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Slipping Through the Cracks: The Shoddy State of New Jersey Sidewalk Liability Law Cries Out For Repair

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SLIPPING THROUGH THE CRACKS: THE SHODDY STATE OF NEW JERSEY SIDEWALK LIABILITY LAW CRIES OUT FOR REPAIR

Donald F. Burke, Jr., Esquire*

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Whether a person who is injured because of an unsafe sidewalk is able to recover damages from an abutting property owner remains open to question as a result of the vagaries of current New Jersey law. Sidewalk liability law contains subtle and not-so-subtle distinctions and exceptions creating uncertainty about whether and under what circumstances an abutting property owner will be liable for injury caused by an unsafe condition on the sidewalk. This lack of clarity has led to an unwieldy hodge-podge of rules and exceptions that, in the interest of fairness, uniformity and predictability should be replaced by a uniform standard irrespective of the status of the property owner or the nature of the unsafe condition.

This Article reviews the current state of sidewalk liability law in New Jersey, which sets different standards of liability depending upon whether the abutting property is owned by a private individual or a public entity and, if private, whether the use of the abutting property is commercial, residential, public or charitable. Further, this Article examines the rationale for imposing different standards. Ultimately, it determines that the public policy rationale for the different standards does not withstand scrutiny. This Article recommends, therefore, imposing a duty and consequent liability only when affirmative conduct of an abutting property owner causes or contributes to the unsafe condition on the sidewalk.

I. EVOLUTION OF SIDEWALK LIABILITY LAW IN NEW JERSEY

A. The Common Law Rule: No Liability Absent Affirmative Conduct of Abutting Property Owner

Under the common law in New Jersey, an abutting property owner had no liability for the condition of a public sidewalk.[1] Exceptions to this rule abounded, however, and an abutting property owner would be held liable for creating an unsafe condition or undertaking an obligation to repair or maintain the sidewalk but doing so negligently.[2] Prior to the seminal New Jersey Supreme Court case of *Stewart v. 104 Wallace*

[1] *See, e.g.*, Yanhko v. Fane, 362 A.2d 1, 3 (N.J. 1976).

[2] *See, e.g.*, Ford v. Jersey Cent. Power & Light Co., 166 A. 490, 490-91 (N.J. 1933); Lambe v. Reardon, 173 A.2d 520, 525 (N.J. Super. Ct. App. Div. 1961), *certif. denied*, 174 A.2d 924 (N.J. 1961).

Street, Incorporated,[3] an abutting property owner generally was not liable for the condition of a public sidewalk absent "negligent construction or repair of the sidewalk by himself or by a specified predecessor in title or for direct use or obstruction of the sidewalk by the owner in such a manner as to render it unsafe for passersby."[4]

The predictable application of this rule was apparent in case law. An example is provided in *Murray v. Michalak*, where the root of a tree elevated a defendant's flagstone sidewalk.[5] While walking along the sidewalk the plaintiff tripped over a raised slab and fell, sustaining injuries.[6] The court found that the plaintiff had the burden of proving that defendants or their predecessors in title planted the tree, thus creating the nuisance.[7] Because there was no proof the defendant or his predecessor in title planted the tree, the Superior Court of New Jersey, Appellate Division (Appellate Division) held summary judgment should have been entered on their behalf.[8] Likewise, in *Lambe v. Reardon*, the plaintiff tripped over a raised flagstone slab and fell, suffering personal injuries in front of the defendants' property.[9] The court remanded for a new trial to determine whether the defendants had in fact installed a drain under the flagstone as alleged by the plaintiff.[10] The court determined that the lifting and replacement of the slab might have been attributable to the owner of the property at the time the installation was made, but the determination of defendant's liability was an issue of fact for the jury.[11] The requirement that an abutting property owner engage in some affirmative conduct before liability could attach culminated in

[3] Stewart v. 104 Wallace St., Inc., 432 A.2d 881 (N.J. 1981).

[4] *Yanhko*, 362 A.2d at 3. *See, e.g.*, Abraham v. Gupta, 656 A.2d 850, 852 (N.J. Super. Ct. App. Div. 1995), *certif. denied*, 663 A.2d 925 (N.J. 1995) (based on *Yanhko* rule, owner of vacant lot owed no duty to plaintiff who fell on snow on abutting public sidewalk); MacGrath v. Levin Prop., 606 A.2d 1108, 1109 (N.J. Super. Ct. App. Div. 1992), *certif. denied*, 611 A.2d 656 (N.J. 1992) (applying *Yanhko* rule in holding a shopping center owner owed no duty to plaintiff to provide a safe means of passage across the adjoining public highway); Levin v. Devoe, 533 A.2d 977, 979 (N.J. Super. Ct. App. Div. 1987) (applying *Yanhko* rule in holding owner owed no duty to plaintiff who tripped on curb in front of owner's apartment building).

[5] Murray v. Michalak, 276 A.2d 866, 867 (N.J. Super. Ct. App. Div. 1970).

[6] *Id*.

[7] *Id*. Nuisance is defined as something that interferes with the use of property by being irritating, offensive, obstructive or dangerous. BLACK'S LAW DICTIONARY (9th ed. 2009).

[8] *Murray*, 276 A.2d at 868.

[9] Lambe v. Reardon, 173 A.2d 520, 522 (N.J. Super. Ct. App. Div. 1961).

[10] *Id.* at 527.

[11] *Id.* at 526.

the seminal case of *Yanhko v. Fane*, in which the New Jersey Supreme Court concluded it would be arbitrary to impose a tort duty of care upon a property owner simply because the property abuts a sidewalk that is part of the public domain.[12]

The common law rule was fair, uniform and predictable. Property owners did not have to concern themselves with an affirmative obligation to maintain an adjacent public sidewalk as long as they did not contribute to a defective condition or voluntarily undertake to make a repair and then do so negligently. Liability was properly placed on the party whose affirmative acts caused or contributed to the defect. This fair, just and predictable rule, however, would soon be jettisoned by the New Jersey Supreme Court as to commercial property owners.

B. Duty to Maintain Imposed on Commercial Property Owners

In 1981, a mere five years after the New Jersey Supreme Court in *Yanhko* pronounced it would be "arbitrary" to impose a duty of maintenance on an owner of property abutting a sidewalk, the Court did an about-face and imposed a duty on commercial property owners. In a clear break from precedent, the Court held in *Stewart* that commercial property owners are responsible for maintaining sidewalks abutting their property.[13] This revision of the common law rule was the first step in diluting the classic rule of no liability absent affirmative conduct. After *Stewart*, mere proximity to a sidewalk made commercial property owners liable for abutting pieces of public property.

The *Stewart* majority based its decision on a fairness rationale. The Court reasoned that commercial property owners "retain considerable interests in and rights to use [abutting] sidewalks over and above those of the public – a fact which renders imposition of the duty of maintenance upon them appropriate and not 'arbitrary'"; further, it held that such owners "are in an ideal position to inspect [these] sidewalks and to take prompt action to cure defects."[14] The duty imposed on owners of commercial property abutting a sidewalk is not limited to artificial conditions, like surface defects, cracks and holes. It also applies to natural conditions, like snow and ice accumulation. The same theory applies in both situations: abutting commercial property owners retain considerable interest in the adjoining sidewalk and are well

[12] Yanhko v. Fane, 362 A.2d 1, 4 (N.J. 1976).
[13] Stewart v. 104 Wallace St., Inc., 432 A.2d 881, 887 (N.J. 1981).
[14] *Id*. at 887-88.

positioned to inspect and maintain it regularly.[15]

In order to justify this about-face, the New Jersey Supreme Court reviewed the development of sidewalk liability law focusing on the utility of sidewalks to support the imposition of liability on abutting commercial property owners. The Court noted: "[c]onsistent with their function, it has long been the law of this State that '[a] sidewalk is intended primarily for pedestrians' and that 'the primary function of the sidewalk [is] the public's right to travel on it.'"[16] The Court further stated, "[a]s a consequence of this primary right of the public to use the sidewalk . . . any act or obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance."[17] The Court justified its reasoning by observing that the public "has the right to assume that there is no dangerous impediment or pitfall. . . ."[18] Although an abutting property owner has considerable interest in and right to use the sidewalk, that right is subject to the "public's paramount easement of unobstructed use."[19]

The underlying rationale for imposition of liability focuses on "the benefits of sidewalks to abutting commercial owners," and the fact that such a rule "would serve the dual purpose of providing recourse to innocent pedestrians and an incentive to abutting commercial owners to keep their sidewalks in good repair."[20] In imposing a duty upon abutting commercial property owners, the Court assumed benefits to the business, specifically ease of access to and from their establishments by the pedestrian public who have a right "to safe and unimpeded passage along the sidewalk."[21]

In *Abraham v. Gupta*, the Appellate Division held there was no legal basis for sidewalk liability because the property was vacant and no business operations or activities were being conducted at the property at the time of the accident.[22] The Appellate Division reasoned that because

[15] *See* Mirza v. Fillmore Corp., 456 A.2d 518, 521 (N.J. 1983).

[16] *Stewart*, 432 A.2d at 884 (quoting Davis v. Pecorino, 350 A.2d 51, 53 (N.J. 1975) (citations omitted)).

[17] *Id.* at 884 (quoting Saco v. Hall, 63 A.2d 887, 889 (N.J. 1949)).

[18] *Id.* (quoting Saco, 63 A.2d at 889).

[19] *Id.*

[20] Nielsen v. Borough of Metuchen, 810 A.2d 600, 601 (N.J. Super. Ct. App. Div. 2002) (citing Stewart, 432 A.2d at 884).

[21] *Stewart*, 432 A.2d at 884.

[22] Abraham v. Gupta, 656 A.2d 850, 852 (N.J. Super. Ct. App. Div. 1995), *certif. denied*, 663 A.2d 925 (N.J. 1995).

the property (1) was not owned by or used as part of a contiguous commercial enterprise or business; (2) did not entertain a daily business activity on the lot to which safe and convenient access was essential; and (3) had no means of generating income to purchase liability insurance or to spread the risk of loss, there was no benefit to the property owner justifying imposition of liability for accidents resulting from an unsafe sidewalk.[23]

Reflecting the difficult task of line drawing resulting from the *Stewart* rule, the Appellate Division in *Gray v. Caldwell Wood Products, Incorporated*, reversed the entry of summary judgment in favor of the owner of a vacant commercial building defendant where the trial court, in reliance on *Abraham*, concluded that the defendant's commercial property was not subject to sidewalk liability because, as a vacant building, the property was not being used at the time of the accident.[24] In granting summary judgment, the trial court reasoned:

> There has to be a-a business enterprise being conducted on the property, whether it's vacant or not, to have the capacity to generate income. Whether they're profitable or not doesn't matter. Once you have an enterprise being conducted from a property under *Stewart*, and as articulated in *Abraham v. Gupta*, you are subject to sidewalk liability.
>
> . . . .
>
> Where there is no use of the property, there can be no liability. So summary judgment is being awarded . . . .[25]

The Appellate Division disagreed and reversed the entry of summary judgment in favor of the owner holding that a vacant commercial building is unlike a vacant commercial lot at issue because "[t]he vacant property could have been put to use to generate income as a retail store" and the defendant made the property accessible to potential buyers, maintained property insurance and "sold the property to make money."[26] None of these details make commercial property all that unlike non-commercial property, however, and every property might be put to a use that generates income.

Thus, the *Stewart* rationale that the benefit a sidewalk provides to an abutting property owner is a sufficient rationale to impose liability on

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[23] *Id.*

[24] Gray v. Caldwell Wood Prod., Inc., No. A-0120-11T1, 2012 WL 1569785, at *1 (N.J. Super. Ct. App. Div. May 7, 2012).

