SECREST WARDLE

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

6.26.06

Potential Slipperiness of a Snow-Covered Surface is Open and Obvious

By Cleo N. Fekaris

In *Ververis et al v Hartfield Lanes*, __ Mich App __, 2006 Mich App LEXIS 1499 (2006), Plaintiff slipped and fell on snow-covered ice in Defendant's parking lot as he tried to enter the bowling alley. The trial court's directed verdict for Defendant on the open and obvious defense was initially reversed by the Michigan Court of Appeals. The Michigan Supreme Court later vacated the Court of Appeals' decision and remanded the matter for reconsideration in light of *Kenny v Katz Funeral Home, Inc*, 472 Mich 929 (2005). On remand, the Michigan Court of Appeals affirmed the trial court's dismissal.

Plaintiff was an invitee (*i.e.*, a business visitor) on Defendant's property when he slipped, fell and fractured his ankle. In general, a premises owner owes a duty to an invitee to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. However, the duty does not extend to open and obvious conditions absent special aspects. In determining whether a condition is open and obvious, the court must consider whether "an average user with ordinary intelligence would have been able to discovery the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475 (1993).

On remand from the Michigan Supreme Court, the Court of Appeals examined and relied upon *Kenny*. The issue was whether snow-covered ice was an open and obvious danger. In *Kenny*, the plaintiff acknowledged that she observed others holding onto her vehicle for support before she exited her vehicle. The *Kenny* Court reasoned that her observations "alone should have clued her into the possible danger that awaited her outside the vehicle."

SECREST WARDLE NOTES:

The Michigan Supreme Court and Court of Appeals continue to apply basic common sense to the open and obvious defense. The Michigan Courts have determined that snow is an open and obvious condition. Snow is slippery in and of itself. Anyone who sees snow knows, or at least should know, that a snow-covered surface is slippery. This is particularly true of those who have lived in Michigan during the winter. By holding that this is a "matter of law," the Court has taken this issue away from the jury.

While the open and obvious defense continues to be a strong defense in favor of Michigan property owners and managers, it is no substitute for snow and ice removal. Property owners and managers still have a duty to take reasonable measures within a reasonable amount of time to alleviate the dangers of snow and ice on their properties. You never know when the law may change, or if there may be a subtle factual difference which will distinguish your case from a previously decided one.

CONTINUED...

The *Kenny* decision suggested two possible rules to the *Ververis* Court. First, by its very nature, a snow-covered surface presents an open and obvious condition because it is likely to be slippery. Second, a snow-covered surface does not, on its own, present an open and obvious condition unless there is some other reason that would lead a plaintiff to reasonably conclude that it is slippery. After examining several other recent opinions of the Michigan Supreme Court, the Court of Appeals determined that the former is the proper interpretation of *Kenny*.

In *Ververis*, the Court of Appeals opined that there was no independent factor beyond the snowy surface that would have reasonably notified Plaintiff that the surface was slippery. Nevertheless, the Court of Appeals held, as a matter of law, that a snow-covered surface presents an open and obvious danger because of the high probability that it may be slippery by its very nature.

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
2025 East Beltline, S.E., Ste. 209, Grand Rapids, MI 49546
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 WARDLE

CONTRIBUTORS

Premises Liability Practice Group Chair
Mark F. Masters

Editor
Carina Nelson

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 **cnelson@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
Contingencies – A guide for dealing with catastrophic property loss
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 Beat – Responding to litigation affecting law enforcement
On the Job – Tracking developments in employment law
Safeguards – Helping insurers protect their clients
State of the Art – Exploring the changing face of product liability
Structures – A framework for defending architects and engineers
Update Illinois - Current trends in Illinois law
Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability