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boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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"Glistening" On Sidewalk After a Slip and Fall on Black Ice Is Considered An Open And Obvious Condition

By Kellie C. Joyce

Recently, in an unpublished decision, *Shehenia Gleaves v Raymundo Deleon*, the Michigan Court of Appeals found that if a plaintiff can see a sidewalk glistening after a slip and fall on black ice, then the icy condition is open and obvious.

In a premises liability case, a possessor of land has no duty to protect an invitee from an open and obvious danger unless special aspects exist. The test is objective not subjective. The test is whether an average person of ordinary intelligence would have discovered the danger upon casual inspection. This was the test used by the Michigan Court of Appeals in this case.

In reversing a denial of the defendant, landowner's, motion for summary disposition based on the open and obvious doctrine, the Court of Appeals considered the plaintiff's testimony, as well as evidence regarding the weather conditions the day of the fall. Evidence was presented that when the plaintiff, invitee, exited her apartment on the morning of the incident, the temperature was 32 degrees. She could feel misting on her face. The fall occurred during the winter season. There was approximately five inches of snow accumulation on the ground. Plaintiff claimed she could not see any ice on the walkway before her fall, thereby claiming she slipped and fell on invisible black ice. Most importantly, however, the plaintiff testified that she noticed "glistening" on the sidewalk after she had fallen.

The Court found that if the plaintiff noticed the icy walkway "glistening" after her fall, it followed that an average person of ordinary intelligence would have noticed the walkway glistening before the fall. Simply put, the wintry conditions on the morning of the fall, combined with the visible glistening of the icy walkway, would have put an average person of ordinary intelligence on notice that there was a danger of slipping on the walkway.

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The Court of Appeals in *Gleaves* found that black ice was open and obvious if it was observed after the slip and fall. In this case, it was critical that evidence was presented that there were wintry conditions on the date of the slip and fall. It was also critical that the plaintiff testified that she could see the sidewalk glistening after her fall. In light of this opinion, testimony that a condition was observed following the incident, or other specific testimony indicating the visibility of the condition, is critical to the open and obvious defense.

Last, the defendant argued that he had no notice of the icy condition because it had formed just 30 minutes before the plaintiff fell. The Court agreed that a mere 30 minutes, during early morning hours, is not a sufficient period of time such that a possessor of land should reasonably have known that icy conditions existed. To hold that a defendant should have notice under these circumstances would be unreasonable.

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We welcome your questions and comments.

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