

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

Watch Your Step: Unlit, Uneven Pavement is Open & Obvious

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SECRET WARDLE NOTES

Injuries sustained in trip-and-fall incidents due to uneven pavement are not ordinarily actionable unless “unique circumstances surrounding the area made the situation unreasonably dangerous.” *Weakley v. City of Dearborn Hts.*, 240 Mich. App. 382 (2000). Although courts have held that darkness may present an unreasonable risk of harm on a premises, the Court in *Pincomb v. Diversified Investment Ventures, LLC*, (Docket No. 324989), found that an uneven sidewalk cast in darkness was an open and obvious condition on the premises, and further, that the darkness did not pose an unreasonable risk of harm.

* * * *

In *Pincomb v. Diversified Investment Ventures, LLC*, (Unpublished, Docket No. 324989), Plaintiff helped his friend move into a rental home owned by Defendant on a dark winter evening. The rental home’s porch light was broken and only the front porch steps were illuminated by nearby streetlights. However, the side of the house, including side stairs leading to the porch, was not illuminated. Plaintiff moved boxes into the house. As he exited the home using the side entrance and stairs, he stepped onto an uneven sidewalk and fell onto the driveway. Plaintiff sustained injuries to his left knee, ankle, leg, and lower back and filed a premises liability action against the landlord.

Defendant moved for summary disposition arguing that there was no genuine issue of material fact that (1) the uneven pavement was open and obvious; (2) Defendant had no notice of the alleged hazard. In response, Plaintiff argued that there were genuine issues of material fact as to whether the uneven pavement was open and obvious and whether the sidewalk posed an unreasonable risk of harm. Further, Plaintiff argued that the condition of the sidewalk was effectively unavoidable as the moving truck blocked the front steps. The trial court granted summary disposition in favor of Defendant, finding that “[t]he uneven sidewalk was not unreasonably dangerous and was avoidable. There were no special aspects present and the defect was discoverable upon casual inspection.” Plaintiff appealed.

The Appellate Court affirmed the trial court’s granting of summary disposition in favor of Defendant. The Court addressed whether the uneven pavement was an open and obvious hazard, whether the condition on the premises posed an unreasonable risk of harm, and whether the uneven pavement was effectively unavoidable.

The uneven pavement was open and obvious. The Appellate Court ruled that the uneven pavement was readily apparent despite the poor lighting conditions. Relying upon *Weakley v. City of Dearborn Hts*, the Appellate Court ruled that “steps and differing floor levels... such as... uneven pavement... are not ordinarily actionable unless unique circumstances surrounding the area in issue made the situation unreasonably dangerous.” 240 Mich. App. 382 (2000). The Court held that unevenness arising from gaps or differing levels between pieces of pavement is a common characteristics of sidewalks in general.

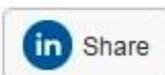
The uneven pavement did not pose an unreasonable risk of harm. Plaintiff argued that the deficient lighting made the uneven pavement unreasonably dangerous. The Court conceded that darkness may pose an additional hazard, but plaintiffs must demonstrate that an average person would be unable to discover the alleged hazard upon casual inspection under the circumstances. The Court noted that Plaintiff expressly recognized that the subject area was dark and not well lit. Nevertheless, Plaintiff made a conscious decision to move items into the home, despite the consistent lack of illumination around the home.

The uneven pavement was not effectively unavoidable. In order for an alleged condition on a premises to be classified as effectively unavoidable, the plaintiff must be “effectively trapped” by the hazard. In *Pincomb*, Plaintiff chose to use the side stairs as a matter of convenience as the side stairs were closest to his vehicle. Plaintiff contended that he could not use the front steps because a moving truck blocked the front entrance of the home. The Court was unimpressed with this argument, finding that Plaintiff could have used the front steps after asking the truck to park elsewhere. Further, Plaintiff could have chosen a different time to move the items into the home. Accordingly, the Court found that Plaintiff had a clear choice in deciding whether to confront the sidewalk at the bottom of the stairs, negating Plaintiff’s argument that the alleged hazard was effectively unavoidable.

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