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boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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No Liability For Out-Of-Possession Tenant

By Joseph Pittel

In *Hoffner v Lanctoe, et al,* _ Mich App _ (issued Nov. 2, 2010) (Docket No. 292275), the Court of Appeals clarified when a tenant could be liable for a dangerous sidewalk, noting that liability attaches only when the tenant has possession and control. The *Hoffner* Court also reaffirmed the rule that a suit arising out of a fall on visible ice is not barred by the open and obvious doctrine when it is unavoidable.

Tenant had neither possession nor control of the icy sidewalk

In *Hoffner,* Plaintiff slipped and fell on an icy sidewalk outside of the only entrance to Fitness Xpress, an exercise facility. Plaintiff testified that she saw the ice on the sidewalk but felt she could safely traverse the icy walk because she was wearing "good boots" and the distance was short.

Defendant Fitness Xpress leased its occupied space from Richard and Lori Lanctoe, the owners of the building. Fitness Xpress argued that it was not liable because it did not have possession and control of the sidewalk where Plaintiff fell. The Court of Appeals agreed.

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Premises liability typically turns on who had "possession and control" of the property. When an accident occurs on a leased premises, claimants will often sue both the landlord and the tenant. In assessing your defenses, it is important to analyze the lease carefully, as well as the historical actions of the parties (who shoveled, salted, swept, repaired and otherwise took care of the area) to determine who may have been in "possession and control" of the area.

Careful investigation and documentation will often lead to dismissal of the claim against the landlord or the tenant when it is established who did and did not have "possession and control."

The Lanctoes argued that Fitness Xpress assumed a duty over the sidewalk by occasionally applying salt and exercising control over the parking lot for the purpose of customer parking. The Lanctoes also argued that Fitness Xpress understood that it was partially responsible for the sidewalk because lease language included sidewalks as part of the "leased facility."

The Court of Appeals rejected these arguments holding that "possession for purposes of premises liability depends on the actual exercise of dominion and control over the property." Slip op at 3. The Court reasoned that the contract – together with the actions and intent of the parties – showed that Fitness Xpress did not exercise dominion and control, and was therefore not a "possessor" of the sidewalk. Accordingly, the Court held that Fitness Xpress could not be held liable for Plaintiff's fall.

In holding that Fitness Xpress did not have possession and control of the sidewalk, the Court found two facts significant: (1) the lease between the Lanctoes and Fitness Xpress specifically placed responsibility for snow removal on the Lanctoes; and (2) evidence was presented (such as evidence that the Lanctoes regularly removed snow from the premises) which indicated that all the parties were aware that the Lanctoes were responsible for the exterior areas of the building.

The ice on the sidewalk was a "special aspect"

The Court also rejected the Lanctoes' argument that Plaintiff's suit was barred because the ice constituted an open and obvious defect. While acknowledging that the condition was open and obvious, Plaintiff argued that the ice on the sidewalk constituted a "special aspect" because it was unavoidable. The Lanctoes responded by arguing that Plaintiff did not *have* to exercise that day and, thus, voluntarily confronted the ice. The Court disregarded this theory. Relying on *Robertson v Blue Water Oil Co*, 268 Mich App 588, 594-95 (2005), the Court held that "the logical consequence of defendant's argument would be the irrational conclusion that a business owner who invites customers onto its premises would never have any liability to those for hazardous conditions as long as customers even technically had the option of declining the invitation." Slip op at 7.

Ultimately, the *Hoffner* Court instructed that "[a] special aspect exists when the danger, although open and obvious, is effectively unavoidable or imposes a uniquely high likelihood of harm or severity of harm." *Id.* (citations omitted). Plaintiff was an invitee with no alternative route to enter Fitness Xpress. Therefore, the Court stated that, "[b]ecause there was only one customer entrance to the facility that was fronted by the icy sidewalk, the 'objective nature of the condition of the premises at issue' reveals that the icy sidewalk was effectively unavoidable as it related to the use of the premises." *Id.* at 8 (citations omitted).

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