

# boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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## Common Law vs. Statutory Law: Partial Effectiveness of the Open And Obvious Defense In Landlord/Tenant Cases

By Kellie Lecznar

In *Royce v Chatwell Club Apartments, aka/a Tobin Group*, \_\_ Mich App \_\_ (2007), Plaintiff (a tenant) slipped on snow-covered black ice in the parking lot of Defendant's apartment complex. Plaintiff did not see the ice before she fell and discovered it only after she tried to get up. The Court of Appeals held: (1) the open and obvious defense barred Plaintiff's common law claims, but (2) did not preclude Plaintiff's statutory claims brought under MCL §554.139 (the Landlord/Tenant Statute).

Plaintiff sued Defendant for common law premises liability and for violation of MCL §554.139. The trial court denied Defendant's motion for summary disposition for the common law claims, but granted Defendant's motion to dismiss the statutory claim. The Court of Appeals reversed both rulings. As to the common law claim, it held the condition of the parking lot was open and obvious. As to the claim for violation of MCL §554.139, it held that Defendant could not rely upon the open and obvious doctrine (which is a common law defense) to avoid liability for a statutory duty.

In regard to the common law claim, Defendant argued the condition of the premises was open and obvious with no special aspects. Plaintiff argued there were special aspects because the ice patch was located near a handicapped parking space. Relying on several precedential cases, the *Royce* Court agreed with Defendant. First, the Court relied upon the Michigan Supreme Court's decision in *Kenny v Kaatz Funeral Home, Inc.* *Kenny* held that snow-covered black ice in a parking lot was open and obvious in Michigan. Second, the Court relied upon *Ververis v Hartfield Lanes*. *Ververis* held that a snow-covered surface was open and obvious, even though no independent factor

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The open and obvious danger defense does not apply to a slip and fall in a parking lot if Plaintiff alleges a violation of MCL §554.139, the Landlord Tenant Statute. However, this defense is available for alleged violations of common law duties.

As always, landlords need to take reasonable measures to address snow and ice on both the sidewalk and parking lot on their property.

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alerted plaintiff of the danger. Lastly, the Court examined *Lugo v Ameritech Corp, Inc.* to determine whether special aspects existed. A special aspect creates an unreasonable risk of harm (e.g., the sole exit of a commercial building blocked with standing water, or an unguarded 30-foot deep pit in the middle of a parking lot). Based upon *Lugo*, the *Royce* Court found no special aspects existed. The fact that the ice was near a handicapped parking lot did not give rise to a high likelihood of harm. Applying those three cases, the *Royce* Court reversed the trial court's ruling on Plaintiff's common law claim. The snow-covered black ice in the parking was open and obvious with no special aspects existing. Therefore, dismissal of the common law claims was merited.

Next, the *Royce* Court examined the statutory claim for violation of MCL §554.139. Plaintiff argued Defendant could not rely upon the open and obvious doctrine (a common law defense) to avoid statutory duties. The Court agreed with Plaintiff based on *Allison v AEW Capital MGT, LLP*. *Allison* held the open and obvious danger doctrine did not shield a landlord from liability under MCL 554.139. The *Royce* Court found the pre-*Allison* decision in *Teufel v Watkins* inapplicable. *Teufel* held that a lessor's duty under MCL §554.139 did not extend to snow and ice removal. *Teufel* was inapplicable for two reasons. First, it ignored binding precedent set forth in *O'Donnell v Garasic*. (*O'Donnell* held the open and obvious doctrine was not available to deny liability from violation of MCL §554.139). Second, more recent cases reiterated *O'Donnell*, reflecting a return from *Teufel's* deviation from precedent. Therefore, Defendant could not rely upon the open and obvious doctrine to avoid its statutory duty under MCL §554.139.

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