

# boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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## A Damp-Appearing Handicap Ramp Is Open and Obvious When There Is Indicia Of Wintry Conditions

By Kellie Joyce

Ordinarily, a landowner owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm posed by a dangerous condition on the land. Michigan provides for liability for breach of this duty if the possessor knows or should know of a dangerous condition on the premises and fails to fix the defect, guard against the defect or warn the invitee of the defect. As it is well known amongst property owners and their insurers, however, an open and obvious defect negates a landowner's duty.

This was the situation in the case of *Carl Bath v. Brownstown Shopping Plaza, LLC and Artistic Outdoor Services, Inc.*, an unpublished Michigan Court of Appeals decision of December 18, 2014. In that case, the Michigan Court of Appeals upheld a dismissal of Carl Bath's premises liability action against Brownstown Shopping Plaza.

The lawsuit arose when Carl Bath drove to the Brownstown Shopping Plaza to return movies he rented from Blockbuster Video. He planned on walking up a blue painted handicap ramp to Blockbuster's exterior drop box. Prior to walking on the ramp, Mr. Bath noticed that the ramp appeared to be damp. He also testified at his deposition that the temperature was below freezing on the day of this incident, but the roads were clear and there had been no precipitation for at least a couple of days.

In *Bath*, the Michigan Court of Appeals opined that perfection is neither practical nor required by the law. Under ordinary circumstances, the overriding public policy is to encourage people to take reasonable care for their own safety. A possessor of land owes no duty to protect or warn of dangers that are open and obvious. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection.

### SECRET WARDLE NOTES:

This is just another example of the Michigan Court of Appeals carving out an exception to a landowner's liability for black ice. When there is indicia of wintry conditions, combined with common sense that moisture turns to ice when it is cold outside, even "invisible" black ice can be found to be open and obvious.

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The Michigan Court of Appeals relied upon *Cole v. Henry Ford Health System* and *Janson v. Sajewski Funeral Home Inc.*, which held that winter weather conditions can render black ice an open and obvious danger, where there are such indicia of a potentially hazardous condition. In applying the facts of this case to the law, the *Bath* Court found that the plaintiff knew the temperature was below freezing. Before his fall, he readily observed that the ground was damp. It was reasonable to expect that an average person with ordinary intelligence would know that moisture turns to ice when temperatures are below freezing. The open and obvious danger, therefore, negated the shopping center's duty to warn or protect.

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