

# boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

03.12.10

## Do You See What I See?

By Kellie Lecznar

In *Romanowski v Classy Chasis #290382 (Mich App 3/2/2010)*, the Michigan Court of Appeals considered a case wherein Plaintiff alleged a depression in Defendant's parking lot caused him to fall. This case was initially presented to the trial court which granted Defendant's Motion for Summary Disposition.

Plaintiff Romanowski testified that he was in Defendant's parking lot drying his car when he fell. Romanowski argued that the depression was not visible to him and in his opinion, would not be visible to others who approached from the same direction he had. At his deposition, Romanowski admitted that after he fell he was able to see the depression in the parking lot when he stood up and turned around. Plaintiff also admitted that he was looking at his car at the time of the fall. Plaintiff presented a photograph of the depression which he had taken after he fell. The photo showed no impediment to the discovery of the condition upon casual inspection from any direction.

The Court disagreed with Plaintiff's argument that the depression was not visually detectable and found that it was clear from Plaintiff's deposition testimony that the reason he did not see the depression was because he was looking at his car at the time of the fall. The Court arrived at the conclusion that reasonable minds could not differ that an average person in the same situation would have been able to visually discover the condition. Further, Plaintiff failed to show any special aspects of the condition that would give rise to a duty. Therefore, the trial court did not err in granting Defendant's Motion for Summary Disposition based upon the "open and obvious" doctrine.

In a premises liability case, a possessor of land has no duty to protect an invitee from an "open and obvious" danger unless special aspects exist. The test is objective-not subjective. Whether an average person of ordinary

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*Romanowski* is an unpublished decision and therefore, not binding on lower courts. However, unpublished opinions provide courts with guidance as to what is considered an "open and obvious" condition. Plaintiffs must provide evidence that an average person, of ordinary intelligence, would not discover the danger upon casual inspection. A premises owner should ensure that their property is reasonably maintained and be without hidden dangers and/or hazards that are visually undetectable. Courts may find that a condition that can be easily seen can be easily avoided and therefore, should be considered an "open and obvious" condition.

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intelligence would have discovered the danger upon casual inspection was the test used by the Michigan Court of Appeals in determining their decision. The Court found that the parking lot depression near the sewer drain was “open and obvious” because it could be observed by the average person from any direction.

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