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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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An "Unreasonably Dangerous" or "Effectively Unavoidable" Condition May be Immune to the Open and Obvious Defense

By Mark Vanneste

For businesses and their insurers, the "Open and Obvious Doctrine" is a strong defense in many slip and fall cases. During Michigan winters, encountering ice, snow and slippery conditions is all too familiar. Typically, ice is an "open and obvious" hazard. Usually, a property owner is not liable to someone who slips on ice unless the ice involves a "special aspects" which trigger an exception to the open and obvious defense. "Special aspects" are present when the condition is "unreasonably dangerous" or when the condition is "effectively unavoidable." When is a condition, such as ice, "unreasonably dangerous" or "effectively unavoidable?"

In *Bullard v Oakwood*, ___ Mich App ____ (2014), Plaintiff was on the roof of Oakwood Hospital to complete a monthly inspection of a generator. To access the generator's control panel, he had to climb a ladder, cross a metal catwalk, and then walk across boards that were five or six feet above the roof deck. The boards were icy and Plaintiff slipped and fell to the roof below.

The trial court agreed with Oakwood that the ice was an "open and obvious" hazard. However, the trial court also found that the ice was "unreasonably dangerous" in and of itself or was "effectively unavoidable." Therefore, the trial court denied Oakwood's request that the case be dismissed based on the "Open and Obvious Doctrine" finding that the "special aspects" exception to the defense was applicable.

On appeal, Oakwood argued that the ice did not present a substantial risk of severe harm or death so it was not "unreasonably dangerous". Oakwood also argued that Plaintiff *chose* to access the generator in the face of whatever hazards existed, meaning the ice was not "effectively unavoidable." Plaintiff countered that the ice was unavoidable because accessing the generator was part of his work duties and walking across the boards was the only way to do so. He also argued that the ice was unreasonably dangerous as evidenced by his injuries.

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If a court finds that "special aspects" apply to a dangerous condition, the open and obvious defense will not be available to a property owner defendant. The "special aspects" exception applies when a condition is "unreasonably dangerous" or "effectively unavoidable."

In *Bullard*, the Court clarified when a condition is "unreasonably dangerous." For a condition to meet this exception to the open and obvious defense, it must present a "substantial risk of death or severe injury." The Court again used an unguarded, 30-foot deep pit in a parking lot as an example.

The Court also clarified when a condition is "effectively unavoidable." A plaintiff must be "effectively trapped" for this exception to apply. In other words, a condition is only "effectively unavoidable" when a plaintiff has no possible alternative to confronting the condition without being trapped by it.

The Court of Appeals held that the ice was an open and obvious condition. In regard to the "unreasonably dangerous" exception, the Court held that the condition must be "more than theoretically or retrospectively dangerous because even the most unassuming situation can often be dangerous under the wrong set of circumstances." The Court ruled that the ice on which Plaintiff slipped was not "unreasonably dangerous" in and of itself because it did not "present a substantial risk of death or severe injury." The Court also pointed out that Plaintiff's job duties included a monthly walk across the planks during all weather conditions militating against a finding that the ice encountered by Plaintiff was "unreasonably dangerous."

In regard to the "effectively unavoidable" exception, unavoidability was "characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome." In other words, Plaintiff must be "effectively trapped" for the "effectively unavoidable" exception to apply.

The Court noted that Plaintiff had ample opportunity to avoid the ice. He was aware of the potential risk because he asked hospital staff to clear snow from the boards on the day prior to his fall. He also chose to inspect the generator early in the morning when it was still dark and cold instead of waiting until later in the day. Ultimately, the fall was the result of choices he made that could have been made differently. Therefore, the open and obvious ice was not "effectively unavoidable" and was not "unreasonably dangerous."

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

CONTRIBUTORS

Premises Liability Practice Group Chair
Mark F. Masters

Editor
Linda Willemsen

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