SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

07.10.09

Jury To Determine If Black Ice Was Open And Obvious

By Krystal D. Hermiz

In *Garrison v. St. Paul Fabric Services, Inc*, , a recent unpublished opinion of the Michigan Court of Appeals, the Court ruled that black ice is an open and obvious hazard *only if* the ice would have been visible upon casual inspection or if there were "other indicia of a potentially hazardous condition."

The *Garrison* Court held that the issue of whether the patch of black ice was open and obvious was a "question of fact" for a jury to determine. The evidence in this case supported a finding that the conditions on the day of the accident were such that a reasonable person would not have foreseen that there was ice in the parking lot. Specifically, (1) no snow had fallen for a day or two, (2) the temperature was in the thirties, (3) the lot was clear of visible snow and ice except for a "very small amount" off to one side of the lot, (4) no one else was seen having trouble walking across the lot, and (5) Plaintiff testified that she looked down before stepping out of the truck and the area where she was about to step looked clear. Plaintiff only realized she slipped on ice after falling and feeling the ice with her hands. If these facts were true, the Court held that a reasonable person in Plaintiff's position would not have foreseen the possibility of a patch of black ice.

The Court also disagreed with Defendant's argument that it could not be liable for a small patch of black ice when the rest of the parking lot was clear and safe. The Court held "Such a finding would be inconsistent with the general premise of landowner liability. Otherwise, a landowner would almost always be able to avoid owing a duty simply by maintaining that, apart from the defect that caused the injury, his property was in good repair."

SECREST WARDLE NOTES:

Claims of "invisible" or "nearly invisible" ice, a.k.a. "black ice," have been on the rise since *Slaughter v. Blarney Castle Oil Company*, 281 Mich App 474 (2008) was published last year. While claims of "black ice" usually guarantee that the "open and obvious" defense must be decided by a jury, the defense of lack of notice remains alive and well as a basis for the trial court to dismiss the case.

In "black ice" cases, claimants are usually well prepared to testify that the "black ice" was invisible. Careful deposition questioning will often lead these claimants to admit that there was no way anyone could have known of the presence of the "black ice" before their accident. These admissions are often the cornerstone of a lack of notice defense by the possessor of the premises. Simply put, if the claimant admitted that there was no way she nor anyone else could have been aware of the ice, the possessor of the premises would have also lacked any such "notice" and, therefore, be entitled to summary dismissal by the trial court.

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Therefore, the case was sent back to the trial court for a jury to determine if the claimed "black ice" was open and obvious.

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