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Labeling A Premises Liability Claim As One Of "Ordinary Negligence" Fails To Avoid "Open And Obvious" Defense

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Summary disposition of plaintiff's claim alleging a slip and fall on a pile of salt outside of a restaurant was affirmed in *Gerzanics v Boston Market Corp*, an unpublished opinion issued by the Michigan Court of Appeals, on November 18, 2010. The Court of Appeals addressed two important issues: (1) whether the plaintiff could avoid the "open and obvious" defense by arguing ordinary negligence versus premises liability; and (2) what evidence is required in order to establish causation in a negligence claim.

SECREST WARDLE NOTES:

Plaintiffs may attempt to argue that a premises liability claim also has an active negligence component to it in order to get around the "open and obvious" doctrine. Under Gerzanics, the court recognizes that there needs to be an analysis of the allegations regardless of the label the plaintiff utilizes. Additionally, the court recognized that there needs to be some evidence beyond speculation and conjecture as to the alleged dangerous condition which caused the injury and, who more likely than not created the condition.

In *Gerzanics*, plaintiff sued as a result of head injuries she sustained when she allegedly slipped and fell on a pile of salt outside of a Boston Market. The plaintiff testified that she did not see what caused her to slip due to poor lighting, but she felt a "raised area" like rocks, sand, or salt, through her coat as she lay on the ground. She further testified that the restaurant manager and an EMS worker made references to salt on the ground while tending to her after the fall.

Boston Market filed a motion for summary disposition arguing that it leased the premises and that the landlord was required to maintain the sidewalk outside the restaurant. Boston Market also argued that the danger was "*open and obvious*." The plaintiff argued that Boston Market was liable under a theory of ordinary negligence versus a theory of premises liability to avoid the "open and obvious" defense. The court ruled that Boston Market was not liable where the lease required the landlord to maintain the sidewalk and also found that the condition was "open and obvious" without any special aspects present.

On appeal, plaintiff attempted to get around the "open and obvious" defense claiming ordinary negligence. The court utilized *Kachudas v Invaders Self Auto Wash Inc*, 486 Mich 913 (2010) in support of its analysis of a premises liability claim versus one sounding in ordinary negligence. The court noted "a claim sounds in premises liability when the injury results from a condition on the land; however, a claim sounds in ordinary negligence when the injury results from 'the overt acts of a premises owner on his or her premises."'

The court focused on the substance of the complaint, and the theory underlying the action, rather than the labels that were attached to the claims by the plaintiff. The court, in support of its decision, looked to the complaint which had alleged that the slip and fall resulted from an unsafe condition on the land. It also noted that the complaint repeatedly

indicated the plaintiff fell on a pile of salt "on the sidewalk outside of the door" and "outside of the doors of the business." The court reasoned that these types of allegations are consistent with an injury that arose out of the condition on the premises.

The court did not stop there. In further support of summary disposition, the court ruled that the plaintiff failed to provide any evidence that the pile of salt caused plaintiff's fall, let alone that Boston Market had applied the salt. The court reasoned that the only evidence presented, was that the Boston Market manager joked about the amount of salt on the sidewalk, but both the plaintiff and the manager testified they did not actually see any salt on the sidewalk. The court also reasoned that plaintiff's testimony describing the condition; "it felt like a raised area", "a pile, a small mound of sand-of salt, like kind of in a curve" and plaintiff could "feel like rocks or something through my coat" was insufficient.

The court recognized that from this evidence the plaintiff may have slipped on salt, but there were certainly other explanations that were consistent with possible conditions at the time of the fall. The court found it to be equally likely that the plaintiff slipped on rocks or sand according to her own testimony. The court noted that the case law requires more than a mere possibility or a plausible explanation for a plaintiff to establish causation in a negligence claim.

It should also be noted that the plaintiff had filed a claim against an additional defendant Metrosweep, a subcontractor who provided snow removal of the area at the time the plaintiff fell. The court applied *Fultz v Union-Commerce Assoc*, 470 Mich 460 (2004) finding that Metrosweep did not owe any duty to the plaintiff separate and distinct from the contractual promise it made under its snow removal contract with another snow removal company. The plaintiff attempted to get around the *Fultz* decision, claiming that it created a new hazard through its "over-salting." The court held this did not constitute a new hazard.

Plaintiff also claimed that Metosweep's active negligence and "over-salting" of the sidewalk precluded summary disposition. The court dismissed this argument for the same reasons it did against Boston Market in that the evidence that plaintiff slipped on a pile of salt, and whether Metrosweep had created the alleged pile, simply was based on speculation and conjecture.

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