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A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Be On Notice Of The "No Notice" Defense, Especially In Snow And Ice Cases

By Drew Broaddus

While it is well known that snow and ice cases often run head-first into the open and obvious defense,[1] the issue of notice is sometimes overlooked by attorneys who defend property owners from slip and fall claims. "Michigan law requires that a *prima facie* case of premises liability include sufficient evidence that the landowner either created the dangerous condition or had actual or constructive notice of the condition." *Sparks v Wal-Mart Stores, Inc*, 361 F Supp 2d 664, 668 (ED Mich 2005). Although the issue of notice is not unique to snow and ice cases, the fact that snow and ice have been judicially recognized as "transient conditions," *Plunkett v DOT*, 286 Mich App 168, 180 (2009), gives notice greater importance in these types of cases.

A property owner is liable for an injury resulting from a dangerous condition on the premises if the condition was caused by the "active negligence" of the defendant or its employees, or if the defendant or its employees either knew or should have known of the condition. *Clark v Kmart Corp,* 465 Mich 416 (2001). Notice may be inferred from evidence that the dangerous condition existed for such a duration of time that a reasonably prudent owner would have discovered the hazard. *Id.* The issue of constructive notice, in the context of a slip and fall on snow/ice, was recently addressed in *Broughton v Tel-Ex Shopping Center*, unpublished opinion per curiam of the Court of Appeals, rel'd 11/29/12 (Docket No. 306360).

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Broughton **illustrates the conundrum faced by slip and fall plaintiffs in snow/ice cases: in order to avoid the open and obvious defense, they will often have to describe the condition as invisible "black ice." However, if the condition is truly invisible, it is very difficult for plaintiff to say that defendant knew or should have known about it, as required to establish notice.**

Although there is a tendency to view snow and ice cases through the lens of the Open and Obvious Doctrine, defense counsel should bear in mind that notice is an entirely separate issue from the open and obvious defense, and ***Broughton*** **illustrates that notice can be dispositive by itself. See also** ***Gass v Catts Realty Co*****, unpublished opinion per curiam of the Court of Appeals, rel'd 3/13/12 (Docket No. 302217).**

Broughton **reiterates that circumstantial evidence that the prevailing weather conditions may have produced ice** ***does not*** **create a question of fact as to whether a defendant had constructive notice of it. See also** ***Altairi v Alhaj*****, 235 Mich App 626, 629 (1999).**

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[1] See *Boundaries,* August 1, 2012, "'Effectively Unavoidable': No Longer So Effective In Avoiding The Open And Obvious Doctrine," by Drew Broaddus. See also *Hoffner v Lanctoe,* 492 Mich 450 (2012).

In *Broughton*, plaintiff slipped and fell on what she described as "black ice" near a shopping center owned by defendant. Defendant moved for summary disposition, based on the Open and Obvious Doctrine as well as the lack of notice. Defendant's motion was granted. Plaintiff appealed, arguing that summary disposition was inappropriate because "defendant Tel-Ex neglected its duty to inspect its parking lot and concedes that there were other indicia that made the alleged 'black ice' in question open and obvious, and thus, defendant may not claim a lack of notice. Plaintiff further assert[ed] that there was evidence that the 'black ice' existed for at least 13 hours before this incident."

The Court of Appeals affirmed, and offered the following explanation: "There is no evidence that defendant had actual knowledge of the 'black ice' in its parking lot. Thus, the question is whether there is a genuine issue of material fact regarding whether the 'black ice' existed for a sufficient length of time that defendant should have had knowledge of it." The panel found no evidence supportive of constructive notice, despite the fact that plaintiff had offered an affidavit from a meteorologist who opined that the ice had been present for about 13 hours. The panel disregarded the meteorologist's affidavit as follows: "First, [the meteorologist's] opinion in his affidavit that the ice developed no later than 13 hours before plaintiff's accident is mere speculation, and thus, is insufficient to create a genuine issue of material fact regarding whether the 'black ice' existed for a sufficient period of time that defendant Tel-Ex should have had knowledge of it. … Next, [the meteorologist's] opinion in his affidavit that the conditions before the incident were conducive to the formation of ice, the fact that the temperature was at freezing at some point during the day, and the fact that there was some snow left on the ground from a prior snow fall were insufficient to impose a duty on defendant Tel-Ex to inspect its parking lot for ice. Furthermore, [the meteorologist's] general assertion regarding the weather being conducive to the formation of ice was circumstantial evidence that does not allow a reasonable inference that defendant Tel-Ex had constructive notice of the 'black ice.' … In sum, plaintiff did not present any evidence that defendant Tel-Ex caused, knew, or should have known of the 'black ice.' The evidence only suggests that plaintiff was the victim of a combination of innocent circumstances, not of defendant Tel-Ex's negligence…."

CONTACT US

Troy
2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
Tel: 248-851-9500 Fax: 248-538-1223

Lansing
6639 Centurion Drive, Ste. 130
Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids
2025 East Beltline SE, Ste. 600
Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

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CONTRIBUTORS

Premises Liability Practice Group Chair
Mark F. Masters

Editor
Bonny Craft

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