

# boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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## Open and Obvious Defense Applies to Black Ice on Sidewalks

By Richard Ballentine

In *Drobot v. Way*, an unpublished opinion of the Michigan Court of Appeals, the Court held that the open and obvious defense applied to “black ice” on a sidewalk which was surrounded by snow and visible ice.

Plaintiff and Defendants were neighbors. Plaintiff had agreed to watch Defendants’ house while they were out of town. When Plaintiff exited Defendants’ house after checking on it, she slipped and fell on black ice as soon as she stepped off of the porch steps onto the sidewalk. Plaintiff and the responding paramedics testified that the area where Plaintiff fell was icy and that the ice was not readily observable. Plaintiff also stated that although there was snow on the lawn and ice on the steps and on the edge of the porch, the sidewalk appeared clear. The trial court granted Defendants’ motion for summary disposition on the basis that there was no genuine issue of material fact that the icy condition was open and obvious.

Plaintiff appealed, setting forth two arguments to secure a reversal. First, Plaintiff attempted to distinguish prior case law by showing that the ice in this case was not obscured by a snow pile as it was in other cases. Second, Plaintiff argued that the ice was unreasonably dangerous and thus constituted a special aspect which was not subject to the open and obvious defense.

The Court of Appeals rejected both arguments. Regarding the first argument, the Court held that “where there is snow in winter in Michigan, there is likely to be ice and the presence of snow puts a person on notice that there may be slippery conditions.” As to the second argument, the Court found that Plaintiff failed to show why the icy conditions were

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In applying the open and obvious defense to “black ice” on a sidewalk which had snow and ice in the surrounding area, the Court of Appeals in *Drobot v. Way* found no reason to depart from the general rule that “hazards presented by snow and ice are open and obvious.”

The *Drobot* decision is more good news for premises owners and possessors because it evidences the Court of Appeals’ unwillingness to attach liability unilaterally to defendants in premises cases. This case continues the trend of holding plaintiffs to some degree of knowledge of Michigan winters and the accompanying slippery weather conditions.

This decision did not address the possession issue, but it is one you should keep in mind when analyzing your own claims. Premises liability in Michigan is based on possession and control of the premises, not simply ownership. Since Defendants left their house in Plaintiff’s possession and control while they were out of town (albeit temporarily), Defendants should have had no liability. *Anderson v. Wiegand*, 223 Mich App 549 (1997).

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unreasonably dangerous. This was especially true since Plaintiff had several alternative options, including using an available alternative route out of the house or declining to enter the house entirely. Accordingly, the Court of Appeals affirmed the trial court's summary disposition in favor of Defendants.

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