

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Plaintiff's Own Creation of "Unavoidability" Avoids Summary Dismissal

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In *Robertson v Blue Water Oil Co.*, ___ Mich App ___ (2005), the Michigan Court of Appeals held in a 2-to-1 decision that Defendant's commercial purpose was a "special aspect" which "trapped" Plaintiff on the premises because the Plaintiff wanted to buy coffee and windshield wiper fluid. Therefore, the open and obvious defense was unavailable to Defendant.

Generally, a premises possessor in Michigan owes the following duties to business visitors ("invitees"): (1) To keep the premises safe and in reasonable repair, and (2) to remove or warn of any unreasonable risk of harm that the invitees might not otherwise observe. Premises possessors cannot be liable for an "open and obvious" condition unless one of two exceptions applies. The exceptions are if the condition is (1) "unavoidable" (the invitee is trapped on the property and can only get out by "going thorough" the dangerous condition), or (2) "unreasonably dangerous" (the condition presents an unreasonably high risk of severe harm).

In *Robertson*, Plaintiff was a truck driver who stopped at Defendant's gas station. After Plaintiff paid for his gas at Defendant's pump, he slipped on ice while walking to the station's convenience store to buy coffee and windshield washer fluid. The lot was covered with ice from freezing rain, and there had been numerous complaints for hours before Plaintiff's accident.

The trial court denied Defendant's motion for summary disposition based upon the open and obvious defense, even though Plaintiff "was aware that the driveway and Defendant's parking lot were icy." The Court of Appeals agreed with the trial court and Plaintiff that the conditions of the premises presented the "special aspect" of being "unavoidable."

The Court held that "an open and obvious accumulation of snow and ice does not *per se* feature any 'special aspects.'" Therefore, "because the icy conditions here were only open and obvious, Defendant would have no liability in the absence of 'special aspects' that 'make a risk of harm unreasonable nonetheless,' irrespective of the specific kind of negligence alleged." Further, "special aspects exist if the condition is 'effectively unavoidable' or constitutes 'an unreasonably high risk of severe harm.'"

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Given the trend of case law in this area, *Robertson v. Blue Water Oil Co.*, is a surprising decision. It has long been the law that the open and obvious defense will not apply when the condition is "effectively unavoidable." The classic example is a person who is trapped somewhere who must confront the dangerous condition, such as a customer in a store with only one exit which is blocked by a puddle of water. However, *Robertson* is the first published decision which has held that the open and obvious defense is inapplicable when the Plaintiff himself makes the condition unavoidable.

Here, the Court held that the condition was effectively unavoidable since Plaintiff wanted to buy windshield washer fluid for his truck, and it would have been unsafe not to do so. By extension of this logic, many open and obvious conditions would be unavoidable. For example, "the puddle was in front of the milk cooler in the store, and I had to get milk for my baby"; or "I had to get food for my dogs"; or "I had to buy nails to fix a loose board in the floor of my house", and so on. Under *Robertson*, such people may now avoid the open and obvious defense.

One of the underlying bases for the open and obvious defense is "the overriding public policy of making people responsible for their own safety." *Robertson* is inconsistent with the trend of cases in this area or the public policy behind them. It is anticipated that it will be overruled by the Michigan Supreme Court.

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The majority of the Court rejected Defendant's positions that the conditions were "avoidable" (1) because Plaintiff could have gone to a different service station or refrained from purchasing washer fluid after paying at the pump for his gas, and (2) because he was not "effectively trapped." The Court reasoned:

A reasonable trier of fact could rationally find that Plaintiff was 'effectively trapped' because it would have been sufficiently unsafe, given the weather conditions, to drive away from the premises without windshield wiper fluid.

...

Even if the record showed that Plaintiff was aware of a realistic, safe alternative location to purchase his fuel, coffee, and windshield washer fluid, where Defendant has invited the public, and by extension Plaintiff, onto its premises for commercial purposes, we decline to absolve Defendant of his duty of care on that basis.

In her dissenting opinion, Judge Kelly poignantly wrote:

Here, Plaintiff was not required to confront an unexpected risk, nor was he "effectively trapped." Plaintiff could have gone to a different service station to make his purchases of fuel, coffee, and windshield washer fluid. Although the majority contends that there was no evidence that any available alternatives existed, the record reveals otherwise. Plaintiff testified that he was aware of other twenty-four hour service stations around the interstate, some of which were truck stops. Nothing prevented Plaintiff from shopping at any of these other stations. Nor was there anything about Defendant's premises which forced him to cross the icy premises to reach Defendant's store. Plaintiff's desire or need to purchase coffee and washer fluid, compelling as it may have been, does not affect the legal duties Defendant owed to Plaintiff. To conclude otherwise impermissibly shifts the focus from an examination of the premises to an examination of the personal circumstances of Plaintiff. Plaintiff admitted he was aware of the icy conditions and chose to traverse the area. Under these circumstances, the icy condition of the parking lot was not "effectively unavoidable."

Nevertheless, the majority of the Court found dispositive the fact that Plaintiff was a "paying customer who was on Defendant's premises for Defendant's commercial purposes, and thus was an invitee of Defendant."

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