SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

03.22.06

Open and Obvious Defense Applies to Tenant's Slip and Fall Claim

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In *Laurendine v. CCA Associates Limited Partnership*, unpublished opinion of the Michigan Court of Appeals decided March 21, 2006, Secrest Wardle obtained a victory on behalf of an apartment complex owner in a slip and fall on ice claim. The Court of Appeals affirmed the trial court's summary dismissal based on the open and obvious defense despite various common law and statutory duties claimed by Plaintiff.

This case arises from an incident where Plaintiff slipped and fell on an icy sidewalk while walking from her apartment to the parking lot and suffered injury. At approximately 5:00 or 5:15 a.m., on April 8, 2003, Plaintiff walked out of the front door of her townhouse to meet her boss, who was going to drive her to work. After she exited her home, she slipped and fell as she stepped onto the ice-covered sidewalk from her porch step. The porch had one step and connected Plaintiff's front entrance door with the sidewalk. Plaintiff did not see the ice on the sidewalk until she slipped and fell on it. Plaintiff testified, "I went down on my bottom and my ankle went under me." Plaintiff broke her ankle due to the fall.

Plaintiff had watched a news broadcast the night before her incident and was informed of the likelihood of freezing rain occurring that night. However, she testified that, when she left her apartment in the morning, the weather was dry and she did not notice the ice. Plaintiff had lived in Michigan her entire life and had experienced the unpredictability of Michigan weather, as well as snow and ice covered sidewalks and roadways prior to the incident.

The Court of Appeals noted that, in order for a plaintiff to establish a negligence claim, a plaintiff must show (1) that the defendant owed him a duty of care, (2) that the defendant breached that duty, (3) that the plaintiff was injured, and (4) that the defendant's breach caused the plaintiff's injury. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72 (2005). A premises owner owes a duty to use reasonable care to protect invitees from an unreasonable risk of harm caused by dangerous conditions on the premises. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516 (2001), citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609 (1995). This duty does not extend to dangers that are open and obvious, unless special aspects of a condition make even an open and obvious risk unreasonably dangerous, in which case the possessor must take reasonable steps to protect invitees from harm. *Lugo, supra* at 517. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. *Joyce v Rubin*, 249 Mich App 231, 238 (2002).

In *Laurendine*, Plaintiff primarily relied on *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99 (2004). However, *Kenny* has been reversed, for the

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Careful deposition questioning and the use of local news weather report footage from the night before the early morning accident again proved instrumental in obtaining a victory for Secrest Wardle's client.

As always, landlords and other premises owners need to make reasonable efforts within a reasonable amount of time to address snow and ice on their properties. In this case, the landlord spread 125 bags of salt on the sidewalks the night before Plaintiff's accident to de-ice the property. If this case had not been dismissed on the open and obvious defense, the landlord's salting would have greatly helped its own defense of the case at trial in the eyes of the jury.

reasons stated in Judge Griffin's dissent. *Kenny v Kaatz Funeral Home*, 472 Mich 929 (2005). In his dissent, Judge Griffin adopted the trial court's reasoning for granting summary disposition. Kenny, supra at 119 (dissenting opinion). The trial court in Kenny noted the fact that the plaintiff had been a long time Michigan resident. Therefore, she should have been aware of the possible danger that awaited her outside the vehicle after witnessing a snow storm. *Kenny, supra* at 119 (dissenting opinion). Similarly, Plaintiff in Laurendine was a long time Michigan resident. The night before the incident, Plaintiff heard, on the news, that there was a possibility of freezing rain occurring. It was reasonable to expect that an average person with ordinary intelligence would have anticipated that the sidewalk would be slippery between 5:00 a.m. and 5:15 a.m. the morning after a night of freezing rain fall. An average person of ordinary intelligence would have discovered the slippery walk upon casual inspection. *Joyce, supra* at 238. Therefore, the condition was open and obvious.

Plaintiff argued that there were special aspects of the condition which precluded dismissal despite the open and obviousness of the ice. However, the Court ruled that the icy sidewalk upon which Plaintiff fell did not present a uniquely high severity of harm and was avoidable. *Kenny, supra* at 121-122 (dissenting opinion). Plaintiff could have walked around the sidewalk or could have been more careful in exiting her apartment after hearing the freezing rain prediction on television the night before. Pursuant to the holdings of *Kenny* and *Joyce*, the icy sidewalk presented no special aspects which would prevent application of the open and obvious defense.

Plaintiff also argued that there were statutory duties owed to her by the Defendant landlord, which precluded dismissal based on the common law open and obvious defense. Again, the Court disagreed: "The plain meaning of 'reasonable repair' as used in MCL 554.139(1)(b) requires repair of a defect in the premises. Accumulation of snow and ice is not a defect in the premises." *Teufel v Watkins*, 267 Mich App 425, 429 n 1 (2005). Thus, MCL 554.139(1)(b) does not impose a statutory duty to remove snow or ice and does not prevent Defendant from availing itself of the open and obvious defense.

Next, Plaintiff alleged that Defendant violated MCL 125.536. MCL 125.536 regulates a landlord's actions in relation to "dwellings," and "common areas" within "dwellings" located on its premises. Statutes must be interpreted under the rule of ordinary usage and common sense. *Adams v Linderman*, 244 Mich App 178, 184 (2000). A "dwelling" is defined as "a building or other place to live in; place of residence; abode." *Random House Webster's College Dictionary* (2001). The sidewalk where Plaintiff slipped was not in a "portion of [her] dwelling." Even though it was arguably a "common area" of the apartment complex, it was not a "common area" of the "dwelling." The ordinary usage of the term "dwelling" does not include a sidewalk because a dwelling is, by definition, a building. Therefore, the statute is not applicable to the maintenance of sidewalks on a premise, and cannot be used to prevent application of the open and obvious defense.

Therefore, the Court of Appeals upheld the trial court's dismissal of the case.

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We welcome your questions and comments.

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