[25] *Id.* at *1-2.

[26] *Id.* at *3.

an adjoining property owner justifies imposing liability for unsafe conditions can be applied to non-commercial property owners as well. Indeed, *Gray* appears to extend the *Stewart* holding to property that "*could have been* put to use to generate income" and may extend liability beyond that anticipated by *Stewart*.[27] In determining whether a use is commercial enough to justify imposition of liability on the adjoining property owner, courts have focused on the activities of the property owner and have engaged in a pigeon-holing of uses that has unduly complicated sidewalk liability law.

II. THE FOUR CATEGORIES OF NON-COMMERCIAL SIDEWALK LIABILITY IN NEW JERSEY

Beyond categorizing a property owner as commercial or non-commercial, non-commercial uses are further segregated into one of four subcategories. Those subcategories are residential, religious/charitable, public, and mixed-use. The classification of non-commercial property is crucial to a plaintiff's case against a property owner, as different precedent and legal standards govern each subcategory, adding to the lack of fairness, uniformity and predictability in the law.

A. Residential

Residential homeowners generally have no duty to maintain sidewalks abutting their property absent an affirmative act that caused or contributed to the unsafe condition. Thus, the common law rule imposed a duty when the property owner "negligently constructed or repaired the sidewalk or used it in a way that rendered it unsafe."[28] "[T]he owner[] in making such use of the way is required to do so by a method of construction as not to create a nuisance but having done so is under a further duty to exercise reasonable care to keep the structure safe for the use of the public."[29] If the defect was caused by an affirmative act of a predecessor in title, a duty may be imposed on the current owner and the predecessor in title even after the property has

[27] *Id.*

[28] Guerriero v. Palmer, 417 A.2d 547, 548 (N.J. Super. Ct. Law Div. 1979) (citing Yanhko v. Fane, 362 A.2d 1, 3 (N.J. 1976).

[29] Young v. Nat'l Bank of N.J., 191 A. 848, 848-49 (N.J. 1937). *See also* Hayden v. Curly, 169 A.2d 809, 812 (N.J. 1961); NJ MODEL CIVIL JURY CHARGES § 5.20B(B)(3) (2009).

been conveyed.[30]

Bierylo v. Santos provides a good illustration of this rule.[31] Plaintiffs Florence and Michael Bierylo appealed from a summary judgment order dismissing their complaint arising out of injuries sustained by Florence.[32] Florence fell on an upraised portion of the public sidewalk abutting property owned by defendants Angel and Maria Santos.[33] Sometime after they purchased their property, the Town of Kearny planted a tree on the grassy strip between the sidewalk and the curb.[34] Over time the roots of the tree extended under the sidewalk and caused one or more of the sidewalk slabs to rise up creating a one inch height differential between the adjacent slabs.[35] While walking on the sidewalk, the plaintiff tripped and sustained significant injuries.[36] According to the plaintiff's expert, "the raised slab constituted a tripping hazard in violation of applicable standards."[37] The court noted that it seemed clear the defendants knew or should have known of the uneven condition of the sidewalk caused by the tree roots.[38] Mr. Santos testified, however, that he did not plant the tree, performed no maintenance on the tree and "had never made any repairs to the sidewalk until immediately following the accident."[39]

The court held that because the town planted the tree, the defendants were not responsible for its placement, care or maintenance.[40] The court noted further that, although the entire area of law has become a "continuing saga"[41] without "any current justification for the rule insulating owners of purely residential property from liability for"[42] the common problem of raised sidewalks, it considered itself bound by *Yanhko*.[43] It went on to note that the matter continues to

[30] Cogliati v. Ecco High Frequency Corp., 456 A.2d 524, 526-27, 530 (N.J. 1983).
[31] Bierylo v. Santos, No. A-1873-05T2, 2006 WL 2052061, at *1 (N.J. Super. Ct. App. Div. July 25, 2006).
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Bierylo*, 2006 WL 2052061, at *2.
[38] *Id.*
[39] *Id.*
[40] *Id.* at *10.
[41] *Id.* (citing Smith v. Young, 692 A.2d 76, 84 (N.J. Super. Ct. App. Div. 1997)).
[42] *Id.* (citing Smith, 692 A.2d at 100 (Brochin, J., dissenting)).
[43] *Bierylo*, 2006 WL 2052061, at *10.

be ripe for re-evaluation.[44] The court concluded by commenting that sidewalk liability law continues to "represent a legal albatross" of the judicial system,[45] which, despite the New Jersey Supreme Court's invitation over twenty-five years ago in *Stewart*,[46] had not been addressed by the New Jersey Legislature.

As to natural accumulations of snow and ice, residential homeowners have no duty to inspect and maintain an abutting sidewalk. Municipal ordinances that impose a duty on homeowners to maintain the sidewalks abutting their homes have been held not to provide a private right of action for violations of such ordinances.[47] The only penalty for violation of such a municipal ordinance is to pay the penalty prescribed by the ordinance.[48]

B. Religious/Charitable

While the law generally protects religious and charitable entities through the Charitable Immunity Act, New Jersey courts have imposed liability on religious and charitable organizations, including churches and schools, for accidents on abutting sidewalks when they engage in business-like activity.[49] For instance, in *Christmas v. City of Newark*, a pedestrian injured on a sidewalk sought to recover from the City of Newark for her injuries.[50] The offending sidewalk abutted property "owned by trustees of the First Presbyterian Church" and was leased to a doughnut shop.[51] The court overturned a jury verdict rendered against the City, concluding that the abutting property owner, the First

[44] *Id*. at *11 (citing Yanhko v. Fane, 362 A.2d 1, 6-13 (N.J. 1976) (Pashman, J., dissenting)).

[45] *Id*. (quoting Yanhko, 362 A.2d at 6 (Pashman, J., dissenting)).

[46] "We note, however, that the law of sidewalk liability is an appropriate subject for reconsideration by the Legislature." Stewart v. 104 Wallace St., Inc., 432 A.2d 881, 889 n.6 (N.J. 1981).

[47] *Bierylo*, 2006 WL 2052061, at *6-7. This rule has been a part of the common law for decades. The New Jersey Supreme Court stated in Sewall v. Fox that "'[o]rdinances requiring persons to keep their sidewalks free from ice impose a purely public duty, and persons injured by slipping on the ice cannot bring private action against the owners of the premises.'" Sewall v. Fox, 98 N.J.L. 819, 821 (1923); see also Brown v. Saint Venantius Sch., 544 A.2d 842, 847 (N.J. 1988).

[48] *Sewall*, 98 N.J.L. at 822; see also Liptak v. Frank, 502 A.2d 1147, 1149 (N.J. Super. Ct. App. Div. 1985).

[49] N.J. STAT. ANN. § 2A:53A-7 (West 2000).

[50] Christmas v. City of Newark, 523 A.2d 1094, 1095 (N.J. Super. Ct. App. Div.), *certif. denied*, 528 A.2d 19 (N.J. 1987).

[51] *Id*.

Presbyterian Church, and its tenant were the responsible parties.[52] The court determined that in leasing a portion of their property to a doughnut shop, the church should be held liable as a commercial property owner. Finding that "the *Stewart* court's holding unambiguously states that commercial property owners, not the municipality, owe a duty to pedestrians to maintain sidewalks which abut their property,"[53] the court held that the church, not the city, was responsible for maintaining the sidewalk abutting the doughnut shop.[54]

Likewise, in *Brown v. Saint Venantius School*, the New Jersey Supreme Court considered whether a school that was part of church organized as a religious corporation pursuant to N.J. STAT. ANN. sections 16:15-1 to -8 could be considered a commercial enterprise for purposes of *Stewart* liability:[55]

> Undeniably, a for-profit private school, not connected with any charity, charging tuition and operated in all other respects substantially like defendant, would be deemed, under *Stewart* and *Mirza*, a commercial landowner for purposes of sidewalk liability. Despite its similarity to such a clear case, defendant St. Venantius School asserts that because it is a nonprofit religious institution, it cannot be classified a "commercial" landowner under *Stewart*. We disagree.[56]

In reaching this conclusion, the Court stated that the point of inquiry is the nature of the activities in which the charitable organization is engaged:

> Balancing these interests in cases such as the one before us requires first that we consider the use of the abutting land, not the nature of the organization that owns the property. For example, if a church owned an abutting property used for a restaurant or hotel, the church in that instance would clearly be a commercial landowner . . . Conversely, the sidewalk in front of a parsonage or rectory abuts residential property. Thus, we reject the notion that religious organizations per se cannot be commercial landowners for purposes of sidewalk liability.[57]

Questionable assumptions and unsupported notions of fairness that

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[52] *Id.* at 1099.
[53] *Id.* at 1098-99.
[54] *Id.* at 1099.
[55] Brown v. Saint Venantius Sch., 544 A.2d 842, 843 (N.J. 1988).
[56] *Id.* at 846.
[57] *Id.*

led the Court to impose a duty on commercial property owners to inspect and maintain an adjacent sidewalk seem inconsistent and even more inequitable when applied to a nonprofit charitable institution such as Saint Venantius School. The inequity resulting from the Court's analysis demonstrates the lack of principled rationale. For instance, if one is in front of a church heading for services and falls on the adjacent sidewalk, the church is immune from liability as a charitable organization.[58] If the same person is walking a child to the adjacent for profit school on property owned by the church, however, the church will be held to the greater duty of care standard of commercial property owners and will be held liable for failing to discover and make safe an unsafe condition. This demonstrates the *Stewart* rule's unfairness and lack of uniformity and predictability. Even if one were to argue that a for-profit commercial property owner should be held liable on the theory that the for-profit commercial property owner gets more use out of the sidewalk and the sidewalk increases the profitability of the business due to ease of access, the same theory does not apply to nonprofit commercial institutions like Saint Venantius School. The Church made no money on the operation of the school and provided the school as a service to the community. Under the *Stewart* rule, the school is a major liability for the Church. A for-profit commercial property owner may be able to pass on to its customers the cost of sidewalk maintenance, repairs and legal liability as a cost of doing business, but nonprofit commercial property owners, in many cases, do not have that luxury. The *Stewart* rule, initially inspired by a sense that it advanced the public interest, may, in fact, dissuade charitable and religious entities from engaging in activities that benefit the community because of a concern that by doing so, they are increasing their exposure to liability.

In *Restivo v. Church of Saint Joseph of the Palisades* the court reached a similar unprincipled result. There, a church was held liable for injuries sustained on a sidewalk in front of a church-owned building,

[58] The New Jersey Legislature has mandated that the Charitable Immunity Act shall be construed liberally to afford immunity "in furtherance of the public policy for the protection of nonprofit corporations, societies and associations organized for religious, charitable, educational or hospital purposes." N.J. STAT. ANN. § 2A:53A-10 (West 2000); Hardwicke v. Am. Boychoir Sch., 902 A.2d 900, 918-19 (N.J. 2006). To successfully obtain Charitable Immunity, an entity must be: (1) formed for nonprofit purposes; (2) organized exclusively for religious, charitable or educational purposes; and (3) promoting such purposes at the time of plaintiff's injury who was then a beneficiary of the entity's charitable works. N.J. STAT. ANN. § 2A:53A-7 (West 2000).

leased in part to a nonprofit community organization that ran a Head Start community action program on the premises.[59] The rest of the building was residential and all of the tenants were paying either below-market rents or no rent at all.[60] The fact that the church made no profit through the ownership of this building and that use of the property by the Head Start program and low-income tenants advanced the charitable works of the church, was essentially ignored by the Appellate Division, which considered the church to be engaged in commercial activity and therefore subject to liability.[61] For the *Restivo* court, the use of the property for rental purposes was commercial even though it rented to Head Start for less than market value.[62] Furthermore, the fact that it leased the other part of the property to tenants who lived in apartments, also at a below-market rate, was of no consequence for the court.[63] The benefit a sidewalk provides to an abutting commercial property owner that led the New Jersey Supreme Court to consider it fair to impose an obligation to inspect and make safe the sidewalk seems entirely inapplicable to a church providing subsidized housing to the poor and a Head Start program for inner city children and such application of the *Stewart* rule is misguided.

