SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Outside Rain Not Enough To Make Inside Conditions "Open and Obvious"

By Mark F. Masters

In *Bialick* v *Megan Mary, Inc.*, _ Mich App _ (2009), the Court of Appeals held that a jury needed to decide if wet conditions in Defendant's gas station store were open and obvious when there was drizzling rain outside.

In January of 2006, Plaintiff pulled her car into Defendant's gas station for the first time. Plaintiff testified that there was drizzling rain outside. She entered the gas station to prepay for her fuel. After she took several steps past the threshold, she turned to head toward the cashier counter. She then slipped and fell, breaking her ankle. Plaintiff testified she was looking down at the floor while walking but did not see anything which would have alerted her to be careful. After the fall, her hands were wet or moist with water, although she was not sitting in water.

Plaintiff testified that there were no mats or caution signs posted. Defendant's owner testified that there was a long mat covering the tile floor from the door to the cashier counter. He confirmed that it was raining off and on that day. The owner also testified that "there was no water," but that the floor had become wet from customers walking into the store with water on the bottoms of their shoes due to the rain. He did not recall if anyone had mopped up that day. However, the Court noted that he inconsistently testified about whether he saw Plaintiff slip, and whether there were any warning signs posted.

SECREST WARDLE NOTES:

As always, careful questioning of a claimant during a deposition often makes or breaks this kind of case. However, this case also highlights an equally important deposition: that of Defendant. In this case, Defendant's owner apparently gave different versions of events in different parts of his deposition, as well as in his answers to interrogatories. While the Court's opinion did not expressly state that Defendant's owner's contradictions were the main reason for the reversal of the dismissal, it did focus on the problem.

Therefore, quality preparation time should be spent with Defendant prior to answering written discovery requests or appearing for a deposition. There was no explanation offered for the owner's contradictory testimony that (1) Plaintiff told him she fell outside, and (2) that he saw her slip and lying on the floor inside. These contradictions usually guarantee a finding of a "question of fact" for a jury to decide.

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His answers to interrogatories were also inconsistent.

The duty a premises possessor owes to those who enter the premises is determined by the status of the visitor. Michigan recognizes three traditional categories of visitors: trespasser, licensee, and invitee. It is undisputed that Plaintiff was an invitee while on Defendant's premises. A premises possessor owes an invitee a duty "to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the [premises]." However, a premises possessor owes no duty to protect an invitee from dangers that are "open and obvious" unless special aspects exist, such as a condition that is effectively unavoidable or imposes an unreasonably high risk of severe harm.

The trial court accepted Defendant's argument that Plaintiff should have been aware of a potentially hazardous condition inside the gas station based solely on the "drizzly" or "misty" weather outside and dismissed the case based on the open and obvious defense. However, the Court of Appeals reversed the dismissal as the "focus must be on the objective nature of the condition of the premises at issue." The Court found that Plaintiff had produced sufficient disputed material facts for the jury to find in her favor.

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