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Ice Under Snow Scenario Survives Dismissal Based on Open and Obvious Defense

By Mark Masters

In *Kenny v. Kaatz Funeral Home, Inc.,* __ Mich App __ (2004), the Court of Appeals ruled that the determination of whether or not ice under snow constituted an open and obvious condition was a question of fact for the jury.

In December of 2001, the 78-year old Plaintiff and four companions drove to Defendant's funeral home to attend a co-worker's funeral. After Plaintiff left the car, and while she was walking near the rear of the car in the funeral home parking lot, she slipped and fell, fracturing her hip.

Plaintiff testified that she knew that the parking lot was covered with snow, but did not know that there was "black ice" underneath the snow. Plaintiff was adamant that the snow was not slippery, but the ice hidden underneath the snow was. She was able to see the ice underneath the snow after she fell and the snow was pushed aside.

The trial court granted Defendant's motion for summary disposition based on the open and obvious defense, noting that Plaintiff, "as a lifelong resident of Michigan, should have been aware that ice frequently forms beneath snow during snowy December nights."

In reversing the dismissal in a 2-to-1 published decision, the Court of Appeals noted that snow and ice cases are governed by the open and obvious defense, but not every patch of snow or ice is open and obvious. The Court held:

> "The question presented to us, as we see it, is whether it can be said, as a matter of law, that a reasonably prudent person with ordinary intelligence would have been able to perceive and foresee the dangerous condition, i.e., black ice under a coating of snow, upon casual inspection. We conclude that the answer is 'no.' Rather, reasonable minds could differ regarding the open and obvious nature of black ice under snow; therefore,

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Kenny v. Kaatz Funeral Home, __ Mich App __ (2004) hijacks dismissals in many cases where the open and obvious defense would otherwise properly bar the claim. If this case is approved for Supreme Court review, it is anticipated that Judge Griffin's dissent, which highlights the analytical errors in the majority's opinion, will be followed by the Supreme Court. Unfortunately, it could take as long as two years for the Supreme Court to rule on this case.

Since *Kenny* is a published decision, it is binding on all lower courts and future panels of the Court of Appeals until the Supreme Court rules on this issue. In the meantime, careful questioning during depositions of plaintiffs will be more critical than ever to a successful defense of these sorts of cases. Properly posed questions will increase the chances that plaintiffs will admit that (1) they have lived through many Michigan winters, (2) that they have vast experience walking over snow and ice, (3) that they have encountered ice under snow on many occasions, and (4) that they knew prior to their slip and fall that it was more likely than not that there was ice under the snow on which they chose to walk. Such admissions are the keys to dismissal.

> the openness and obviousness of the danger must be determined by a jury."

The Court distinguished this case from its prior decision in *Joyce v. Rubin,* 249 Mich 231 (2002). In *Kenny,* there was no testimony that Plaintiff knew the lot was covered with ice before she walked from the car toward the funeral home. Plaintiff never told anyone that the lot was slippery, nor had she slipped in the lot prior to the fall like the plaintiff in *Joyce.* There was also no evidence in this case that Plaintiff felt the presence of ice before falling. The Court further noted "considering that 'black ice' coated the area, it is questionable that the ice would be observable even without the snow covering it."

Further, the Court held that even if the condition was open and obvious, there was still a question of fact for the jury regarding whether or not the condition was unreasonably dangerous due to its unavoidability, thus rendering the open and obvious defense inoperative. The majority explained:

> "Here, there was evidence that the parking space utilized by Plaintiff was the only remaining vacant spot in the entire lot and that Plaintiff was a passenger in the vehicle, not the driver with control over the automobile. Moreover, others fell in the parking lot, which could lead reasonable minds to conclude that the parking lot remained unreasonably dangerous even assuming the danger was open and obvious. Accordingly, should the jury determine that the danger or hazard was open and obvious, an issue of fact would still need to be resolved by the jury in regard to whether special aspects existed such that the danger remained unreasonably dangerous, with the jury taking into consideration all of the surrounding circumstances which presented to Plaintiff that snowy December day."

In his well-written dissenting opinion, Judge Griffin noted that the majority opinion improperly focused on Plaintiff's subjective knowledge of the condition, rather than "whether 'an average user [an objective standard] with ordinary intelligence [would] have been able to discover the danger and the risk presented on casual inspection.'" Judge Griffin held "after witnessing three companions exit a vehicle into the snow-covered parking lot on December 27 and seeing them holding on to the hood of the car to keep their balance, all reasonable Michigan winter residents would conclude that the snow-covered parking lot was slippery."

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