Conversely, a church used only for non-commercial activity is not subject to liability for injuries resulting from defects on an abutting sidewalk. In *Dupree v. City of Clifton*, the plaintiff fell while walking south along the uneven public sidewalk bordering the Netherlands Reformed Church's property.[64] The sidewalk's uneven condition was caused by a tree with roots running underneath.[65] The plaintiff's foot caught the raised edge of the sidewalk, causing her to trip and tumble toward the tree, smashing her hand and wrist into the tree trunk and sustaining injury.[66] The church was a nonprofit corporation created solely for religious and charitable purposes; none of its property was rented or otherwise used for any other purpose.[67] The parties also discovered that

[59] Restivo v. Church of Saint Joseph of the Palisades, 703 A.2d 997, 998 (N.J. Super. Ct. App. Div. 1997).
[60] *Id*.
[61] *Id*. at 1004.
[62] *Id*.
[63] *Id.* at 1003.
[64] Dupree v. City of Clifton, 798 A.2d 105, 106 (N.J. Super. Ct. App. Div. 2002).
[65] *Id*.
[66] *Id.*
[67] *Id.* at 106-07.

the Church constructed the sidewalk about forty years before plaintiff's fall, and repaired a portion of the sidewalk eight or ten years prior to the accident.[68]

Plaintiff hired a consulting engineer who concluded that the sidewalk was negligently maintained.[69] His inspection revealed that the roots of the tree lifted the sidewalk abutting the Church's property two and one-quarter inches.[70] Plaintiff's claim rested on his belief that "'persons responsible for the maintenance of [the] sidewalk should have performed regular inspections of the premises to assure that such defects did not remain over long periods of time since their occurrence is so common.'"[71]

The court held that the Church was a nonprofit corporation "created solely for religious, charitable and educational purposes."[72] There was no evidence that it engaged "in any commercial or business-like activity."[73] As such, the court held the Church did not have a duty to maintain the sidewalk because it was a non-commercial property owner.[74]

In *Dupree* the church-defendant did not operate a school, day-care center or other so-called commercial service that would have exposed it to liability as in *Brown* and *Restivo*. The irony is palpable – a religious or charitable entity that does not partner with other entities to provide needed services to the community will not face liability while one that does will be liable. The *Stewart* rule's blind adherence to the commercial nature of activities conducted on the abutting premise without considering the lack of profit and the undeniable public benefit leads to anomalous results. The lack of fairness, uniformity and predictability of the *Stewart* rule may result in churches and other nonprofit institutions shuttering their "commercial" yet socially beneficial works for fear of the liability imposed upon these so-called commercial enterprises.

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[68] *Id.*
[69] *Id*. at 107.
[70] *Dupree*, 798 A.2d at 107.
[71] *Id.*
[72] *Id*.
[73] *Id.*
[74] *Id.* at 111.

C. Public

Public entities have an entirely different duty regarding sidewalks. The Tort Claims Act[75] (Act) provides that "a public entity is not liable for an injury"[76] caused by an act or omission "[e]xcept as otherwise provided by this Act."[77] Further highlighting the lack of uniformity in this area of law, "immunity is the rule and liability is the exception" under the Act.[78] The exception to the general rule of immunity relevant to sidewalk liability is found in N.J. STAT. ANN. section 59:4-2, which covers dangerous conditions on public property. That statute provides:

A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

> a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.
>
> Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.[79]

The Act defines "public property" as property that is "owned or controlled by the public entity."[80] A "'[d]angerous condition' means a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used."[81] By the explicit terms of the Act, a public entity can be liable for dangerous conditions of property it does not own, as long as the public entity "controls" the dangerous property,

[75] N.J. STAT. ANN. §§ 59:1-1 to -12-3 (West 2006).
[76] N.J. STAT. ANN. § 59:2-1.
[77] N.J. STAT. ANN. § 59:3-1.
[78] Posey *ex rel.* Posey v. Bordentown Sewerage Auth., 793 A.2d 607, 613 (N.J. 2002).
[79] N.J. STAT. ANN. § 59:4-2.
[80] N.J. STAT. ANN. § 59:4-1(c).
[81] N.J. STAT. ANN. § 59:4-1(a) (West 2006).

provided that the requirements of notice, causation, foreseeability, "palpably unreasonable" condition of the property, and permanency of injury are met.

Despite acknowledging that public housing authorities must operate within limited budgets and are precluded by state and federal statutes from raising rents, the New Jersey Supreme Court found "no reason to treat public landlords differently from other commercial landlords" in *Bligen v. Jersey City Housing Authority*.[82] In Bligen the plaintiff was on her way to meet a friend when she stepped off the curb into the parking area outside her public housing project when she slipped and fell, severely fracturing her wrist.[83] Although there had been a snowstorm the previous Friday, no snow had been cleared over the weekend.[84] The Court held that the public housing authority was not entitled to immunity under the Act and the common law immunity for the negligent removal of snow does not apply to public housing authorities because public housing authorities were deemed to have the same obligation to their tenants as commercial landlords under the common law.[85] Displaying his renowned wit, Justice Clifford in his dissent stated "the Court skate[d] on thin ice" with its decision in *Bligen* as public entity immunity for garden-variety snow removal activities "ha[d] been frozen in our jurisprudence for a quarter of a century."[86] Declaring the majority opinion a "snow job" Justice Clifford "suggest[ed] that the integrity of the common law would be better served by an outright acknowledgement that the Court is shoveling a new path."[87]

In *Roman v. City of Plainfield*, the City of Plainfield forbade the owner of property abutting the sidewalk from cutting the roots of the City's tree which grew under the sidewalk. The City assured the property owner it would take care of the roots so the sidewalk could be repaired. The question was whether this assurance constituted sufficient evidence of "control" of that private property within the meaning of N.J. STAT. ANN. section 59:4-1(c). The *Roman* court held that in assuring the property owner that it would remove the roots, the City exercised

[82] Bligen v. Jersey City Hous. Auth., 619 A.2d 575, 581 (N.J. 1993).
[83] *Id*. at 571.
[84] *Id*.
[85] *Id*. at 582.
[86] *Id*. (Clifford, J., dissenting).
[87] *Id*. (Clifford, J., dissenting).

sufficient control over the property to render itself subject to liability for the plaintiff's injuries under the Act.

D. Mixed Use

The realm of mixed commercial/residential use property is perhaps the most unfair, non-uniform and unpredictable area of New Jersey sidewalk liability law. State courts utilize a "predominant use" test to determine how a mixed-use property should be categorized for purposes of liability. The courts consider factors including extent of income and extent of non-owner occupancy in terms of time and space to determine whether the owner's residential occupancy preponderates. If there are factual disputes with respect to these factors, or if it is not clear how to weigh them, resolution by a trier of fact is required.[88] The need to determine predominant use on a case-by-case basis leaves little jurisprudential guidance.[89]

In *Hambright v. Yglesias*, the Appellate Division held a landlord liable for failure to remove ice from a sidewalk abutting a two-family house in which both units were occupied by tenants, considering the house to be more commercial in nature than residential.[90] The plaintiff slipped and fell on an icy public sidewalk in front of a two-family house owned by the defendant.[91] Though the sidewalk was "an entire sheet of ice" the plaintiff decided to take a "calculated risk" and attempted to navigate it.[92] Hambright brought suit to recover for her ensuing injuries.[93] On appeal, defendant contended that his property was not a commercial property within the meaning of *Stewart* and *Mirza*.[94] The

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[88] Avallone v. Mortimer, 599 A.2d 1034, 1036 (N.J. Super. Ct. App. Div. 1991).

[89] The Appellate Division recognized some of the difficult practical implications of the mixed-use analysis in Smith v. Young, 692 A.2d 76, 82 (N.J. Super. Ct. App. Div. 1997):

> The Stewart/Mirza rule . . . creates significant ancillary problems, apart from those of direct interpretation and application. For example, if a property owner who resides in a two or three-family home and rents the other flat or flats at market rates, is considered, as a matter of law, to be engaged in a commercial use, it may be that the owner will experience difficulty in obtaining coverage under a homeowner's insurance policy which contains a business pursuits exclusion, notwithstanding that the property is used only for residential purposes. See Wickner v. Am. Reliance Ins. Co., 661 A.2d 1256, 1259-61 (N.J. 1995).

[90] Hambright v. Yglesias, 491 A.2d 768, 769 (N.J. Super. Ct. App. Div. 1985).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 769-70.

court in *Hambright* noted that *Stewart* made clear that it was the nature of the ownership that mattered, not the use to which the property is put.[95] Recognizing the inherent difficulty in classifying a building that has two important uses, the court stated "[a]partment buildings are residential in the sense that they are places where people live; they are commercial in the sense that they are operated by their owners as a business."[96] Here, because it was undisputed the property was owned and operated as a business venture, the court found it was a commercial property within the meaning of *Stewart* and *Mirza*.[97] Foretelling controversies yet to come in which the necessary line-drawing would be even more arbitrary, the court "express[ed] no opinion as to the result where a two-family house is partly owner-occupied."[98]

Another example of the mixed use dilemma was provided in *Gilhooly v. Zeta Psi Fraternity*, in which a fraternity house was treated as commercial property.[99] Defendant Zeta Psi owned and maintained a fraternity house on the New Brunswick campus of Rutgers University, which abutted a public sidewalk running along College Avenue.[100] The plaintiff was walking on the public sidewalk in front of defendant's fraternity house when she fell, sustaining injury.[101] The defendant conceded that the sidewalk was in disrepair, but nevertheless contended that it was entitled to summary judgment as an owner of residential property pursuant to the rule of nonliability set forth in *Stewart*.[102]

Defendant argued that the property in question, owned by the Zeta Psi Alumni Association, was used exclusively as a home for undergraduate students who were members of the fraternity and was therefore residential in character.[103] In support of its position, the defendant pointed out that the Alumni Association which oversaw the operation was comprised of individuals who volunteered their services.[104] The defendant further asserted that, with the exception of the

[95] *Id.*
[96] *Hambright*, 419 A.2d at 769.
[97] *Id.*
[98] *Id.*
[99] Gilhooly v. Zeta Psi Fraternity, 578 A.2d 1264, 1268 (N.J. Super. Ct. Law Div. 1990).
[100] *Id.* at 1265.
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 1266.

chef, there were no paid positions at the fraternity.[105] The fraternity house provided living space for forty-two undergraduate members, each paying a fee for room and board.[106]

The defendant argued that the sole purpose of the house was to provide a place for fraternity members to live while attending school but conceded that many resided in dormitories and other non-fraternity owned housing.[107] All members, whether residents or not, paid dues utilized by the fraternity to pay for social functions.[108]

Despite noting that the fraternity house was a nonprofit organization, the court held that defendant Zeta Psi was a hybrid organization, both commercial and residential: commercial in the sense that it functioned as a social club for all its members and alumni and residential by virtue of the fact that forty-two members resided there during the school year.[109] As such, the court denied the defendant's motion for summary judgment, holding that for the purposes of sidewalk liability – in accordance with the rule established in *Stewart* – the fraternity was a commercial property owner subject to liability for negligent maintenance of the sidewalk abutting its premises.[110]

Conversely, in *Borges v. Hamed*, a three family owner-occupied home in which two of the units were rented was treated as residential.[111] Plaintiff Albertina Borges fell on the sidewalk in front of a three-apartment house owned by defendants Faiez and Lourdes Hamed.[112] Borges sued the Hameds for damages resulting from her injuries.[113] The property in question was a legal three-family house owned by the Hameds.[114] They lived in the third floor apartment.[115] Ms. Hamed's mother, stepfather and brothers occupied the second floor apartment.[116] Her sister, her sister's husband and their children lived on the first

[105] Gilhooly, 578 A.2d at 1265-66.
[106] *Id*. at 1266.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 1267.
[110] *Id.* at 1267-68.
[111] Borges v. Hamed, 589 A.2d 169, 170 (N.J. Super. Ct. App. Div. 1991).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*

floor.[117] The second and first floor tenants paid rent, but there was nothing in the record to show if the rent paid yielded a profit or merely covered the costs of owning and running the building.[118] The court held that this "vertical family compound" could not be considered a commercial property.[119] Unlike the fraternity house in *Gilhooly*, the Hameds' property was not used for social purposes. Like the *Hambright* court, the court in *Borges* explicitly noted it was not considering what the result should be if defendants lived in one apartment and rented the other two at market rates.[120]

A slightly different circumstance was found in *Smith v. Young*, which involved a co-owned, two-family home, "unquestionably residential in use."[121] One of the co-owners, defendant Young, occupied the first floor, and had been living on the property for more than twenty-five years.[122] She considered herself the owner of the portion of the property in which she resided.[123] The co-owner of the remaining interest in the property was the estate of Ms. Young's sister, defendant Lorraine Benjamin, who died before the plaintiff's injuries occurred and who had lived on the second floor.[124] At the time the plaintiff's injuries occurred, the estate's co-ownership interest in the property was managed by Deborah Benjamin, Lorraine's daughter.[125] Deborah Benjamin rented out the second floor to unrelated tenants and collected the rent on behalf of the estate.[126] Ms. Young looked after the property and hired a handyman to clear the sidewalk of snow and ice whenever necessary.[127] The co-owners divided the costs of property maintenance and repair.[128]

The court held that just as the activities of the private school in *Brown* had no residential characteristics, the uses here had no real commercial qualities: "[w]e may choose to label rental of a single flat, presumably at market rates, as commercial for *Stewart*/*Mirza*

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117 *Borges*, 589 A.2d at 170.
118 *Id.*
119 *Id.*
120 *Id.*
121 Smith v. Young, 692 A.2d 76, 84 (N.J. Super. Ct. App. Div. 1997).
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.*
127 *Smith*, 692 A.2d at 84.
128 *Id.*

classification purposes, but doing so does not transform the activity, as a matter of fact, into a business."[129] The court noted the difficulties of classifying a property such as this within the *Stewart*/*Mirza* framework.

> And how, in the peculiar facts of this case, would the calculation be made? Would the rental income of the tenanted flat be balanced against the whole of the carrying costs even though half of those costs are borne by a residing owner who receives none of the rental income? Is only half of the rental income to be balanced against the half of the carrying charges borne by the owner who receives all of the rent? Would either approach, or any other, be a real basis of decision, or would it be one artificially created to deal with the apparent equities of the particular situation in the light of a dictated need to classify the property?[130]

Despite its resistance to articulating an alternate approach based upon the unique facts of the case, the court lamented that "*Stewart* requires that the property be classified."[131] The court held that the owners did not have a duty to maintain the abutting sidewalk because the New Jersey Supreme Court did not intend for small owner-occupied dwellings to be subsumed within the classification of commercial property.[132] The court concluded its analysis by expressing its frustration in the arbitrary uncertainty in this area of the law, noting it was "aware that this holding does nothing to resolve the classification issues regarding all non-owner-occupied properties and those that are owner-occupied but accommodate more than two or three families."[133] The court predicted that "the lingering difficulties that the currently prevailing rule imposes will persist as long as courts are required to classify properties according to the existing commercial/residential dichotomy."[134]

In a landmark case affirmed on appeal, the Appellate Division in *Luchejko v. City of Hoboken* held that a condominium association was not a commercial entity for the purpose of sidewalk liability.[135] The plaintiff slipped and fell on ice on a public sidewalk abutting a 104 unit

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[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id*. at 85.
[133] *Smith*, 692 A.2d at 85.
[134] *Id.*
[135] Luchejko v. City of Hoboken, 998 A.2d 506, 514 (N.J. Super. Ct. App. Div. 2010), aff'd, 23 A.3d 912 (N.J. 2011).

condominium complex in Hoboken.[136] Skyline Condominium Association (Skyline) was the entity responsible for maintaining the adjacent sidewalks and other common elements of the building.[137] Skyline contracted with CM3 Management Company (CM3) to manage the property, and CM3 hired D&D Snow Plowing Company (D&D) to provide snow plowing services for all the sidewalks surrounding the building.[138] The plaintiff asserted that at the time he fell, the sidewalk was covered in black ice and partially covered in snow.[139] The plaintiff sued the City of Hoboken, Skyline and CM3 and subsequently filed an amended complaint adding D&D as a defendant.[140]

The plaintiff argued that Skyline was a commercial entity for purposes of sidewalk liability.[141] Citing *Stewart*, the court stated the general rule is that apartment complexes are characterized as commercial and thus are generally responsible for maintaining any abutting sidewalks.[142] However, the court cited the defendants' properties in *Borges* and *Smith* as examples of multi-family buildings that were not held liable for sidewalk defects under *Stewart*.[143] The court concluded that a property would not be considered commercial if it is predominantly owner-occupied.[144] Highlighting the complex nature of the inquiry, the court discussed a balancing test to be employed in situations like this, noting the tensions between the nature of ownership and the ability to pass along liability.[145] The court determined the key issue in determining whether a property is commercial turns on its

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[136] *Id.* at 509.

[137] *Id.*

[138] *Id.*

[139] *Id.* The snow that remained on the sidewalk was in violation of a Hoboken ordinance requiring snow to be removed from sidewalks within six hours.

> The owner or occupant or person having charge of any dwelling house, store or other building or lot of ground in the city shall, within the first (6) hours after every fall of snow or hail, or after the formation of any ice upon the sidewalks, unless the ice is covered with sand or ashes, cause the snow and ice to be removed from the sidewalk abutting such dwelling house, store, building or lot of land and piled not more than eighteen (18) inches from the curb line into the public street or road.

HOBOKEN, N.J., CODE § 168-8(A) (1994).

[140] *Id.*

[141] *Luchejko*, 998 A.2d at 511.

[142] *Id.*

[143] *Id.* at 512-13.

[144] *Id.* at 513.

[145] *Id.*

income-generating capacity.[146] Here, Skyline was a nonprofit corporation and its membership was open only to unit owners.[147] Although the corporation collected fees, the funds were used solely for the upkeep of the property, and no profit was realized by the corporation.[148] The court held that this is different from a rental apartment building, which is considered commercial due to the owner's capacity to generate income from the property.[149] The court reasoned that though Skyline did have the capacity to spread the risk of loss arising from injuries on abutting sidewalks "through higher charges for the commercial enterprise's goods and services,"[150] Skyline did not provide the public with goods or services and therefore could not increase revenue collection to accommodate such liability.[151]

Lastly, the court held that a property should not be considered commercial if it is predominantly owner-occupied.[152] Skyline's underlying nature was predominantly owner-occupied and it was unable to generate an overall income and spread the risk of loss through higher charges on goods and services.[153] The court concluded that Skyline was not subject to sidewalk liability pursuant to *Stewart* and there was no basis from which a reasonable trier of fact could find that Skyline was a commercial entity.[154]

The New Jersey Supreme Court granted certification and affirmed the Appellate Division on appeal.[155] In a lengthy opinion, the Court attempted to synthesize over 100 years of sidewalk liability as a seamless evolution of sentiment on tort liability for sidewalk defects. The Court seemed intent on insisting it had been ideologically consistent all along, referring to its line of opinions glowingly. At various points in its opinion the Court stated "We did not then extend sidewalk liability to residential properties . . . and have not done so

[146] *Id.*
[147] *Luchejko*, 998 A.2d at 513.
[148] *Id.*
[149] *Id.* (citing Stewart v. 104 Wallace St., Inc., 432 A.2d 881, 889 n.7 (N.J. 1981).
[150] *Id.* (citing Mirza v. Fillmore Corp., 456 A.2d 518, 522 (N.J. 1983).
[151] *Id.*
[152] *Id.* at 514 (citing Avallone v. Mortimer, 599 A.2d 1034, 1036 (N.J. Super. Ct. App. Div. 1991).
[153] *Luchejko*, 998 A.2d at 513 (citing Mirza, 456 A.2d at 522); Abraham v. Gupta, 656 A.2d 850, 852 (N.J. Super. Ct. App. Div. 1995).
[154] *Id.* at 514.
[155] Luchejko v. City of Hoboken, 23 A.3d 912, 914 (N.J. 2011).

since"[156]; and "[t]here is no call to upset the well-established and longstanding difference in the duties imposed on residential versus commercial property owners"[157]; and "[i]t was of considerable consequence that the new rule was being adopted only for commercial property owners. . . ."[158] Seeming a bit defensive of the clarity, or lack thereof, of New Jersey case law on the matter, the Court stated:

> In cases since, we may have grappled with what was or was not commercial property, but we have not deviated in our holdings or in our discussions of the law . . . .[159]

However, the inconsistencies in the Court's treatment of sidewalk liability law are readily apparent from the start. In a delicate balancing act, the Court instructs that even though it has been ideologically consistent as to the division of burdens between residential property owners and commercial property owners, when analyzing nonprofit owners, "the examination must focus on 'the nature of the use of the property and *not the nature of the ownership*.'"[160] Further complicating the inquiry, the Court stated it is not important whether actual profit is obtained through use of the property, but "whether a property's predominant use has the capacity to generate income . . . ."[161]

Despite heralding *Stewart*'s "multiple reasons that supported imposition of the new rule for commercial entities"[162] the Court noted that in *Stewart* the majority stated apartment buildings would be considered commercial properties under the new rule. Thirty years later in *Luchejko*, however, the New Jersey Supreme Court found a 104-unit condominium complex in one of New Jersey's largest cities to be a residential property.[163] The Court brushed aside the plethora of confusing opinions post-Stewart that have complicated the analysis of liability for sidewalk defects in New Jersey, stating "we need not address the universe of appellate decisions, with their fine distinctions."[164] These "fine distinctions" have made sidewalk liability the wild west of New Jersey tort law.

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156 *Id.*
157 *Id.*
158 *Id.* at 918-20.
159 *Id.* at 920 (emphasis added) (citations and quotations omitted).
160 *Id.* at 920 (emphasis added).
161 *Luchejko*, 23 A.3d at 921 (emphasis added).
162 *Id.* at 918.
163 *Id.* at 924.
164 *Id.* at 921.

The dissent noted that despite the majority's resoluteness in the uniformity of the Court's decisions since *Stewart*, "[t]he Appellate Division and trial courts have grappled with the commercial-residential distinction established in *Stewart* with varying results."[165] The dissent also noted that the confusion bred by *Stewart* has led to commercial property owners being exempt from liability and liability imposed on owners of residential property.[166] Despite reaffirming the difficulties *Stewart* has created, however, the dissent argued not for a return to a bright line rule but for an even more wishy-washy "weighing and balancing duty analysis."[167] Though not this Article's recommended course of action, the dissent's take on the duty analysis of sidewalk liability law in New Jersey was at least more honest, as it considered the Stewart court's public policy reason for extending liability to commercial property owners without compelling "classif[ication] [of] properties according to the . . . commercial/residential dichotomy."[168]

Capitalizing on the confusion resulting from the *Stewart* decision acknowledged by the majority in *Luchejko*, the plaintiff in *Mohamed v. Iglesia Evangelica Oasis de Salvacion* argued that a church that allows parish members to use its basement to celebrate birthdays and other events for nominal donations was "partially commercial" because it engaged in this economic activity.[169] The church also gave parishioners and their friends permission to park in its lot while they use public transportation or go shopping in the area.[170] Some gave donations for this privilege, while others did not.[171] The plaintiff argued that because the church was "partially commercial" she should be compensated for injuries sustained when she tripped on the sidewalk in front of the church.[172] The court determined it would have to decide whether the use of the church was, in fact, commercial, noting that the New Jersey Supreme Court in *Stewart* provided little guidance on the issue.[173] The

[165] *Id.* at 929 (Long, J., dissenting).

[166] "[S]ome premises which serve only as residences have found their way into the so-called "commercial" category . . . and some clearly non-residential premises have been spared from liability . . . ." *Id.* at 930 (Long, J., dissenting).

[167] *Luchejko*, 23 A.3d at 930.

[168] Smith v. Young, 692 A.2d 76, 100 (N.J. Super. Ct. App. Div. 1997).

[169] Mohamed v. Iglesia Evangelica Oasis de Salvacion, 30 A.3d 376, 376 (N.J. Super. Ct. Law Div. 2011).

[170] *Id.* at 376-77.

[171] *Id.* at 377.

[172] *Id.* at 376.

[173] "[The Stewart Court] intentionally gave little guidance as to what should constitute a

court discussed *Brown*, wherein the New Jersey Supreme Court held that using a church-owned property as a nonprofit religious school made the property commercial, and *Restivo*, where the court held a church liable for injuries caused by a defect on an abutting sidewalk because the church leased part of its premises to a nonprofit organization that rented space to needy families and employees for little or no rent.[174] Despite citing and discussing these instances whereby churches had been held liable as commercial enterprises even when engaging in charitable, nonprofit enterprises in furtherance of their mission, the court in *Mohamed* determined the church was immune from liability because "[a]lthough some money might exchange hands . . . the lack of formality and regulation indicates *something less than a commercial enterprise*."[175] Notably, the court failed to cite any support for the assertion that "formality" and "regulation" are indicia of a commercial enterprise.[176]

This inconsistency of results reflects the *Stewart* rule's unworkability. In *Hambright*, a two family house rented to tenants was deemed a commercial property, while in *Luchejko* a large apartment building in Hoboken was deemed a residential property. The church in *Hamed* collected money for use of its property yet retained its immunity, while the church-owned building housing a nonprofit school and apartments for the poor in *Restivo* was deemed a commercial enterprise. While some landlords, such as the landlord in *Hambright*, do garner a profit renting to tenants, they are also providing a benefit to the

'commercial' property." *Id*. at 378.

[174] *Id*.

[175] *Mohamed*, 30 A.3d at 379 (emphasis added).

[176] The Appellate Division reversed and remanded as the discovery period still had another five months to run when the trial court granted summary judgment in favor of the defendant. Mohamed v. Iglesia Evangelica Oasis de Salvacion, 38 A.3d 669, 673 (N.J. Super. Ct. App. Div. 2012). Depositions of the church's treasurer and pastor had recently been taken, and both testified that members and non-members of the church used the parking lot while shopping or commuting to work. *Id*. at 672. The church's treasurer admitted that donations were made by those who used the lot, that payments were made by check, and that records of donations by non-members were kept in a separate ledger. *Id*. The transcripts of these depositions were not available for the court's review at the time defendant's motion for summary judgment was being considered, though the transcripts were provided as part of plaintiff's motion for reconsideration, which was denied. *Id*. at 673. Citing Restivo, the court held that as "liability can be found, even against a nonprofit organization that uses the property for primarily religious purposes, if the organization engages in some degree of commercial activity on the premises" plaintiff should have been allowed to continue discovery to determine if acceptance of donations for use of the parking lot amounted to commercial activity. *Id*. at 675.

community. Not everyone can afford a home, so some people must rent or go homeless. Depending on the level of exposure to liability from a defective sidewalk, some homeowners might find that it is cheaper and more prudent to sell a house or let it sit vacant than to rent.

III. LIABILITY FOR NATURAL CONDITIONS

Theories of liability for unsafe conditions caused by natural circumstances such as tree roots growing under and lifting or cracking sidewalks, as in *Roman*, is another aspect of sidewalk law that is changing. Traditionally, no liability attached to an abutting property owner for injuries sustained by individuals outside the property if the condition that produced the injury was "natural" as opposed to "artificial."[177] The traditional distinction between "natural" conditions of land and artificial conditions has been steadily eroding. Prosser & Keeton discussed this erosion in their treatise on torts.[178] In addressing the issue of "non-liability" of property owners for a natural condition of land, they distinguished between rural and urban areas, recognizing the evolution of the land and the law:

> The rule of non-liability for natural conditions was obviously a practical necessity in the early days, when land was very largely in a primitive state. It remains to a considerable extent a necessity in rural communities, where the burden of inspecting and improving the land is likely to be entirely disproportionate not only to any threatened harm but even to the value of the land itself. But it is scarcely suited to cities, to say that a landowner may escape all liability for serious damage to his neighbors, merely by allowing nature to take its course. A different rule accordingly has been developing as to urban centers.[179]

In *Burke v. Briggs*, the Appellate Division gave approval to this eroding distinction, stating that it is too antiquated as a basis for determining actionability.[180] Rather, the court honed its focus on the duty of reasonable care, which may shift depending on a range of factors. It determined this case-by-case approach would be more equitable than assigning liability based on whether the nuisance was created by a

[177] PROSSER AND KEETON, THE LAW OF TORTS, § 57 (5th ed. 1984).
[178] *Id.*
[179] *Id.*
[180] Burke v. Briggs, 571 A.2d 296, 297 (N.J. Super. Ct. App. Div. 1990).

natural or artificial condition.[181]

The issue has also been addressed by the *Restatement (Second) of Torts*, which also imposes liability for natural conditions under some circumstances:

> Natural Conditions "(1) Except as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land. (2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.[182]

Thus, the trend is decidedly away from a rule of no liability for natural conditions and toward a rule imposing a duty to inspect for and make safe dangerous conditions. Pursuant to this analysis, the question is whether the abutting property owner exercised reasonable care and if a reasonable inspection by the abutting property owner would have revealed an unsafe condition of the public sidewalk, impeding the safe passage of pedestrians on the sidewalk. The existence of a hazardous condition which is discoverable by reasonable inspection imputes liability.

Dangerous conditions caused by natural accumulations of snow and ice on sidewalks have made the *Stewart* rule more problematic. In *Mirza v. Filmore Corp.*,[183] the New Jersey Supreme Court extended the duty of commercial property owners to include inspecting for and removing or making safe accumulations of snow and ice on the adjacent sidewalk. Ignoring the long-standing immunity for liability caused by natural accumulations of snow and ice, the Court stated: "No functional basis exists to differentiate an accumulation of snow or ice from other hazards."[184] Like *Stewart*, *Mirza* overturned decades of precedent in which commercial property owners were not liable for failing to remove snow and ice.

The *Mirza* Court held that a test of reasonableness would be

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[181] *Id.*

[182] RESTATEMENT (SECOND) OF TORTS § 353 (1977).

[183] Mirza v. Fillmore Corp., 456 A.2d 518, 524 (N.J. 1983) ("[w]e also hold that maintenance of the public sidewalk abutting commercial properties under Stewart includes removal or reduction of the hazard of snow and ice dependent upon the standard of care of a reasonably prudent person under the circumstances.").

[184] *Id.* at 521.

applied in determining whether a commercial property owner fulfilled the duty to remove snow and ice from an abutting sidewalk.[185] The Court framed the inquiry as whether "after actual or constructive notice, [an abutting commercial owner] has not acted in a reasonably prudent manner under the circumstances to remove or reduce the hazard."[186] Further, while previously there was no common law duty to take affirmative action to make safe natural accumulations of snow and ice, "an abutting landowner who invades the public easement exclusively for his own benefit is responsible for the resultant hazardous condition."[187]

Thus under the *Stewart* and *Davis* combination, a commercial property owner has an affirmative obligation to remove unsafe natural accumulations of snow and ice on an abutting sidewalk. This leads to another example of the lack of uniformity, predictability and fairness of the *Stewart* rule. As a general proposition, an abutting homeowner owes no duty to pedestrians using the abutting sidewalk to remove ice and snow under New Jersey law, but may be fined for failing to remove snow and ice in accordance with local municipal law.[188] A fine from the borough or township for failing to comply with a local snow/ice removal ordinance, however, does not provide the basis for tort liability to a pedestrian who slips and falls and is injured on one's sidewalk.[189] The law in New Jersey regarding snow and ice removal and injured pedestrians is as such: If a homeowner does nothing to remove ice or snow from his or her premises and a person is injured as a result of the snow or ice accumulation, there exists no liability. However, the law takes a bizarre twist and imposes liability on a homeowner for a poor job shoveling snow if a pedestrian slips on a poorly shoveled sidewalk. Confirming the saying "no good deed goes unpunished" it may be prudent for a homeowner to refrain from attempting to make the sidewalk safer.

Recognizing the absurdity of the current state of the law, Justice Clifford urged the Court to abandon the *Stewart* rule in his Concurring Opinion in *Mirza*, cogently stating:

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[185] *Id.* at 521-22.

[186] *Id.* at 521.

[187] Davis v. Pecorino, 350 A.2d 51, 53 (N.J. 1975).

[188] Sarah Schillaci, *After Major Storms, New Jersey Towns Crack Down on Snow Removal*, THE STAR-LEDGER, Feb. 15, 2010, http://www.nj.com/news/index.ssf/2010/02/after_major_storms_new_jersey.html.

[189] Lambe v. Reardon, 173 A.2d 520, 527 (N.J. Super. Ct. App. Div. 1961).

> And so another long-standing principle of law melts away, this one under the fervid heat generated by Stewart. I thought then, as I do now, that Stewart was wrongly decided; that its rule is both unjustified and unwise; and that Yanhko represented the correct approach to sidewalk cases . . . . Five members of the Court joined in Yanhko's majority opinion. There remains but one. Nothing has changed in the six years since Yanhko's definitive treatment of the subject – no "new" developments in sidewalk construction or maintenance, in snow-clearing methods, in society's mores, in the weight of authority elsewhere (it continues to be against Stewart and today's rule) – nothing save the composition of this Court.[190]

A survey of case law shows sidewalk liability precedent to be wildly inconsistent. Commercial property owners are always liable for sidewalk defects, even if they did not create the defect. Residential homeowners are generally not liable for defects to a sidewalk or natural accumulations of snow and ice but may be liable for snow and ice conditions if they attempt to make a sidewalk safer for pedestrians by negligent attempts to address snow and ice. Religious and charitable institutions may be held liable if they provide a public service the courts deem "commercial" such as a daycare center or a school, even if the institution generates no profit. Mixed use property may or may not be commercial, depending on whether the owner of the property lives on site, and who the owner rents to. The size of the property and the number of residents have no bearing on the property owner's liability for sidewalk defects; a two-family home in a residential area was deemed commercial in *Hambright*, while a large apartment building in a major New Jersey city with hundreds of occupants was deemed residential in *Luchejko*.

IV. OWNERSHIP OF SIDEWALKS

The broad structure for sidewalk law in New Jersey is outlined in Title 40, Chapter 65. N.J. STAT. ANN. section 40:65-1 gives municipalities the authority to adopt ordinances providing for sidewalk improvements and repairs such as construction, paving, and curbing. The work may be funded and performed by the municipality, the adjacent property owner or both. Municipalities are authorized to inspect sidewalks and adopt standards for their construction.[191]

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[190] *Mirza*, 456 A.2d at 524 (Clifford, J., concurring) (citations omitted).

