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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

Ice Accumulation Caused by Downspout is an Open and Obvious Condition

By Javon R. David **January 31, 2017**

The Michigan Court of Appeals recently affirmed summary disposition in favor of Defendants in a premises action involving a slip and fall on ice accumulation caused by a downspout in *Alioto v Astrein's Fine Jewelry, et. al.*, Mich App ___ (Docket No. 329646). In *Alioto*, Plaintiff filed suit against Defendants following a slip and fall on black ice that occurred on a cold day in February 2013. On the date in question, Plaintiff and his wife walked down a paved pathway known as "Willits Alley," which is owned by the City of Birmingham. Willits Alley is adjacent to Defendants' business, Astrein Fine Jewelry, Inc. Plaintiff fell near the rear of the building and filed suit against Defendants and Oliver Trendz of Birmingham, a tenant of the same building. Plaintiff alleged his fall was caused by black ice that had accumulated from a downspout affixed to the building, which directed water onto Willits Alley.

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The stringent standards of premises liability often result in plaintiffs crafting unique arguments in an attempt to circumvent the Open and Obvious Doctrine. See, *Lugo v Ameritech Corp*, 464 Mich 512 (2001). However, even under unique fact scenarios, such as an accumulation of ice caused by a downspout affixed to a building, plaintiffs must *still* overcome an objective test of whether an average user with ordinary intelligence would have discovered the danger upon casual inspection. This principle was recently revisited in *Alioto v Astrein's Fine Jewelry, et. al.*, ___ Mich App ___ (Docket No. 329646), which provides that Defendants, as owners of a building and downspout system, did not breach any duty owed to Plaintiff following Plaintiff's fall on an accumulation of "black ice" caused by the downspout.

Defendants filed a dispositive motion contending that they had no duty to maintain the subject area as the alley was owned by the City of Birmingham. Further, to the extent Defendants owed a duty to prevent injury to pedestrians as a result of water flowing from a downspout affixed to their building, Defendants were still not liable for Plaintiff's alleged injuries for three reasons: (1) the lease agreement between Defendants and Oliver Trendz assigned the duty to keep adjoining streets and alleys free from snow and ice to Oliver Trendz; (2) the downspout system was compliant with City of Birmingham codes and there was no evidence that the release of water breached any duty; and (3) any alleged hazard was not unavoidable as the alley was sufficiently wide enough to allow a pedestrian to avoid the ice accumulation.

In response to Defendants' dispositive motion, Plaintiff argued that Defendants' downspout system created an unnatural accumulation of ice and was an unavoidable hazard. The trial court agreed with Defendants' assertions and granted summary disposition. Specifically, the trial court found that Plaintiff had failed to provide sufficient proof of a duty owed by Defendants to Plaintiff or any breach of that duty. Therefore, summary disposition was warranted.

On appeal, the Court stated Plaintiff failed to provide any authority for the proposition that a landowner is liable whenever discharging any water onto a public street that may freeze into ice in winter. Accordingly, the Court looked to whether this particular water discharge, when combined with freezing temperatures, constituted a breach of Defendants' duty to maintain the premises. Ultimately, the Court found no breach of duty in this regard. Citing longstanding case law, the Court stated, "the test to determine if a danger is open and obvious is whether an average user with ordinary intelligence would have been able to discover the danger and risk presented upon casual inspection." Citing *Joyce v Rubin*, 249 Mich App 231 (2002). Further, the Michigan Supreme Court has held that "black ice" is "open and obvious when there are indicia of a potentially hazardous condition" present. *Janson v Sajewski Funeral Home, Inc.*, 486 Mich 934, 935 (2010).

In the present case, Plaintiff testified that the fall occurred on a cold February evening and that, after he fell, he could see ice and snow that accumulated in an area around the downspout. Plaintiff also admitted to using Willits Alley with frequency during his twelve years as a Birmingham resident. Further, the photographs provided to the trial court depicted the downspout and nearby drain in plain sight. Accordingly, the appellate court concluded that sufficient indicia of a potentially hazardous condition were present to enable a reasonable person to foresee the danger. Accordingly, the appellate court ruled that Defendants, as owners of the building and downspout that directed water into the alley, did not breach any duty to Plaintiff. As such, the trial court did not err by granting summary disposition in favor of Defendants.

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