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boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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# A Slippery Question: When Does Even An Open And Obvious "Blanket Of Ice" Create A Duty Of Due Care For A Premises Owner?

By Peter A. Davenport

In the unpublished case of *Ehrler v Frankenmuth Motel, Inc*, No. 296908 (August 2, 2011), the Michigan Court of Appeals has suggested when a known, obvious and naturally occurring icy condition might nonetheless require action by the owner or controller of a premises. In a 2-1 split decision, the majority (Judges Borrello and Beckering) held that the "special aspect" exception to the open and obvious rule was present when early morning freezing rain transformed into a thin layer of ice that covered the Defendant's entire motel premises. The "blanket of ice" was determined to be "effectively" unavoidable because motel guests were "effectively" required to walk on the ice to get to their vehicles, check-out, and/or sample the motel's complimentary breakfast.

**SECREST WARDLE NOTES:**

**In most cases an apparent icy condition will be considered "open and obvious" and a property owner or controller will have no legal duty to warn and/or act to reduce the risk. However, if the obvious condition is determined to have a "special aspect", such as being effectively unavoidable, a jury will decide the ultimate question of whether a defendant negligently breached the duty. A dangerous condition that blocks all reasonable exits from a building is likely to be determined to be "effectively unavoidable".**

Although the lower court did not clearly articulate its rationale, it apparently granted the Defendant's Motion for Summary Disposition on the basis that (1) the sheet of ice was admittedly "obvious" and (2) no "special aspect" existed because of *disputed* testimony that some salting had occurred on some areas or paths before the two retired Plaintiffs fell and suffered significant injuries.

Plaintiffs had argued in the lower court that even an independent witness (a paramedic) had testified that he saw no evidence of any salting on the premises and that a motel guest *had* to encounter the glaze of ice if they wanted to leave their rooms to do anything, such as check-out, retrieve something from their parked car or get to the office for the complimentary breakfast.

The majority cited and discussed the landmark case of *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW 2d 384 (2001), as it reversed the trial court. The majority determined that a duty of care existed because, although the icy condition was obvious, it was effectively unavoidable because it had to be encountered if a motel guest desired or

needed to leave his/her room. Further, in determining if a special aspect exists, a court must analyze "the objective nature of the condition and not the subjective degree of care used by the plaintiff or other idiosyncratic factors related to the plaintiff". See, *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593-595; 708 NW2d 749 (2005); *Hoffner v Lanctoe*, __ Mich App __; __NW2d__ 2010 WL 4320340, lv pending 796 NW2d 50 (2011).

Thus, the majority found that genuine issues of material fact existed and that a jury should have been allowed to decide if the motel had breached the duty it owed.

Presiding Judge Donofrio wrote a dissent in which he defined "effectively unavoidable" more restrictively. Although the sheet of ice did *have* to be encountered *if* a guest left his/her room, he reasoned that the Plaintiffs could have foregone the complimentary breakfast or simply waited until the area was actually "de-iced." Thus, the dissenter felt that the behavior of the Plaintiffs upon encountering the obviously icy condition was relevant to whether it was "effectively unavoidable" or not.

## CONTACT US

**Farmington Hills**
30903 Northwestern Highway, P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500 Fax: 248-851-2158

**Mt. Clemens**
94 Macomb Place, Mt. Clemens, MI 48043-5651
Tel: 586-465-7180 Fax: 586-465-0673

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

**Grand Rapids**
2025 East Beltline SE, Ste. 209, 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

**Premises Liability Practice Group Co-Chair**
Caroline Grech-Clapper

**Editor**
Bonny Craft

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