[191] Pursuant to N.J. STAT. ANN. § 40:65-1 (West 1992):

The statute considers a sidewalk to be an element of the street, implying public ownership. The most common procedure used by municipalities to pay for new sidewalks or the repair or reconstruction of existing curb and sidewalk is to assess the abutting property owners for all or a portion of the costs. N.J. STAT. ANN. section 40:65-2 to -9 sets forth procedures that a municipality must follow when it decides to construct a sidewalk along a roadway at the full or partial expense of abutting property owners. Such a municipality is required to provide adequate notice of the municipality's plans and allow property owners a chance to construct the sidewalks.[192] If the property owner or owners do not make the required improvements at their own expense, or if the municipality has agreed to share in the cost of constructing the sidewalk, the municipality is allowed to construct the sidewalk and assess the costs to be born to abutting property owners.[193] N.J. STAT. ANN. section 40:65-9 allows sidewalk assessments to be treated the same as local improvements in terms of payment procedures; municipalities may also assess property owners in installments over time.[194] N.J. STAT. ANN. section 40:65-9.1 provides conditions for

> The governing body may make, amend, repeal and enforce ordinances: To regulate and provide for the construction and reconstruction, paving and repaving, curbing and recurbing, repairing and improving of the sidewalks of the streets and highways of the municipality, wholly at the cost of the municipality or wholly at the cost of the owner or owners of the real estate in front of which the improvement is made, or at the cost of the municipality and such owner or owners, to prescribe the method thereof, the materials to be used therein and the inspection thereof.

[192] The notice provision is set forth in N.J. STAT. ANN. § 40:65-2 (West 1992):

> The notice shall contain a description of the property affected sufficient to identify it, a description of the improvement, and a statement of the percentage of the cost to be borne by the owner or owners of such real estate, if the cost thereof is to be borne in part by such owners, or a statement that unless the owner or owners complete the same within 30 days after service thereof the municipality will make the improvement at the expense of the owners, if the cost of the improvement is to be borne wholly by the owner or owners of such real estate.

[193] Costs are to be apportioned to abutting property owners based upon street frontage:

> The officer of the municipality in charge of such improvement shall keep an accurate account of the cost thereof and if such cost or any part thereof is to be assessed upon the several properties fronting on the improvement, shall assess such cost or the proportion thereof required to be assessed under said ordinance upon such properties in proportion to their respective frontage thereon . . . .

N.J. STAT. ANN. § 40:65-8 (West 1992).

[194] Municipalities may also charge interest:

> Such sidewalk assessments shall bear interest from the time of confirmation at

reconstructing sidewalks or curbs wholly at municipal expense.

It is important to recognize that N.J. STAT. ANN. section 40:65-1 – the statute authorizing municipalities to assess property owners for the cost of constructing or reconstructing sidewalks – is different from the statutes that authorize municipalities to create special benefit assessment districts. The responsibility for constructing and maintaining sidewalks in New Jersey rests with the abutting property owners; although as discussed above, municipalities, counties and the state are all authorized to pay for all or a portion of such costs. When sidewalk improvements have been made and are to be assessed to the abutting property owner, the assessment is made not based on the benefit to the property owner but rather the proportional frontage of a property along the subject street. This assessment reflects the statutory responsibility a property owner has to maintain the pedestrian way on which the property abuts.

This approach to funding sidewalk management dates back to the traditional method by which roadway improvements were funded. Under English law, the maintenance of the public way in front of one's property was the responsibility of the property owner.[195] As a result, no benefit to the property owner has to be shown – instead, it is the property owner's responsibility to perform the sidewalk management

> the same rate and with the same penalties for nonpayment as assessments for local improvements in the municipality, and from the confirmation thereof shall be a first and paramount lien upon the real estate assessed to the same extent and be collected and enforced in the same manner as assessments for local improvements. The governing body may provide for the payment and collection of such assessments in installments in the same manner and at the same rate of interest as assessments for local improvements are payable in installments in the municipality. No such assessments shall be invalid by reason of error in the statement or omission of the name of any owner or owners of real estate assessed, or for any other informality, where such real estate has been actually improved.

N.J. STAT. ANN. § 40:65-9 (West 1992).

[195] The Highways Act of 1835 provided:

> And be it further enacted, that the said Surveyor shall and he is hereby required to make, support and maintain, or cause to be made, supported and maintained every public Cartway leading to any Market Town twenty feet wide at the least, and every public Horseway eight Feet wide at the least, and to support and maintain every public footway by the side of any Carriageway or Cartway Three feet at the least, if the Ground between the fences including the same will admit thereof.

Highways Act, 1835, 7 Will. 4, c. 50 s, LXXX, available at http://www.legislation.gov.uk/ukpga/1835/50/pdfs/ukpga_18350050_en.pdf (emphasis added).

tasks. As discussed previously, however, liability for injuries created by sidewalk defects depends on the abutting property owner's classification.

Although it has authorized municipalities to impose the costs of sidewalk construction on individual property owners, the New Jersey Legislature has declined to clarify who retains responsibility for the sidewalk once it is constructed. It is evident, however, the statutory scheme contemplates public ownership of the sidewalk, as the provision providing for public funding of construction, or reconstruction due to natural dilapidation and wear, states that entirely public funding is permissible when the denigration was not caused by the "*abutting* property owner or his predecessor in title" and "[w]hen the *abutting* property owner or his predecessor in title shall have paid within twenty years then last past, or shall pay, in full with interest all the assessment for the laying or relaying of the sidewalk *in front of* his property . . . ."[196] This language also implicitly acknowledges that absent affirmative conduct of the property owner leading to deterioration of the sidewalk, responsibility for care and maintenance lies with the municipality.

V. SIDEWALK LIABILITY LAW IN OTHER STATES

A. New York

Only within the last decade has New York imposed upon its citizens the obligation to tend to the sidewalks abutting their property.[197] Because property owners had no duty per se to an injured pedestrian, plaintiffs had to prove the property owner assumed a duty by creating a dangerous condition or making the natural condition on the

[196] N.J. STAT. ANN. § 40:65-9.1 (West 1992) (emphasis added). While it seems unfair, a property owner's obligation to maintain abutting public property is not without precedent. In Thirteenth Century England, the Statute of Winchester of 1285 endeavoured to check the activities of the highway robber by placing on the property owner the additional liability of making good to the person robbed the loss he had sustained in his territory. The Act also provided that highways leading from one market town to another should be so opened out that there should not be any "dike, tree or bush wherein a man might lurk to do hurt, within 200 feet on one side and 200 feet on the other side of the road, but it was not to extend to great Oaks or other trees so that they be clear underneath." Statute of Winchester, 1285, 13 Edw., c. 2 (Eng.).

[197] D'Ambrosio v. City of New York, 435 N.E.2d 366, 367 (N.Y. 1982). See also Loforese v. Cadillac Fairview Shopping Centers, 652 N.Y.S.2d 84, 85 (N.Y. App. Div. 1997) (citations omitted) ("An owner of land abutting a public sidewalk does not, solely by reason of being an abutting owner, owe a duty to keep the sidewalk in a safe condition . . . .").

sidewalk more hazardous.[198] In keeping with common law tradition, tort liability to third parties will not be imposed against an owner or lessee of adjoining property in New York absent a statute specifically imposing liability for failure to clear the sidewalk.[199] Prior to 2003, the City of New York was inundated with tens of thousands of new cases every year to defend against sidewalk liability, which created substantial budgetary constraints while absorbing valuable resources within the City government. According to Mayor Michael Bloomberg, from 2001 to 2003 the City paid over $189 million for damages caused by sidewalk defects and slip and falls.[200]

When suing the City of New York, plaintiffs are required to file a formal Notice of Claim under the General Municipal Law within ninety days of the accident as a condition precedent to filing a lawsuit.[201] On September 15, 2003, a new law went into effect in New York City shifting the duty for damage or injuries caused by sidewalk conditions from the City to real property owners. Under an amendment to section 7-210 of the Administrative Code of the City of New York, property became liable for injuries as a result of dangerous conditions or defects in the sidewalk. Specifically, property owners are liable for "the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt and other material from the sidewalk."[202] As a result of section 7-210, both commercial and residential property owners will now be liable for an abutting sidewalk which is negligently maintained, defective, or in a dangerous condition.

B. Massachusetts

A similar change was recently made in Massachusetts, where the Supreme Judicial Court overturned 100 years of precedent in announcing that all Massachusetts property owners are legally responsible for the removal of snow and ice from their property. The old common law rule was that owners could leave naturally accumulated

[198] Nadel v. Cucinella, 750 N.Y.S.2d 588, 589 (N.Y. App. Div. 2002); Gibbs v. Rochdale Vill., Inc., 724 N.Y.S.2d 324, 324 (N.Y. App. Div. 2001).

[199] Booth v. City of New York, 707 N.Y.S.2d 488, 489 (N.Y. App. Div. 2000).

[200] Debra A. Estock, *Sidewalk Liability Now Falls to Property Owners*, THE COOPERATOR: THE CO-OP AND CONDO MONTHLY, *available at* http://cooperator.com/articles/916/1/Sidewalk-Liability/Page1.html.

[201] N.Y. GMU. LAW § 50-e.

[202] N.Y. ADC. LAW § 7-210.

snow and ice untouched and escape liability. The Supreme Judicial Court in *Papadopoulos v. Target Corp.* held that all Massachusetts property owners must remove or treat snow and ice like any other dangerous condition on property.[203] The Court rejected the old rule, holding it "is not reasonable for a property owner to leave snow or ice on a walkway where it is reasonable to expect that a hardy New England visitor would choose to risk crossing the snow or ice, rather than turn back or attempt an equally or more perilous walk around it."[204]

C. Michigan

Michigan follows an approach more akin to the pre-Stewart framework in New Jersey. The Michigan Supreme Court has held that property owners have no duty to maintain sidewalks; rather, that duty falls by statute to the local government. Michigan's Motor Vehicle Code provides: "the duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion . . . ."[205] The Michigan Supreme Court has construed this limiting language to place the burden for maintenance of such pedestrian thoroughfares in the realm of local government responsibility.[206]

D. Connecticut

Similarly, in Connecticut an abutting property owner is under no duty to keep public sidewalks in front of his or her property in a reasonably safe condition. Rather, the municipalities have the duty to maintain public sidewalks, and, under Connecticut General Statutes section 13a-149,[207] they are liable for damages caused by a breach of that

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[203] Papadopoulos v. Target Corp., 930 N.E.2d 142, 154 (Mass. 2010).

[204] *Id.* at 151.

[205] M.S.A. § 3.996 (102)(1).

[206] "It appears that the purpose of this limiting sentence, which applies only to counties and the state, is to allocate responsibility for sidewalks and crosswalks to local governments, including townships, cities, and villages." Mason v. Wayne County Bd. of Comm'rs, 523 N.W.2d 791, 794 n.6 (Mich. 1994) (emphasis added).

[207] Section 13a-149 provides, *inter alia*:

> Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. . . . No action for any such injury shall be maintained against any town, city, corporation or

duty. Although the responsibility to maintain public sidewalks is generally the responsibility of the municipalities, Connecticut courts recognize exceptions where a statute or ordinance shifts the duty to the abutting property owner and where the abutting property owner created the unsafe condition.[208]

Connecticut has enacted legislation specifically permitting municipalities to adopt ordinances requiring property owners and their tenants to remove snow and ice from sidewalks abutting the property and transferring liability for damages associated with snow and ice on sidewalks to the property owners or tenants.[209] In cities and towns where such ordinances are enacted, a property owner or tenant can be held liable for not sufficiently clearing snow and ice from an abutting sidewalk within a reasonable time.[210] The duty of an abutting property owner in those municipalities which have adopted section 7-163a is to use reasonable care to keep the sidewalks in a reasonably safe condition

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> borough, unless written notice of such injury and a general description of the same, and of the cause thereof and of the time and place of its occurrence, shall, within ninety days thereafter be given to a selectman or the clerk of such town, or to the clerk of such city or borough, or to the secretary or treasurer of such corporation.

CONN. GEN. STAT. § 13a-149 (West 2009). The word "road" has been construed to include sidewalks. Rivers v. City of New Britain, 950 A.2d 1247, 1250 n.1 (Conn. 2008) (citing Hornyak v. Fairfield, 67 A.2d 562, 563 (Conn. 1949)).

[208] *Rivers*, 950 A.2d at 1250 n.3 (quoting Wilson v. New Haven, 567 A.2d 829, 830 (Conn. 1989)); Abramczyk v. Abbey, 780 A.2d 957, 960 (Conn. App. Ct. 2001), *cert. denied*, 785 A.2d 229 (Conn. 2001).

[209] Connecticut General Statutes § 7-163a provides, in pertinent part:

> (a) Any [municipality] may, by ordinance, adopt the provisions of this section.
>
> (b) Notwithstanding the provisions of section 13a-149 or any other general statute or special act, such [municipality] shall not be liable to any person injured in person or property caused by the presence of ice or snow on a public sidewalk unless such municipality is the owner or person in possession and control of land abutting such sidewalk . . . provided such municipality shall be liable for its affirmative acts with respect to such sidewalk.
>
> (c) (1) The owner or person in possession and control of land abutting a public sidewalk shall have the same duty of care with respect to the presence of ice or snow on such sidewalk toward the portion of the sidewalk abutting his property as the municipality had prior to the effective date of any ordinance adopted pursuant to the provisions of this section and shall be liable to persons injured in person or property where a breach of said duty is the proximate cause of said injury.

[210] "In sum, an ordinance adopted in accordance with § 7-163a has a dual function: it relieves the municipality of the duty and liability with respect to the removal of snow and ice from public sidewalks, and it shifts that duty and liability to the abutting landowner." *Rivers*, 950 A.2d at 1261.

from snow and ice.[211]

E. Washington

Washington has always been protective of abutting property owners. In *Rivett v. Tacoma*, the Washington Supreme Court invalidated a Tacoma ordinance making property owners who failed to notify the City of hazardous sidewalk conditions liable for all amounts paid to any person suffering injury on account of the sidewalk defect.[212] The Court concluded that the ordinance exceeded Tacoma's police powers and deprived abutting owners of substantive due process.[213] Washington courts had held repeatedly that abutting owners have no duty to take action, of any kind, with respect to the adjacent sidewalk, unless the abutting owner's use of that sidewalk itself created the hazard to passing pedestrians.[214] Rather it is the abutting owner's use of the property, not use of the sidewalk or mere ownership of abutting property, that gives rise to liability.[215] As in New Jersey pre-*Stewart*, where an abutting owner causes the dangerous condition by a special use of the property, such owner is directly liable to the injured person.[216] The city is also directly liable to the injured claimant, assuming the city was on notice of the defect, but may recover over against the at-fault abutting owner, originally under a passive-active theory of primary and secondary liability.[217] The Court in *Rivett* held that a City has the primary duty to maintain public rights of way in a safe condition and that the Tacoma ordinance was invalid for purporting "to place that primary duty upon the abutting landowner."[218]

[211] *Id*. at 1253 n.8 (quoting Rivers v. City of New Britain, 913 A.2d 1146, 1152 (Conn. App. Ct. 2007)), (Bishop, J., dissenting), *rev'd*, 950 A.2d 1247, *supra* note 201, at 1262.

[212] Rivett v. Tacoma, 870 P.2d 299, 305 (Wash. 1994).

[213] *Id*.

[214] *See, e.g.*, Groves v. Citv of Tacoma, 777 P.2d 566, 567 (Wash. Ct. App. 1989).

[215] James v. Burchett, 129 P.2d 790, 791-92 (Wash. 1942); *Groves*, 777 P.2d at 568.

[216] *James*, 129 P.2d at 792 (citing 25 AM. JUR. 657 *Highways* §§ 364 and 365); Mitchell v. Thomas, 8 P.2d 639, 641 (Mont. 1932); Cobb v. Salt River Valley Water User's Ass'n, 114 P.2d 904, 905 (Ariz. 1941).

[217] *See* Turner v. City of Tacoma, 435 P.2d 927, 931 (Wash. 1967); City of Cle Elum v. Yeaman, 259 P. 35, 36 (Wash. 1927).

[218] *Rivett*, 870 P.2d at 303.

F. South Carolina

South Carolina also imposes responsibility for the care and maintenance of its sidewalks on local governments.[219] The South Carolina Supreme Court affirmed this principle in *Vaughn v. Town of Lyman*, a case involving an alleged trip and fall on a municipal sidewalk that had become broken over time by overgrown tree roots.[220] The plaintiff filed suit against the Town of Lyman.[221] The Town argued it should not be held liable because it "did not own, control, or maintain the sidewalk where the injury occurred."[222] The plaintiff moved for summary judgment, which was granted.[223]

The South Carolina Supreme Court affirmed that while generally, the common law does not impose any duty to act, "[t]he general rule in this country is that municipalities which have full and complete control over the streets and highways within their corporate limits are liable in damages for injuries sustained in consequence of their failure to use reasonable care to keep them in a reasonably safe condition for public travel."[224] Additionally, the Court noted it "has interpreted this duty to extend not only to those streets, ways, and bridges owned and maintained by the municipality, but also to those under the control of the municipality."[225]

G. Pennsylvania

Pennsylvania has a unique system in which either the abutting property owner or the municipality may be held liable for sidewalk defects, depending on the circumstances. In Pennsylvania, there are two

[219] Pursuant to S.C. CODE ANN. § 5-27-120 (West 1976):

> The city or town council of any city or town of over one thousand inhabitants shall keep in good repair all the streets, ways and bridges within the limits of the city or town and for such purpose it is invested with all the powers, rights and privileges within the limits of such city or town that are given to the governing bodies of the several counties of this State as to the public roads.

[220] Vaughan v. Town of Lyman, 635 S.E.2d 631, 633-34 (S.C. 2006).

[221] *Id*. at 633.

[222] *Id.*

[223] *Id.*

[224] *Id.* at 635 (quoting Terrell v. City of Orangeburg, 180 S.E. 670, 672 (S.C. 1935)) (emphasis added) overruled by McCall v. Batson, 329 S.E.2d 741, 744 (S.C. 1985) (abrogating sovereign immunity).

[225] *Id.* (citing Dolan v. City of Camden, 103 S.E.2d 328, 330 (S.C. 1958)); Terrell, 180 S.E. at 670. Both parties conceded that under S.C. CODE ANN. § 56-5-480, the definition of street includes the sidewalk. Vaughan, 635 S.E.2d at 635 n.2.

general categories of sidewalk cases, each of which has its own rules regarding liability. In cases in which the injury was caused by a failure to maintain or repair the sidewalk where the defect "was occasioned, or knowingly permitted to exist, by either the tenant in sole possession or the owner,"[226] the primary duty is on the property owner or tenant. The "[c]ity's liability to see that the sidewalk is left in repair is secondary."[227] In these cases, if a plaintiff recovers from the city, the city may in turn seek indemnification from the property owner who is primarily liable. Because the property owner is primarily liable, it cannot seek indemnification from the city.[228] In contrast, where the defect is as a result of the construction or design of the sidewalk, and such defect was created by the municipality, the municipality is the "active tortfeasor," and it cannot seek indemnification from the property owner.[229] Where the city itself has created a hazardous condition through its contractors or architects, the property owner has no duty to eliminate the condition. Therefore, there can be no occasion for the property owner to seek indemnification or contribution from the municipality.[230]

Thus, of the jurisdictions surrounding New Jersey, only the City of New York has completely absolved itself of all responsibility, while neighbors such as Connecticut and, to a lesser extent, Pennsylvania, continue to insulate property owners from liability, placing the burden of sidewalk maintenance on public entities. Of the states farther away from New Jersey, Massachusetts is the only other jurisdiction that has extended the duty of care to abutting property owners, while Michigan, Washington and South Carolina all respect the traditional common law rule of no duty to act absent affirmative conduct.

VI. ANALYSIS

The question of sidewalk ownership and liability underscores the fundamentally ambiguous state into which sidewalks have fallen in New Jersey. Originally, sidewalks were considered to be essential components of public roadways in urban areas. Indeed, one reason that villages and towns sought to incorporate as boroughs or cities was to obtain the legal power to improve the streets and lay sidewalks.

[226] Golden v. City of Philadelphia, 57 A.2d 429, 430 (Pa. Super. Ct. 1948).
[227] Psichos v. Sauvion, 520 A.2d 945, 946 (Pa. Commw. Ct. 1987).
[228] *Golden*, 57 A.2d at 430.
[229] *Id.*
[230] *Psichos*, 520 A.2d at 946.

Recognizing that municipalities are no longer willing to maintain and repair sidewalks and that the Legislature has not seen fit to clear up the ambiguity or allocate responsibility, the courts in New Jersey have chosen to place the burden of liability, and hence sidewalk repairs, on abutting commercial property owners – and property owners the courts deem commercial in nature.

The rationale for imposing a duty to inspect and maintain adjoining sidewalks on owners of commercial property as opposed to residential, public, charitable/religious and mixed use property cannot withstand scrutiny. Sidewalks benefit all abutting property owners and the public in general, and to suggest commercial owners receive a greater benefit is an unjustifiable assumption. The "pass through of costs" theory, frequently used as a rationale in products liability cases, leads to inconsistent and unpredictable results when applied to New Jersey's sidewalk liability law.[231]

The *Stewart* approach and rule of law, based upon an artificial and contrived rationale, was bound to yield confusing and untoward results. Post-*Stewart* case law bears this out. To begin with, given the rationale of the *Stewart* decision, the "abutting commercial landowner" exception to New Jersey's "no sidewalk liability rule" has been carefully and consistently limited by the New Jersey courts, even as to abutting commercial owners.[232] For instance, the *Stewart* rule was not applied when a pedestrian tripped on a curb in front of the defendant's apartment building.[233] The curb was separated from the sidewalk itself by a strip of grass.[234] Notwithstanding the benefit to the abutting property owner in having a safe curb over which pedestrians may traverse, the court held the abutting commercial property owner owed no duty.[235] The exception was also not applied when a shopping center

[231] Justice Clifford noted as much in Davis, stating "[b]ut why should a business operator have imposed on him a legal duty which an abutting residential owner or operator escapes under circumstances precisely the same from the point of view of the injured pedestrian, a stranger to both of them?'" Davis v. Pecorino, 350 A.2d 51, 57 (N.J. 1975) (Clifford, J., dissenting).

[232] *See* Levin v. Devoe, 533 A.2d 977, 979 (N.J. Super. Ct. App. Div. 1987); MacGrath v. Levin Prop., 606 A.2d 1108, 1109 (N.J. Super. Ct. App. Div. 1992).

[233] *Levin*, 533 A.2d at 979.

[234] *Id.* at 977.

