SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

07.16.14

Be On Notice Of The "No Notice" Defense, Especially In Ice And Snow Cases

By Drew Broaddus

While it is well known that snow and ice cases often run head-first into the open and obvious defense,[1] the issue of notice is sometimes overlooked by attorneys who defend property owners from slip and fall claims. "Michigan law requires that a *prima facie* case of premises liability include sufficient evidence that the landowner either created the dangerous condition or had actual or constructive notice of the condition." *Sparks v Wal-Mart Stores, Inc,* 361 F Supp 2d 664, 668 (ED Mich 2005). Although the issue of notice is not unique to snow and ice cases, the fact that snow and ice have been judicially recognized as "transient conditions," *Plunkett v DOT,* 286 Mich App 168, 180 (2009), gives notice greater importance in these type of cases.

SECREST WARDLE NOTES:

Borsos illustrates the conundrum faced by slip and fall claimants in snow/ice cases: in order to avoid the open and obvious defense, they often describe the condition as invisible "black ice." However, if the condition is truly invisible, it is very difficult for a claimant to say that the property owner knew or should have known about it, as required to establish notice.

Although there is a tendency to view snow and ice cases solely through the lens of the open and obvious doctrine, you should bear in mind that notice is an entirely separate issue from the open and obvious defense, and *Borsos* illustrates that notice can be dispositive by itself.

A property owner is liable for an injury resulting from a dangerous condition on the premises if the condition was caused by the "active negligence" of the defendant or its employees, or if the defendant or its employees either knew or should have known of the condition. *Clark v Kmart Corp,* 465 Mich 416 (2001). Notice may be inferred from evidence that the dangerous condition existed for such a duration of time that a reasonably prudent owner would have discovered the hazard. *Id.* The issue of constructive notice, in the context of a slip and fall on snow/ice, was recently addressed in *Borsos v Muirwood Square Assoc,* unpublished opinion per curiam of the Court of Appeals, rel'd 6/24/14 (Docket No. 315060).

In *Borsos*, Plaintiff allegedly slipped on invisible black ice on February 12, 2011, while on her way into a business located in Defendant's shopping plaza. Plaintiff testified that, apart from the patch of invisible ice where she fell, the walkway appeared to be clear. Plaintiff further testified that, although it was not snowing at the time of her alleged fall, she did observe snow piled on the ground. She admittedly had no way of knowing how long the ice patch had been there, although she had an expert who was purportedly going to testify about this issue at trial. Based upon this record, Defendant (represented by Secrest Wardle) moved for summary disposition under the open and obvious doctrine. Defendant's motion also cited Plaintiff's failure "to show defendant had actual or constructive notice of the allegedly dangerous condition, in this instance, black ice."

The trial court granted Defendant's motion for summary disposition, "finding defendant did not have constructive notice of the unsafe condition of the sidewalk and, alternatively, that the black ice was an open and obvious danger." Plaintiff appealed by right. The Court of Appeals affirmed but only addressed the notice issue. The Court held:

---

[1] See *Boundaries,* August 1, 2012, "'Effectively Unavoidable': No Longer So Effective In Avoiding The Open And Obvious Doctrine," by Drew Broaddus. See also *Hoffner v Lanctoe,* 492 Mich 450 (2012).

> Because defendant had a duty to inspect its premises for latent dangers, it could be liable for harm caused by a latent dangerous condition if the dangerous condition was of a kind or sort that by the exercise of reasonable care it would have discovered. … The failure to inspect or adequately inspect may constitute constructive notice if the dangerous conditions is of such a character or has existed for a sufficient time that a reasonable premises possessor would have discovered it.…
>
> Defendant's property manager was deposed. He stated that he inspects the property "anytime there's a snow event or a snow event that's forecasted [I] check the property before, during and after." He testified that during these inspections he drives the parking lot and walks the sidewalks looking for ice and any other dangers. Specifically regarding the day of plaintiff's fall, he testified that he inspected the property at approximately 8:00 a.m. and again on his way home from work in the afternoon. Plaintiff offered no evidence to contradict the property manager's testimony, i.e., there was no testimony that defendant failed to conduct timely inspections given the conditions.
>
> Moreover, there was no evidence to indicate that the inspections were inadequate and that dangerous conditions should have been noted at those times. Plaintiff offered no evidence indicating when the black ice was formed; indeed, she acknowledged that it could have formed mere moments before the accident. Plaintiff's only evidence as to when the black ice formed was contained within the affidavit of a civil engineer, retained by her counsel as a safety consultant. He offered generalized observations about the conditions that give rise to black ice. However, he was unable to opine when the ice formed other than that it did so "by sunset" which was at approximately 6:00 pm. Plaintiff estimated that she fell due to the black ice sometime between 5:00 p.m. and 6:00 p.m. Thus, there was no evidence to support the contention that the black ice formed at anytime other than immediately before she fell.

The Court expressly "decline[d] to address" the trial court's holding "that the hazard was open and obvious," because the lack of actual or constructive notice was, by itself, dispositive of the entire case.

CONTACT US

Troy
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
Tel: 248-851-9500 Fax: 248-538-1223

Lansing
6639 Centurion Drive, Ste. 100
Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids
2025 East Beltline SE, Ste. 600
Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

SECREST SW WARDLE

CONTRIBUTORS

Premises Liability Practice Group Chair
Mark F. Masters

Editor
Linda Willemsen

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for Boundaries, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at **swsubscriptions@secrestwardle.com** or **248-539-2850**.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice
Blueprints – Mapping legal solutions for the construction industry
Community Watch – Breaking developments in governmental litigation
Contingencies – A guide for dealing with catastrophic property loss
Fair Use – Protecting ideas in a competitive world
In the Margin – Charting legal trends affecting businesses
Industry Line – Managing the hazards of environmental toxic tort litigation
Landowner's Alert – Defense strategies for property owners and managers
No-Fault Newsline – A road map for motor vehicle insurers and owners
On the Beat – Responding to litigation affecting law enforcement
On the Job – Tracking developments in employment law
Safeguards – Helping insurers protect their clients
Standards – A guide to avoiding risks for professionals
State of the Art – Exploring the changing face of product liability
Structures – A framework for defending architects and engineers
Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability