

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Wet Concrete vs. Icy Concrete: Jury to Determine if Open and Obvious

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In *Wolfenbarger, et al v Lakeside Mall, LLC*, an unpublished decision by the Michigan Court of Appeals, Plaintiff slipped on ice on a concrete sidewalk near an entrance to Lakeside Mall. The Court of Appeals affirmed the trial court's finding of a "question of fact" regarding whether the condition was open and obvious.

Plaintiff dropped his wife off near an entrance at Lakeside Mall and parked his car in the parking lot. There was no precipitation at the time, but the parking lot was wet. Plaintiff did not recall any snow or snow banks in the parking lot. He estimated the temperature at 30 degrees. Plaintiff did not see any ice on the sidewalk when he dropped his wife off. Similarly, he did not see any ice in the parking lot nor on any part of the walkway before he fell.

Plaintiff walked to the concrete walkway without incident. When he reached the concrete walkway, he stepped up, slipped and fell. Plaintiff testified that he did not see the ice before he fell. He saw the ice for the first time when he was lying on it. Plaintiff admitted that he saw that the concrete walkway was wet before he fell.

In support of the motion for summary disposition, Defendant presented the testimony of two of its security personnel. Lieutenant Patch routinely checked all the mall entrances before it opened and did not see ice at this entrance. Another security officer, Jason Corrie, testified that he inspected the walkway after Plaintiff fell. He testified that the walkway was just wet. However, Corrie reported on the incident report that he "observed ice on the handicap ramp and the sidewalk."

SECRET WARDLE NOTES:

Michigan courts have repeatedly demonstrated their common sense approach to Michigan winters, including what average Michiganders should know about snow and ice. This decision fails to follow that trend.

Plaintiff testified that it was below freezing when the incident occurred. Common sense would indicate that a wet sidewalk during freezing temperatures in a Michigan winter may be icy (or at least slippery). However, the Court failed to draw a parallel between ice forming under snow and ice forming on wet concrete during freezing temperatures.

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Invitors are not absolute insurers of the safety of their invitees. “In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land.” *Lugo v Ameritech Corp Inc*, 464 Mich 512, 516 (2001). The premises owner does not have a duty to remove or warn the invitee of open and obvious dangers, unless the premises owner should anticipate that special aspects of the condition make even an open and obvious condition unreasonably dangerous. *Id.* at 517. Whether a condition is open and obvious depends on if it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475 (1993).

Relying on *Mann v Shusteric Enterprises, Inc*, 470 Mich 320 (2004), the *Wolfenbarger* Court opined that the open and obvious doctrine applies to accumulations of snow and ice. The Court also relied upon its numerous prior holdings and Michigan Supreme Court’s holdings that apply the open and obvious doctrine to cases involving snow-covered ice, even when the plaintiff claims that he did not know there was ice beneath the snow. The reasoning in these cases is that a reasonably prudent person should anticipate that snow might conceal ice.

In this case, the Court reasoned that there was no snow on the ground which would have alerted Plaintiff of the possible existence of ice. Wet concrete is not analogous to snow which would alert someone of the presence of ice. The danger and risk presented by wet concrete is not the same as icy concrete.

Furthermore, Defendant’s own security officer did not see the ice when he inspected the area, thereby demonstrating that a genuine issue of material fact existed as to whether an average person of ordinary intelligence would have been able to discover the danger and risk upon casual inspection.

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