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# Another Surprise from Supreme Court: Black Ice Can Be "Open and Obvious"

By Mark Masters

In *Janson v. Sajewski Funeral Home*, _ Mich _ (2010), the Michigan Supreme Court held that an alleged "black ice" condition in Defendant's parking lot was open and obvious based on prevailing weather conditions, and dismissed Plaintiff's lawsuit.

Plaintiff alleged he slipped and fell on "black ice" in Defendant's parking lot in the early evening and broke his ankle. There had been light precipitation earlier in the day with below freezing temperatures all day long. A witness testified that roads had been icy in the morning and salt trucks had been out. Defendant's parking lot had been largely cleared of snow, and it had been salted in the morning because it had been icy. By the afternoon, Defendant's operator believed there was no ice remaining in the lot. A witness testified that he had difficulty walking through the lot due to patches of "black ice … everywhere in the parking lot" shortly before Plaintiff's fall. Plaintiff had been to the funeral home numerous times before, and was walking from his car to the entrance when he fell. Plaintiff testified that he slipped and fell on a patch of ice about five to six feet wide, and that he did not encounter any other ice in the lot. Defendant's operator did not "see any ice per se," but found the area of the fall "a little bit on the slick side." A witness to the fall believed Plaintiff slipped on one of the patches of ice in the parking lot.

**SECREST WARDLE NOTES:**

This decision is another big surprise from the "new" Michigan Supreme Court. This is the second defense victory on the open and obvious defense from the Court in the last week. Again, there is a majority of four Justices finding in favor of the defense, with the rest either dissenting or voting to deny hearing the case.

In *Janson*, the Court went so far as to admonish the Court of Appeals for "failing to adhere to the governing precedent" established in a previous Court of Appeals case on the issue of "black ice."

Presently, it appears that the open and obvious defense will continue to be a strong defense to many premises liability claims despite the recent electoral victory of Justice Hathaway over former Justice Clifford Taylor.

The trial court dismissed the case based on the open and obvious defense. The Court of Appeals reversed, finding that the condition was not open and obvious, and that "black ice" would almost never be open and obvious.

In reversing the Court of Appeals and reinstating the dismissal of the case, the Supreme Court held that "black ice" may be open and obvious based on "indicia of a potentially hazardous condition." Such indicia included the specific weather conditions present at the time of Plaintiff's fall.

> "Here, the slip and fall occurred in winter, with temperatures at all times below freezing, snow present around the Defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the

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> Plaintiff's fall in the evening. These wintery conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection. … Moreover, the alleged condition did not have any special aspect. It was avoidable and not unreasonably dangerous."

The Supreme Court decided this case based on the application to appeal, and not on a full scale appeal. Justice Kelly dissented, and Justices Cavanagh and Hathaway would have denied leave to appeal.

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We welcome your questions and comments.

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