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boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

An uneven sidewalk is *open and obvious* to the average Joe and the plain Jane

By: Sante S. Fratarcangeli **March 14, 2016**

SECREST WARDLE NOTES

The Court's ruling is particularly important because the Court found that an average person with ordinary intelligence would have discovered that two abutting same color sidewalk slabs with a significant height difference to be open and obvious. The Court was looking for the plaintiff to show how an objective person in plaintiff's position would have viewed the premises and the hazard. If plaintiff desired to show exactly how the view looked from plaintiff's perspective (because she thought the photographs were not representative), it was incumbent upon her to provide such photographs or some other evidence - she did not.

* * * *

In *Eaton v. Frontier Commc'ns ILEC Holdings, Inc*., unpublished, the Michigan Court of Appeals examined the applicability of the open and obvious doctrine to the common-place occurrence of uneven sidewalk slabs.

Plaintiff attended the Clinton Fall Festival. The festival was located on property owned by Frontier Communications. A hospitality tent was set up on the property. Plaintiff was walking toward the tent when her foot landed on an uneven portion of sidewalk, causing her to fall and break her elbow. Plaintiff brought a premises liability suit against the Festival and Frontier.

Plaintiff testified that she approached the sidewalk on an angle, i.e., while the sidewalk ran east-west, she approached the offset from the northwest. She testified that she was not looking down as she approached the sidewalk; her attention focused on the hospitality tent. Plaintiff admitted that afterward she did not have to point out to people what she tripped on because it was "obvious."

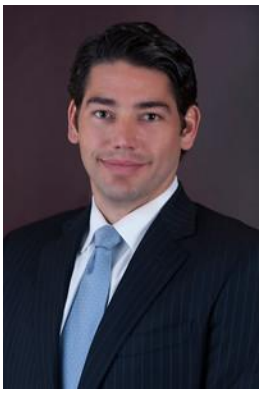
Photographs revealed a large striking difference between the heights of the two sidewalk slabs. Additionally, two individuals who viewed the sidewalk after the fall reported that they thought the defect would be plainly visible upon casual inspection.

Defendants moved for summary disposition arguing that the uneven sidewalk was an open and obvious danger. Plaintiff argued that the angle of her approach to the sidewalk and the color of the sidewalk caused the 2 ½ - or 3 inch height difference to not be noticeable, i.e., not 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." *Hoffener v Lanctoe*, 491 Mich 450, 461 (2102). When considering whether a defect is open and obvious, courts must consider the "objective nature of the condition of the premises at issue." *Lugo v. Ameritech Corp, Inc*, 464 Mich 512, 516 (2001). A plaintiff's failure to see a hazardous condition does not eliminate the applicability of the open and obvious doctrine because the test is *objective*. *Watts v Mich Multi-King, Inc*, 291 Mich App 98, 102 (2010).

To support her position, Plaintiff argued that the witnesses and photographs were not applicable because they did not speak to how an objective person from plaintiff's point of view would have viewed the hazard. Problematically, plaintiff did not submit photographs showing exactly how the view looked from her perspective. Plaintiff's only evidence was her own testimony; self-service testimony that purported to demonstrate that the level difference in the slabs was not noticeable because of the "angle" of her approach and because the two abutting sidewalk slabs were the same color. For plaintiff to say that the submitted photographs were not indicative of how an objective person in plaintiff's position would have viewed the premises, without any other meaningful evidence, was to venture into impermissible speculation. *Ghaffari v Turner Co*, 268 Mich App 460, 464.

After carefully considering both arguments, the Court of Appeals held that the hazard was open and obvious as a matter of law. The Court admitted their familiarity with the common-place occurrence of uneven sidewalk slabs and reasonably inferred how the hazard would have appeared from different angles not depicted in the photographs. The Court discredited plaintiff's self-serving testimony given her admission that she was not looking down as she approached the sidewalk. The Court further determined that there was no explanation as to why an "average person with ordinary intelligence" would not have noticed the height difference "upon casual inspection" once within a couple of steps of the sidewalk.



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Please contact Sante S. Fratarcangeli at

sante@secrestwardle.com

or 248-539-2856

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Troy 248-851-9500
Lansing 517-886-1224
Grand Rapids 616-285-0143
www.secrestwardle.com

CONTRIBUTORS

Premises Liability Practice Group Chair
Mark F. Masters

Editor
Linda Willemsen

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