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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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"Abundant Snow" Present When Plaintiff Fell Renders Danger of Ice "Open and Obvious"

By Drew Broaddus

On December 7, 2010, the Michigan Court of Appeals released its unpublished opinion in *Torrez v Goodwill Industries*, No. 292138. In this timely opinion – released just days before an early December snowstorm that was remarkable even by Michigan's standards – the court held that the Plaintiff's "black ice" slip and fall claim was properly dismissed under the "open and obvious" doctrine. Moreover, the Court found that the ice did not present a "special aspect." This was despite testimony that the ice may have resulted from a problem with Defendant's roof, and that Defendant had knowledge of this problem.

The Plaintiff in *Torrez* slipped on ice and fell as she walked toward the entrance of Defendant's retail store. Plaintiff testified that, as she got out of her vehicle in the store's parking lot, she noticed snow several inches deep. However, a concrete walkway leading to the store's entrance appeared to be mostly dry (although she acknowledged seeing some areas of dampness). Plaintiff used that walkway in order to avoid the snow, and proceeded to walk across the visibly damp area. Unfortunately, this area was actually covered with a thin layer of ice, and Plaintiff slipped and fell. Plaintiff admittedly could have reached the front door via a nearby concrete ramp, but she did not use that ramp because she did not want to get snow in her shoes. The assistant manager of the store admitted that the roof leaked over the entryway, allowing water to drip onto the concrete below. The assistant manager was aware that the area sometimes posed a risk to customers, and she occasionally broke the ice up with a hammer, cleaned up the area, and salted it.

SECREST WARDLE NOTES:

Torrez reflects a trend: recent Court of Appeals panels have viewed "black ice" claims with a critical eye. Plaintiffs have often relied upon *Slaughter v Blarney Castle*, 281 Mich App 474 (2008) in trying to avoid the "open and obvious" defense in snow and ice cases. However, *Torrez* confirms that the term "black ice" is not a mere pleading tool. Even "invisible" ice, naturally occurring in the wintertime, will be open and obvious in all but the most unusual cases.

Torrez also shows that courts may look carefully when a Plaintiff asserts that a condition was effectively unavoidable. The fact that the Plaintiff cannot enter a particular building without confronting snow or ice is not enough. Courts may ask: Why did the Plaintiff need to enter the building in the first place?

Defendant moved for summary disposition, citing the "open and obvious" doctrine. The trial court agreed, finding that "this spot on the [pavement] … was open and obvious. It was avoidable or not effectively unavoidable, clearly, and there were no special aspects." *Torrez*, *supra* at *2. Plaintiff appealed, challenging both of these findings. In affirming, the Court of Appeals reiterated the core holding of *Lugo v Ameritech Corp*, 464 Mich 512 (2001). Although a property owner "owes a duty to an invitee to … protect [them] from an unreasonable risk of harm caused by a dangerous condition on the land," this duty "generally does not require the owner to protect an invitee from open and obvious dangers." *Torrez*, *supra* at *2. A condition is open and obvious if an average user of ordinary intelligence would have been able to discover the danger,

upon casual inspection. The test is objective. A court does not ask whether a particular plaintiff knew or should have known of the hazard.

In finding that the ice at issue was "open and obvious," the court cited *Janson v Sajewski Funeral Home*, 486 Mich 934 (2010). In this panel's view, *Janson* "made very clear" that "black ice" is open and obvious when there are "indicia of a potentially hazardous condition." *Torrez*, *supra* at *2. Thus, when a slip and fall occurs in winter, "wintry conditions" – such as sub-freezing temperatures, snow on the ground, mist, light freezing rain, and/or light snow fall earlier that day – make the "open and obvious" defense applicable even if the ice itself was allegedly not visible.

In *Torrez*, "plaintiff testified to seeing snow all over, on that December day. When there is abundant snow on the ground, a reasonable person observing wet pavement should understand that the apparent moisture might have begun to freeze, and thus present an extremely slippery surface. Accordingly, the combination of winter temperatures and abundant snow on the ground rendered the ice lurking within a wet area of concrete an open and obvious hazard." *Id.*

Even when a condition is open and obvious, there can still be liability under *Lugo* if there is a "special aspect" that makes the condition unreasonably dangerous. Upon finding that the condition at issue here was open and obvious, the panel next considered – and rejected – Plaintiff's argument that a "special aspect" existed. Special aspects exist where the person confronting the dangerous condition should be expected to "hazard it" despite the apparent danger, or where the severity of the potential harm is extreme. Here, Plaintiff did not argue that the hazard of slipping and falling was particularly extreme. She did, however, argue that the hazard in question was effectively unavoidable. The court disagreed, noting that "a reasonable person shopping for anything other than an urgent necessity that sees no way to enter a store other than by confronting a serious hazard would elect to postpone the errand, or take her business elsewhere." *Torrez, supra* at *3. Even if Plaintiff needed to enter the store at that time, Plaintiff's testimony indicated that she could have used the concrete walkway to avoid the ice (although this would have required her to walk through snow).

Judge Brian Zahra and Kirsten Frank Kelly signed the majority opinion. Judge Elizabeth Gleicher concurred, but wrote separately to emphasize that in her view, the result was mandated by *Janson.* *Janson* is binding Supreme Court precedent in Judge Gleicher's view; in the absence of *Janson* she would have found a fact question.

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