SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Ice on Walkway in Winter Was Open and Obvious

By Brian Thomas

In *Butler v Balal, Inc.*, unpublished decision of the Michigan Court of Appeals, Plaintiff slipped and fell on "clear" ice located outside the main entrance of Defendant's gas station and convenience store. The Court of Appeals, in reversing the trial court's denial of Defendant's motion for summary disposition, held that the icy walkway was an open and obvious danger, and remanded the case back to the trial court for entry of an order granting Defendant's motion for summary disposition.

At approximately 5:00 a.m. on February 27, 2004, Plaintiff stopped at Defendant's gas station and convenience store to purchase gasoline and cigarettes. The weather was cold but it was not snowing. The lights were on in the store and above the gas pumps. After paying for his purchases, Plaintiff exited the store, stepped down off the small, porch-like area located in front of the store's main entrance, and then slipped and fell on "clear" ice located on the pavement below, breaking his ankle.

Defendant filed a motion for summary disposition arguing that the ice on which Plaintiff allegedly slipped was an open and obvious condition which did not present a unique risk of harm. The trial court denied Defendant's motion finding that the condition was not open and obvious, and further holding that, because it had not snowed on the day of the accident, Plaintiff should not have expected to encounter this danger. Defendant appealed the trial court's ruling, arguing that the trial court committed error by finding that the icy walkway was not an open and obvious danger.

The open and obvious doctrine, under *Lugo v Ameritech Corp.*, 469 Mich 512 (2001), states that a premises possessor owes a duty to invitees (i.e., business visitors) to exercise reasonable care to protect against an unreasonable risk of harm caused by dangerous conditions on the premises, but it does not extend to open and obvious hazards. However, the open and obvious hazard must not be "effectively unavoidable" or "unreasonably dangerous."

SECREST WARDLE NOTES:

While the open and obvious defense continues to be a strong defense in favor of Michigan property possessors and managers, it is no substitute for snow and ice removal. Property owners and managers still have a duty to take reasonable measures within a reasonable amount of time to alleviate the dangers of snow and ice on their properties. You never know when the law may change, or if there may be a subtle factual difference which will distinguish your case from a previously decided one.

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In *Kenny v Kaatz Funeral Home*, 472 Mich 929 (2005), the Michigan Supreme Court held that snow and ice are common occurrences during a Michigan winter and that the slip hazard posed by snow or ice is open and obvious, generally posing no special aspects that render it unreasonably dangerous. In addition, in *Ververis v Hartfield Lanes*, 271 Mich App 61 (2006), the Court of Appeals held that "as a matter of law, by its very nature, a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery."

The *Butler* Court, in reversing the trial court, found that the absence of snowfall on the day of the accident was a red herring argument. The Court noted that the presence of snow cover or snowfall was not the standard for imputing reasonable awareness of icy conditions. Rather, the Court, in relying on *Kenny* and *Ververi*s, held that it is common knowledge that the cold climate during Michigan's winter months is conducive to the formation of ice on the ground, and that an average person would have reasonably expected the danger of ice in the parking lot. Therefore, the *Butler* Court concluded that the danger was open and obvious and did not pose a risk of serious harm.

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We welcome your questions and comments.

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