[235] *Id*. at 979. Courts have declined to categorically extend Stewart's rule of liability to curbs, generally reasoning that a curb is more a feature of the road and is, therefore, "a significantly less immediate means of pedestrian ingress and egress to the abutting property than is a sidewalk." Norris v. Borough of Leonia, 734 A.2d 762, 772 (N.J. 1999). Thus,

patron was injured while crossing the public highway adjoining the defendant's shopping center, again notwithstanding the benefit to the abutting commercial property owner in having a public highway adjacent to its premises.[236] Finally, the exception was not applied when a pedestrian fell on snow accumulated on a sidewalk abutting a vacant lot zoned for commercial use on the theory that the owner of a vacant lot derives no benefit from pedestrian traffic on the adjacent sidewalk.[237] In refusing to apply the *Stewart* exception to commercial property owners under the above circumstances, courts have stressed that, under New Jersey law, the existence or non-existence of a tort duty is "ultimately a question of fairness."[238] Fairness, of course – like beauty – is in the eye of the beholder. Therefore, it should be no surprise that imposing a tort duty on a commercial property owner to inspect and maintain property it does not own or control may certainly be viewed as unfair by those burdened, especially when non-commercial owners who also benefit from an adjacent sidewalk are not so burdened.[239]

because the primary functions of the curb in *Levin* were to "channel surface water from the road into storm drains and to serve as a barrier for cars to park against," the court refused to hold a commercial property owner liable for injuries suffered when a pedestrian tripped and fell on a curb in front of an apartment building as she was attempting to cross the street. *Levin*, 533 A.2d at 979. The court recognized, however, that in some cases curbs might be "structurally an integral part of . . . sidewalks" for which the abutting property owner may be liable. *Id.* Confusing the issue even more, the New Jersey Supreme Court has determined that in many cases a fact sensitive inquiry is required. *See Norris*, 734 A.2d at 771 ("whether a curb is deemed part of a sidewalk . . . might well depend on the context and facts in the given case."). *See also MacGrath*, 606 A.2d at 1109.

[236] *MacGrath*, 606 A.2d at 1109.

[237] Abraham v. Gupta, 656 A.2d 850, 852 (N.J. Super. Ct. App. Div. 1995).

[238] *See* MacGrath, 606 A.2d at 1109, and Levin, 533 A.2d at 979 (quoting Goldberg v. Hous. Auth. of Newark, 186 A.2d 291, 293 (N.J. 1962)). *See also* Stewart v. 104 Wallace St., Inc., 432 A.2d 881, 889 (N.J. 1981) (Schreiber, J., concurring) ("notions of fairness weigh heavily" in deciding whether to hold property owners responsible for injury to pedestrians).

[239] Justice Clifford addressed these principles in his dissenting opinion in Davis, dealing with a commercial owner's obligation to remove ice and snow where he observed:

> As for the 'fairness and equity' of the situation my notion of it does not lead me to discover a hitherto unrecognized obligation to remove whatever snow and ice impediment may be said to have existed in the public way. Apparently the critical factor in the majority's consideration is the commercial nature of defendant's activities. And so if plaintiff had fallen where passing pedestrians had packed down the snow, there would be no duty to correct the condition. With respect to, say, a retail store, I suppose under the majority's theory a fall at a spot in the public sidewalk where customers making toward the store had created a slippery condition in the public way could give rise to liability; whereas if the mishap occurred at a snowy place trampled down and made

There have always been circumstances where fairness dictates imposing a duty on an abutting owner to inspect and maintain the adjacent sidewalk in a reasonably safe condition. These cases have, however, always involved affirmative conduct of the property owner. For instance, sixty years ago, in *Saco v. Hall*,[240] the New Jersey Supreme Court noted that an abutting property owner is liable for "an 'invasion of the public easement for the owners benefit by the erection and use of devices located over and above the sidewalk' that create 'a dangerous condition in the public easement.'"[241] There, the Court held that the plaintiff was entitled to recover for injuries sustained as a result of falling on an icy sidewalk in front of the defendant's property because the frozen water had flowed from a deteriorated leader on the defendant's building across the public sidewalk, where it created a dangerous condition.[242] The Court held the property owner responsible for creating a hazardous sidewalk condition in the course of his use of the abutting property because he invaded and made use of the public easement for his own exclusive benefit.[243] The erection and use of devices located over and above the sidewalk became the proximate cause of plaintiff's injury, creating a dangerous impediment in the free and safe use of the sidewalk by the public.[244]

Other cases have similarly imposed a duty on an abutting property owner when the property owner was responsible for the creation of a dangerous condition within the public right-of-way. In *Narsh v. Zirbser Brothers, Inc.*,[245] for instance, the court stated that "[t]he rule is well settled in this State that one who places or maintains in or near a highway anything which, if neglected, will render the way unsafe for travel, is bound to exercise due care to prevent it from becoming dangerous."[246] Likewise, in *Pirozzi*, the New Jersey Supreme Court

> hazardous by disinterested pedestrians, there would be no obligation to correct the condition. Such examples, limited only by one's imagination, emphasize that the principle announced by the majority is neither equitable nor susceptible of judicial administration.

Davis v. Pecorino, 350 A.2d 51, 56 (N.J. 1975) (Clifford, J., dissenting).

[240] Saco v. Hall, 63 A.2d 887, 890 (N.J. 1949).

[241] *Id.*

[242] *Id.* at 888.

[243] *Id*. at 889-90.

[244] *Id*. at 890.

[245] Narsh v. Zirbser Bros., Inc., 268 A.2d 46, 49 (N.J. Super. Ct. App. Div. 1970) (citing Weller v. McCormick, 52 N.J.L. 470 (1890)).

[246] *See also* Sims v. City of Newark, 581 A.2d 524, 531 (N.J. Super. Ct. Law Div.

stated that a property owner is entitled to use the sidewalk in front of his premises, only on the condition that such use does not unreasonably interfere with the safety of the highway for public travel.[247] The Court reasoned that "the public duty to exercise reasonable care . . . exists for the benefit of individual travelers, and hence, when an individual sustains peculiar personal injury as the result of such negligence, a private action accrues to him against the person in default."[248]

As can be observed, prior to *Stewart*, it was settled law that commercial and non-commercial property owners were held responsible for injuries resulting from their affirmative acts that caused or contributed to an unsafe condition on an abutting sidewalk. *Stewart* expanded that liability by imposing an affirmative duty on an owner of commercial property abutting a sidewalk to inspect the sidewalk and maintain it in a reasonably safe condition without regard to affirmative conduct creating or contributing to the unsafe condition.[249]

Nevertheless, residential, charitable/religious and public property owners have no such affirmative duty to inspect and maintain abutting sidewalks. As previously demonstrated, imposition of duties owed to the public traversing an abutting sidewalk by these property owners varies widely. Such property owners do not currently have an obligation to inspect the sidewalk and alleviate dangerous conditions not of their making akin to the duty Stewart imposes on owners of commercial property. The Court has long had an opportunity to come up with a principled, consistent approach. As a result of the Court's failure to do so, however, the New Jersey Legislature should return the state of the law to the pre-*Stewart* era by crafting a fair, uniform and predictable standard with regard to liability for defects on sidewalks. The new standard should be easy for the residents of New Jersey to understand and the courts of New Jersey to apply consistently. Potential plaintiffs injured on sidewalks would also clearly understand their burden of proof: in any sidewalk liability case, it must be shown that the property owner created or contributed to the defect, no matter what type of property owner the defendant may be. A suggested bill has been

1990); Deberjeois v. Schneider, 604 A.2d 210, 214 (N.J. Super. Ct. Law Div. 1991).

[247] Pirozzi v. Acme Holding Co. of Paterson, 74 A.2d 297, 301-02 (1950).

[248] *Id.*

[249] *See also* Brown v. Saint Venantius Sch., 544 A.2d 842, 843 (N.J. 1988); Dupree v. City of Clifton, 798 A.2d 105, 108 (N.J. Super. Ct. App. Div. 2002); Nielsen v. Lee, 810 A.2d 600, 601 (N.J. Super. Ct. App. Div. 2002); Learn v. City of Perth Amboy, 586 A.2d 327, 328 (N.J. Super. Ct. App. Div. 1991).

included as Appendix A.

VII. CONCLUSION

In 1981, the New Jersey Supreme Court abandoned the common law general rule of no liability for unsafe abutting sidewalks as to commercial owners. Thus, *Stewart* imposed an obligation on behalf of owners of commercial property abutting sidewalks to maintain the sidewalk in a reasonably safe condition but otherwise left alone existing law as to residential, charitable/religious and public property owners. The rationale in treating commercial property owners differently than others was the perceived fairness of imposing a duty to inspect for and correct unsafe conditions in light of the benefit commercial property owners derive from pedestrians using the sidewalk. However, non-commercial property owners may benefit from pedestrians using the sidewalk and some commercial property owners may not benefit from pedestrian traffic. As a result, the fundamental rationale for the *Stewart* rule must be reexamined.

In the interest of fairness, uniformity and predictability, the law pertaining to sidewalk liability should be altered to impose a duty only when the affirmative conduct of an adjoining property owner, without regard to status, causes or contributes to an unsafe condition on the abutting sidewalk. All property owners, no matter what type, would be able to understand their duty and assess their liability. The New Jersey Supreme Court stated in *Stewart* that "[a]s for the determination of which properties will be covered by the rule we adopt today, commonly accepted definitions of 'commercial' and 'residential' property should apply, with difficult cases to be decided as they arise."[250] Yet difficult cases have become the rule and not the exception as the Court envisioned. Even so, the New Jersey Supreme Court continues to abide by the confusion engendered by *Stewart*, lauding in *Luchejko* the "clarity of the residential/commercial dichotomy" as opposed to an "unpredictable case-by-case balancing test that would be extremely difficult to fairly and consistently administer *and that would lead to tremendous uncertainty*."[251] Accordingly, the New Jersey Legislature must act. This change in the law would eliminate the artificial distinctions between property owners based on use of the property and

[250] Stewart v. 104 Wallace St., Inc., 432 A.2d 881, 889 (N.J. 1981).
[251] Luchejko v. City of Hoboken, 23 A.3d 912, 924 (N.J. 2011) (emphasis added).

would reinstate the no duty rule. Fairness, uniformity and predictability compel such a change.

VIII. APPENDIX A

1 AN ACT concerning liability for defects on public sidewalks
2 in New Jersey.
3 BE IT ENACTED by the Senate and General Assembly of the State
4 of New Jersey.
5
6 The Act shall read as follows:
7
8 There shall be no duty to maintain or make repairs to a
9 public sidewalk absent affirmative conduct of an adjoining
10 property owner. The status of the adjoining property owner,
11 be it commercial, residential, public, religious/charitable or
12 mixed use, will not be considered purposes of assessing liability.
13 The burden lies with the injured to prove that an abutting
14 property owner caused or contributed to the unsafe condition(s)
15 on the abutting sidewalk(s) that caused the injury.
16
17STATEMENT
18
19 This bill is intended to clarify confusion regarding liability
20 for defects to public sidewalks in light of the New Jersey
21 Supreme Court's decision in Stewart v. 104 Wallace Street,
22 Inc., 432 A.2d 881 (1981).
23
24The New Jersey Supreme Court in Stewart abrogated
25 the longstanding common law rule of no liability absent
26 affirmative conduct for a rule that holds property owners
27 deemed to own commercial property liable for defects on
28 abutting property. The lower courts, in attempting to apply
29 *Stewart*, have had difficulty assessing what should be
30 considered commercial for purposes of assessing property
31 owner liability. The result has been injustice for both property
32 owners, who have not been given notice that repairs must be
33 made to adjoining sidewalks, and the injured, whose chances
34 of being made whole are dependent largely upon which spot
35 on the sidewalk the injury occurred. In the interest of fairness,
36 uniformity and predictability, this bill will reintroduce the
37 common law standard of no liability absent affirmative
38 conduct, regardless how the adjoining property is classified.