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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

4.18.05

Snow-Covered Ice v. Open and Obvious: The Debate Goes On

By Todd M. Rowe

In *Chapman v. National City Bank of Michigan/Illinois,* an unpublished decision of the Michigan Court of Appeals, Plaintiff alleged she slipped and fell in Defendant's parking lot on snow covered ice on her way to work. The Kalamazoo Circuit Court granted Defendant's motion for summary disposition holding that the snowy and icy condition of the parking lot at the time Plaintiff fell was open and obvious. The Michigan Court of Appeals affirmed the trial court's dismissal.

It is well-settled law in Michigan that "absent special circumstances, the hazards presented by ice and snow are open and obvious and do not impose a duty on the property owner to warn of or remove the hazard." *Corey v. Davenport College of Business,* 251 Mich App 1, 4-5, 8; 640 NW2d 392 (2002). Any danger posed by snow-covered ice is open and obvious where plaintiff knew of, and under the circumstances an average person with ordinary intelligence would have been able to discover the condition and risk it presented. *Joyce v. Rubin,* 249 Mich App 231, 239; 642 NW2d 360 (2002). However, the Michigan Court of Appeals has previously held that the fact that two other people fell in the same spot in a parking lot "could call into question that the danger was indeed open and obvious to reasonably prudent persons."

In upholding the trial court's decision in this case, the Court of Appeals closely examined the evidence provided in support of Defendant's motion for summary disposition. First, Plaintiff admitted in her deposition that she was aware the weather had recently become warmer which created the potential for melting snow. Plaintiff's deposition testimony further demonstrated that light snow had accumulated over ice in the parking lot. Plaintiff testified that she was walking slowly on this particular morning

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The Court of Appeals' decision in *Chapman* serves as yet another reminder of the important role a plaintiff's own testimony plays in supporting a defendant's motion for summary disposition. The standard for summary disposition in the context of the open and obvious doctrine is "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In *Chapman,* the Court of Appeals relied heavily upon Plaintiff's own testimony that she was aware there had been an increase in temperatures causing snow to melt, and that she could have foreseen the risk of falling due to her experience with Michigan winters. Consequently, summary disposition was appropriate because "[g]iven this testimony, the parking lot's condition was open and obvious."

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because she understood the risk of falling based upon her experience with previous Michigan winters. Second, a witness who was dropping his wife off for work in the parking lot at the time testified that snow piled on the grass had begun melting due to warmer temperatures and the melted snow "flowed" into the parking lot. Finally, one of Defendant's maintenance technicians testified the "parking lot was a 'frost color' because a sleety mixture of snow had started falling."

Based upon the deposition testimony of Plaintiff and witnesses to the conditions of the parking lot on the morning of the accident, the Court of Appeals found that Plaintiff was aware that the weather had recently warmed and there would be the potential for ice-covered snow. The Court further noted that there was no evidence to establish "that other people fell in the same spot at the same time." Moreover, there was ample evidence to establish that a "reasonable person in Plaintiff's position should have foreseen that the parking lot was slippery." Consequently, given this testimony, the Court of Appeals upheld the trial court's finding that Defendant owed no duty to Plaintiff as the condition of the parking lot was open and obvious.

In Michigan, a premises owner has a duty to diminish the hazard posed by an accumulation of snow and ice that is "unreasonably dangerous" despite its open and obvious nature. Such a condition would constitute a "special aspect," which would exempt the case from the open and obvious defense. In her final argument, Plaintiff asserted that Defendant failed to take reasonable measures within a reasonable time to diminish the risk of injury to Plaintiff. The Court of Appeals rejected Plaintiff's argument in this regard because Plaintiff failed to allege any special aspects that made the parking lot unreasonably dangerous. In the absence of any such "special aspects," Defendant owed no duty to Plaintiff to take any measures after it snowed.

The Court of Appeals concluded that the snow and ice in the parking lot in this case was open and obvious, and the condition possessed no special aspects that precluded the application of the open and obvious doctrine. Therefore, the trial court correctly held Defendant owed no duty to Plaintiff.

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