

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

3.3.05

Darkness Was Not a Special Aspect of a Pothole

By Cleo N. Fekaris

In *Norris v Waterford Big Boy, Inc*, an unpublished decision by the Michigan Court of Appeals, Plaintiff had been a patron of the Defendant restaurant for many years and fell in Defendant's parking lot. When Plaintiff left the restaurant, she stepped into a pothole in the parking lot and injured her leg. It was dark at the time and the parking lot was dimly lit.

The trial court dismissed the case based on the open and obvious defense. On appeal, Plaintiff argued that despite the open and obvious nature of the pothole, special aspects existed which made the condition unreasonably dangerous. The Court disagreed and explained that if a condition is so open and obvious that it could be expected that a plaintiff would have discovered it, then there is no liability. Determining whether a condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk.

Relying on *Lugo of Ameritech Corp, Inc*, 464 Mich 512 (2001), the Court opined that potholes are an everyday occurrence which should be observed by a reasonably prudent person. Furthermore, “[w]hen considering such ‘everyday occurrences,’ the overriding public policy of encouraging people to take care for their own safety precludes imposing a duty on the possessor of land to make these ordinary occurrences ‘foolproof.’”

SECRET WARDLE NOTES:

The *Norris* decision, although unpublished and therefore non-binding on lower courts, explains that lighting is not a special aspect of an ordinary condition. That is, the dim lighting did not create a special aspect thereby removing this ordinary pothole from the open and obvious doctrine. In its decision, the Court further solidifies the current trend of holdings which define “special aspects” as physical characteristics of the condition itself rather than the surrounding circumstances.

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In deciding this case, the Court noted that Plaintiff had prior knowledge that the parking lot had potholes. During her deposition, Plaintiff admitted that she could have seen the pothole had she been looking at it before she stepped in it. Based on this, the Court concluded that “[a]n ordinary person of average intelligence would have been watching the area of the dim parking lot where she was walking, would have seen the pothole, and would have not stepped in it.” The Court held that the condition, even at night, was an ordinary pothole and it could not have been expected that a typical person tripping on an ordinary pothole would suffer severe injury.

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