SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

12.1.04

The Court of Appeals Applied The Open and Obvious Defense to a Landlord-Tenant Relationship

By Cleo N. Fekaris

In an unpublished decision by the Michigan Court of Appeals, *Rosario v 16481 Ten Mile Road, LLC, et al.,* Plaintiff slipped and fell on snow-covered ice sustaining back injuries. Plaintiff was Defendant's tenant. The morning after it had snowed and rained, Plaintiff exited her apartment to help her friend dig his car out from beneath the snow. Realizing that she could not walk with stability on the sidewalk, Plaintiff used her friend's arm to help her get through the snow to the car. As she walked back to her apartment alone, she slipped and fell. She testified that she did not see the ice under the snow and did not know it was there until after she fell. The trial court held that the snow and ice were open and obvious conditions and granted Defendant's Motion for Summary Disposition.

On appeal, Plaintiff argued that the trial court should not have allowed Defendant to avail itself of the open and obvious defense in order to avoid its statutory duty under MCL 554.139. Plaintiff also argued that the snow-covered ice was not open and obvious. Plaintiff further argued that special aspects existed rendering the snowy and icy sidewalk unreasonably dangerous.

It is undisputed that Plaintiff was Defendant's tenant and, thus an invitee. Defendant owed Plaintiff, an invitee, a duty to exercise reasonable care to protect her from an unreasonable risk of harm caused by a dangerous condition on the land. This duty did not include removal of open and obvious dangers. In determining whether a condition is open and obvious, the Court must ask whether a reasonable person of ordinary intelligence would have been able to discover the risk upon casual inspection.

The Court held that it was reasonable to expect that Plaintiff would have discovered the danger of the snowy sidewalk; thus, the condition was open and obvious. Plaintiff admitted that she

SECREST WARDLE NOTES:

In the past, the open and obvious doctrine has not been applicable to landlord-tenant relationships due to the statutory duties of landlords to their tenants. Common law defenses, such as the open and obvious doctrine, cannot be used to defeat claims of violation of a statutory duty. Although the Court applied the open and obvious doctrine to this landlord-tenant relationship, it strongly suggested that is should only be applied when the plaintiff has not pled a statutory violation.

Finding that snow-covered ice is open and obvious is the current trend of the Michigan Court of Appeals, but the issue largely hinges on the testimony of the plaintiff in a particular case. Therefore, even though this seems to be the current trend in Michigan, landowners must continue to take reasonable measures in maintaining their premises after a winter rain and/or snow fall, especially during thawing and re-freezing conditions.

CONTINUED...

knew it rained and snowed the night before her accident. Plaintiff even had a telephone conversation with a co-worker discussing the dangerous road conditions. The Court noted that even if Plaintiff did not see the ice under the snow, "a reasonable person knowing that it had rained the night before, on a cold Michigan December night, and that the road conditions were unfit for driving that morning, would have foreseen the danger presented by the snow-covered sidewalk." Therefore, the Court of Appeals agreed with the trial court's determination that no reasonable juror could have concluded that the condition was not open and obvious.

The Court further held that no special aspects made the open and obvious condition unreasonably dangerous. Plaintiff argued that the condition was unavoidable because it covered the sidewalk. However, the Court disagreed and opined that Plaintiff could have avoided the condition by remaining inside her apartment, waiting for the area to be cleared, or walking around it.

In regard to Plaintiff's argument that Defendant had a statutory duty under MCL 554.139 to maintain the premises in reasonable repair, Plaintiff failed to plead a violation of this statute in her Complaint. Therefore, the Court did not have authority to find in Plaintiff's favor based on this. Strangely, there was no mention of whether or not Plaintiff petitioned the trial court for leave to amend her Complaint to add a statutory violation claim under MCL 554.139.

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
1550 East Beltline, S.E., Ste. 305, Grand Rapids, MI 49506-4361
Tel: 616-285-0143 Fax: 616-285-0145

Champaign, IL
2919 Crossing Court, Ste. 11, Champaign, IL 61822-6183
Tel: 217-378-8002 Fax: 217-378-8003

www.secrestwardle.com

SECREST SW WARDLE

CONTRIBUTORS

Premises Liability Practice Group Chair
Mark F. Masters

Editor
Carina Carlesimo

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for Boundaries, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at **ccarlesimo@secrestwardle.com**, or **248-539-2850**.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice
Blueprints – Mapping legal solutions for the construction industry
Community Watch – Breaking developments in governmental litigation
Fair Use – Protecting ideas in a competitive world
In the Margin – Charting legal trends affecting businesses
Industry Line– Managing the hazards of environmental toxic tort litigation
Landowners' Alert – Defense strategies for property owners and managers
No-Fault Newsline – A road map for motor vehicle insurers and owners
On the Job – Tracking developments in employment law
On the Beat – Responding to litigation affecting law enforcement
State of the Art – Exploring the changing face of product liability
Structures – A framework for defending architects and engineers
Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability