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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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The "Accidental" Trespasser: Still A "Trespasser" For The Purposes Of Premises Liability; Owed Minimal Duty

By Drew Broaddus

On December 14, 2010, the Michigan Court of Appeals released its unpublished opinion in *Gibson v Anderson,* No. 293830. *Gibson* involved a Plaintiff who slipped on an icy road adjoining Defendant's property, and fell onto a metal pipe stuck into the ground in Defendant's yard. Secrest Wardle represented the Defendant on appeal. The pipe was being used by Defendant as a boundary stake, in order to discourage pedestrians from walking on her lawn. The parties agreed that the condition which caused Plaintiff to fall (the ice) was not under Defendant's control. However, Plaintiff argued that the condition which caused her injury (the pipe) was a defective condition of Defendant's property. Defendant moved for summary disposition on the grounds that Plaintiff was a trespasser that thus owed only a minimal duty (she was not invited onto the property but rather, she fell onto it). Defendant further argued that, even if Plaintiff were an invitee, her claim was barred by the "open and obvious" doctrine.

SECREST WARDLE NOTES:

Gibson reiterates that a visitors' status, for the purposes of premises liability, will be judged from the perspective of the landowner, not the visitor. When the landowner does not give the visitor permission to be on the property, the duties owed to licensees or invitees are not triggered.

Gibson also indicates that the concept of "trespass" has a different meaning in premises liability that it does in the context of a criminal or tort claim against a trespasser. A trespasser in the premises liability context need not *intend* to be a trespasser.

The trial court granted Defendant's motion. On appeal, Plaintiff argued that the trial court improperly granted Defendant's motion because genuine issues of material fact existed regarding: (1) whether Defendant breached her duty to maintain her premises in reasonable repair; and (2) whether the dangerous condition on Defendant's land was open and obvious and, if it was, if the applicability of the "open and obvious" doctrine relieved Defendant from liability for the injury suffered by Plaintiff.

The Court first addressed Plaintiff's argument that her claim was not a premises liability claim but rather, one for ordinary negligence. This was significant because, if the claim did not fall under premises liability, the "open and obvious" doctrine would not apply. However, the Court had little trouble rejecting Plaintiff's argument upon reviewing her Complaint, which "very clearly alleged that defendant was negligent with respect to a condition on defendant's land."

Analyzing the claim under the rubric of premises liability, the Court addressed Plaintiff's status on the land. The duty that a landowner owes to a visitor depends on the visitor's status as a trespasser, licensee, or invitee. A trespasser is one who enters another's land without consent. A licensee is a person who enters another's land with consent. An invitee enters the

land of another by invitation, "which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." *Stitt v Holland Abundant Life Fellowship,* 462 Mich 591, 596 (2000).

Plaintiff offered to evidence that she was a licensee or invitee. Rather, Plaintiff slipped on the icy road, causing her to inadvertently intrude onto Defendant's property. The Court noted that Defendant had enclosed this area with a makeshift fence, constructed from metal pipes and rope, specifically to prevent trespassers from entering. Importantly, the Court found that "[t]he fact that plaintiff intruded on to defendant's property inadvertently is irrelevant to any duty owed to her by defendant because, as regards the degree of care owed by the landowner, the status of an accidental trespasser is still that of a trespasser." *Gibson*, *supra* at *2.

A landowner owes no duty to keep his premises safe for trespassers, other than to refrain from wanton and willful misconduct. The Court found that in this case, Defendant fashioned a fence out of metal pipes and rope around her yard to prevent children from walking on her grass. The fencing of a yard is a "common occurrence" that does not show indifference or intent to harm.

Although this finding was fatal to Plaintiff's claim, the Court went on to consider the "open and obvious" defense. The Court found that, "even assuming that plaintiff was an invitee … the trial court properly granted summary disposition in defendant's favor under the open and obvious doctrine." *Gibson*, *supra* at *3. A danger is open and obvious if "it is reasonable to expect an average user with ordinary intelligence to discover [it] upon casual inspection." *Id.* The pipes were visible upon casual inspection, did not present a special aspect because they were not unreasonably dangerous, and were not "effectively unavoidable" because Plaintiff chose to walk in this particular area.

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