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Jury to Decide if "Black Ice" is Open and Obvious

By James P. Molloy

In *Woodard v ERP Operating Limited Partnership,* 2005 U.S. Dist. LEXIS 114 (E.D. Mich., January 7, 2005), Plaintiff filed suit after slipping and falling on a patch of ice on a cracked and broken concrete sidewalk on Defendant's property. Defendant argued the ice on the sidewalk outside the apartment where Plaintiff fell was open and obvious. Defendant claimed Plaintiff testified he was able to see the ice after he fell and he was not paying attention nor looking where he was walking. Judge Avern Cohn of the Eastern District of Michigan disagreed.

Under Michigan's "Open and Obvious" Doctrine for premises liability actions, a possessor of land generally has no duty to warn of open and obvious dangers. In examining whether a risk of harm is open and obvious, the question is whether an average person of ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection.

Defendant claimed that any alleged ice on the sidewalk outside the apartment building was open and obvious because a reasonable person in Plaintiff's position would have noticed the ice. Defendant argued that Plaintiff testified he was able to see the ice after he fell and that he was not paying attention and not looking at where he was walking. Judge Cohn found these claims unpersuasive for two reasons: 1) this case involved "black ice," which was not noticeable upon casual inspection by its very nature; and 2) a fair reading of Plaintiff's deposition testimony did not support the claim that he was not paying attention while walking.

Plaintiff testified that there was a "little bit" of snow on the ground when he arrived at the apartment building. He

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In *Woodard,* it is clear how vital deposition testimony is in supporting a Motion for Summary Judgment based on the open and obvious doctrine. The Court stated that a fair reading of Plaintiff's deposition testimony did not support the claim that he was not paying attention while walking. In fact, he testified that he slipped on "black ice" and that he did not notice the ice until after he fell. Plaintiff's deposition testimony, as well as the Defendant-employee's testimony regarding the lighting in the area, showed that there were genuine issues of material fact for a jury to consider.

Reading between the lines of this decision, it seems as though this Court is recommending that Michigan judges step back from their role as decision maker when applying the "Open and Obvious" Doctrine and leave that role to jurors instead.

testified that he "was paying attention to where he was going" and that he was looking forward immediately before he fell on the sidewalk. Plaintiff stated that he did not see that the concrete where he fell was broken before his fall because the area was dark.

Judge Cohn pointed out that Michigan courts have recognized that black ice presents a special issue in the context of Michigan's Open and Obvious Doctrine. In *Kantner v Ann Arbor Tower Plaza Condominium Association,* 2004 WL 2601289 (Mich App, November 16, 2004), the Michigan Court of Appeals reversed the trial court's granting of summary disposition based on the open and obvious doctrine. The *Katner* court noted that "[b]y its very nature, black ice is not noticeable *even without* a covering of snow." In *Kantner,* as in this case, the plaintiff became aware of the presence of black ice only after she fell on what she initially believed to be dry concrete. The *Katner* Court found that the black ice was not immediately noticeable and that the trial court improperly determined that black ice was open and obvious as a matter of law.

In further support of the fact that the record could not support a finding of an open and obvious condition, Judge Cohn found conflicting testimony regarding the lighting conditions at the time Plaintiff fell. Because genuine issues of material fact existed regarding whether the ice on Defendant's sidewalk was open and obvious, including disputes over the amount of lighting in the area, the Court could not proceed to an analysis under *Lugo v Ameritech,* 464 Mich. 512 (2001) regarding whether the condition had "special aspects" which rendered it unreasonably dangerous.

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