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Supreme Court Speaks: Open and Obvious Defense Can Apply to "Black Ice"

By Mark E. Masters

In *Kaseta v. Binkowski*, _ Mich _ (2007), the Michigan Supreme Court held that the open and obvious defense is applicable to "black ice" claims. The applicability rests on prevailing weather conditions.

Plaintiff, a real estate agent, arrived at Defendants' home to have Defendants execute a contract regarding the purchase of a parcel of vacant land. After concluding her business and leaving the home, Plaintiff slipped and fell on "black ice" on Defendants' driveway. The "black ice" was not described in the opinion, but is believed to have been alleged as invisible or nearly invisible ice. The driveway was clear of snow and non-"black ice."

The weather conditions on the day of the accident "were such that a reasonable person would anticipate and foresee the possibility of ice on paved surfaces. Snow had fallen early on the day in question, followed by sunshine and warmer temperatures, which served to melt some of the snow. Then in the evening, temperatures dipped, causing melted snow to refreeze into ice." Plaintiff, a life-long resident of Michigan, had considerable experience with such weather. Plaintiff even testified that she was aware that the temperature was dropping as the day progressed, and when she exited her car and walked up to the areas around Defendants' property, she observed that the street was wet and slushy. All of the paved areas around Defendants' home were clear of snow and ice, but there were mounds of shoveled snow on the Defendants' lawn, adjacent to the driveway.

The trial court denied Defendants' Motion for Summary Disposition, and the Court of Appeals affirmed the denial in a two-to-one decision. The Supreme Court reversed, and simply adopted the

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Since the advent of the open and obvious defense, plaintiffs' attorneys have tried to avoid its application by many methods. One of the most widely used methods has been the invisible, or "black ice," theory. Namely, that the ice was invisible upon casual inspection by an ordinary person. Therefore, it could not be open and obvious. Many trial courts and panels of the Michigan Court of Appeals have agreed with this argument.

The Supreme Court has changed all of that. Now, prevailing weather conditions (especially recent precipitation, freeze-thaw cycles and the presence of visible snow or ice in nearby locations) are enough to give rise to the effective use of the open and obvious defense. The Supreme Court has reasoned that these weather conditions give people notice that "black ice" is likely to be present, even if it cannot be easily seen.

analysis of the dissenting opinion from the Court of Appeals. The Court held: "Given the temperature fluctuations of the day, a reasonable person would note the possibility of ice forming on the driveway, particularly on the edges of the driveway which were adjacent to the snow." Therefore, the "black ice" was an open and obvious condition for which summary disposition was granted.

Lastly, Plaintiff's arguments that the "black ice" fit into the exceptions to the open and obvious defense also failed. The "ice in the instant case cannot be considered to have given rise to an unreasonably high risk of severe injury. Moreover, Plaintiff could have avoided the driveway all together and chosen an alternate path to get to her car."

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We welcome your questions and comments.

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