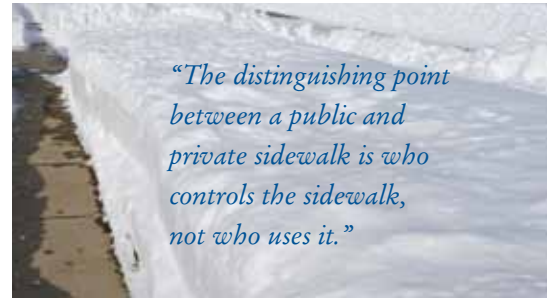
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liability. In a case entitled *Luchejko v. City of Hoboken*, the Court held that associations were immune from liability for the failure to adequately clear snow and ice from an adjacent public sidewalk. The decision discussed the distinction between residential and commercial properties and reasoned that commercial property owners were better suited to treat additional insurance premiums and maintenance expenses as a necessary cost of doing business. The Court found that the association, as a non-profit corporation, was not comparable to a rental property, which is able to generate revenue for the owner from the use of the property. Thus, the Court held that residential homeowners, including condominium associations, would not be liable in such situations unless they create or exacerbate a dangerous condition.

The *Qian* case involved a claim by a resident in an adult residential community who was injured after a slip and fall on ice following a winter storm. Qian sued the association, its developer (who controlled the board), its managing agent and the contractor responsible for snow and ice removal. The

trial court dismissed the claims against the association, developer and managing agent based in part on the decision in *Luchejko*. In an unpublished opinion decided on February 7, 2014, the Appellate Division, New Jersey's intermediate appellate court, agreed with the trial court that the association's sidewalks were the "functional equivalent" of the public sidewalks in *Luchejko*. Accordingly, the Appellate Division determined that the association's duty to maintain common areas of a common interest community does not "equate to a civil tort duty and liability to an injured party."

The problem with the lower court decisions is that Qian fell on an interior, private sidewalk within the community rather than on an adjacent public sidewalk as in *Luchejko*. Qian argued that this distinction, plus the specific maintenance responsibilities spelled out by the association's governing documents and by statute, required the imposition of tort liability. The Appellate Division rejected this reasoning, holding that there is difference between a legal responsibility to act and the imposition of tort liability.



"The distinguishing point between a public and private sidewalk is who controls the sidewalk, not who uses it."

ity. In other words, the Appellate Division said that just because the association had a duty to clear the snow, does not mean that it would be responsible to compensate an individual who was injured as the result of its negligent performance.

The Supreme Court disagreed with the lower courts, holding that the residential sidewalk immunity applicable to public sidewalks does not apply to the privately owned sidewalks in a common interest community. The distinguishing point between a public and private sidewalk is who controls the sidewalk, not who uses it. The Court stated that because the New Jersey Condominium Act as well as the association's governing documents in this case spell out a duty to manage and maintain the community's

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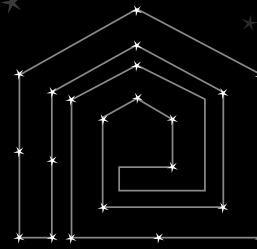
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common property, including the sidewalks, the association cannot avoid liability for its potential failure to properly maintain its private sidewalks. [It should be pointed out that the association in the *Qian* case was a homeowners association, not subject to the Condominium Act, but even without the statutory responsibility, the association's governing documents would have provided the necessary duty.] Accordingly, the Supreme Court remanded this case to the trial court to address these and other issues, including the determination as to whether the association was entitled to tort immunity pursuant to *N.J.S.A. 2A:62A-13* and the association's governing documents. ■



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