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Twice As Nice: Co-Defendant Settles For $400k While Secrest Wardle's Client Stands Its Ground

By Drew Broaddus

In *Dombrowski v Laurel Chapel & Villa Del Signore,* released April 26, 2012, Case No. 301484, Patricia Dombrowski slipped and fell on ice in a parking lot on her way into her granddaughter's wedding. The wedding chapel was operated by Laurel Chapel (represented by Secrest Wardle), which leased the building. The building was owned by Villa Del Signore. Mrs. Dombrowski sued Laurel Chapel and Villa Del Signore under premises liability and negligence theories. Villa Del Signore then filed a cross-claim against Laurel Chapel, seeking indemnity under a provision in the lease. The lease allegedly required Laurel Chapel to reimburse Villa Del Signore for any liability Villa Del Signore might have to third-parties relating to the leased premises.

Defendants filed separate motions for summary disposition in the trial court, both arguing that the ice Mrs. Dombrowski slipped on was open and obvious. Laurel Chapel also moved to dismiss Villa Del Signore's indemnity claim, arguing that the language of the indemnity clause did not cover this particular injury. The trial court denied all three motions – in other words, finding that Mrs. Dombrowski's premises liability claims would proceed to trial against both Defendants, and that Villa Del Signore could maintain its indemnity suit against Laurel Chapel. Shortly thereafter, Villa Del Signore opted to settle with Mrs. Dombrowski for $400,000 and then claimed that it could recover the considerable sum it had paid to Mrs. Dombrowski from Laurel Chapel under the indemnity clause.

SECREST WARDLE NOTES:

Dombrowski reflects a trend: recent Court of Appeals opinions have viewed slip and fall claims involving snow and ice with a critical eye. The "Open and Obvious" Doctrine is a powerful defense to such claims. Plaintiffs can still get their snow and ice cases before a jury, but it is becoming less frequent. There must be something truly unusual about the snowy or icy condition to avoid the open and obvious defense.

When defending indemnity claims, it is important to have a firm grasp on contract interpretation principles as well as the law governing the underlying claim. Here, the lack of merit of the underlying slip and fall claim was dispositive of the indemnity claim. Because Secrest Wardle's attorneys raised this issue early, it enabled them to take a more aggressive stance. While some indemnity clauses are more complicated (and provide for the payment of defense costs for mere "claims"), many require a finding of actual liability in the underlying case before indemnity is triggered.

Laurel Chapel pursued an interlocutory appeal of both issues. The Court of Appeals held that Laurel Chapel was entitled to summary disposition as to the premises liability claim as well as the indemnity claim. The Court's holding resulted in Laurel Chapel's dismissal from the case without any exposure.

As to the premises liability claim, the Court found: "[A] possessor of land has a duty to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land. … But the duty of a premises possessor is not absolute and does not extend to open and obvious dangers…." The Court noted that "[w]hether a danger is open and

obvious depends upon whether an average user with ordinary intelligence would have been able to discover the danger upon casual inspection. Absent special circumstances … the hazards presented by visible ice and snow are generally open and obvious and do not impose a duty on the property owner to warn of or remove the hazard. Only if there is some special aspect that makes the accumulation unreasonably dangerous must a possessor of land take reasonable measures within a reasonable time after an accumulation of ice and snow…."

Here, Mrs. Dombrowski argued that the ice on which she slipped and fell was not open and obvious because it was "black ice on asphalt not visible upon casual inspection." The Court explained that black ice by definition is transparent, or nearly invisible and, *unless there is evidence that it would have been visible upon casual inspection or other indication of a potentially hazardous condition,* it does not present an open and obvious danger. "Indication of a potentially hazardous condition may include circumstances such as the presence of snow in the area or covering the ice, the recent occurrence of any type of precipitation combined with freezing temperatures, or a situation where the plaintiff observed others slipping."

Here, the Court found that "[t]he indicia of a potentially hazardous condition were sufficient to allow a conclusion as a matter of law that the black ice, although not actually visibe upon casual inspection, was an open and obvious danger." Specifically, "…[t]here was no dispute that snow and slush were present near the area where Mrs. Dombrowski fell – the pictorial evidence and Mrs. Dombrowski's husband's own testimony supported that fact. Moreover, in her deposition, Mrs. Dombrowski testified that she observed snow flurries on the day of the incident, that the ground felt slippery while she was walking up to the area where she actually fell, that she saw snow on the ground nearby, and that she was a life-long Michigan resident."

The Court also rejected Plaintiff's "special aspect" argument as follows: "[t]o the extent that Mrs. Dombrowski argued that the water dripping from the awning was a special aspect that made the accumulation of black ice unreasonably dangerous, we find that argument without merit. The allegedly unnatural circumstances of the accumulation of the ice in this case did not differentiate the risk associated with it from the risk typically associated with other naturally icy surfaces."

Regarding Villa Del Signore's indemnity claim, the Court simply held: "[b]ecause … the black ice at issue was open and obvious, Laurel Chapel was not liable for Dombrowski's claims. Thus, Laurel Chapel was entitled to summary disposition on Villa Del Signore's cross-claim based on the indemnification clause as well." Therefore, the Court found it unnecessary to consider Laurel Chapel's more complicated arguments based on the lease language.

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