

boundaries

A GUIDE FOR PROPERTY OWNERS AND INSURERS IN A LITIGIOUS SOCIETY

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Watch Your Step? “Black Ice” On Common Sidewalk Within Apartment Complex Deemed Open And Obvious. No Statutory Duty Triggered Under MCL 554.139(1)(a)

By Justin Cole

Secret Wardle successfully defended the “black ice” premises liability claim brought by the Defendants’ tenant in *Lowery v Brookline Management Company, RHP Properties, Inc, and Hunters Ridge Apartments Associates, LLC*, Michigan Court of Appeals Docket No 290875, rel’d 7/29/2010, on the grounds that (1) the “black ice” on a common sidewalk was open and obvious, without special aspects, and (2) that, pursuant to MCL 554.139(1)(a), the sidewalk was fit for its intended use despite the presence of snow and ice.

Plaintiff claimed that she slipped and fell on a patch of “black ice” on a common sidewalk leading to her apartment. She testified that she observed visible ice on the sidewalk and was attempting to avoid that ice when she slipped on a patch of “black ice” and fell. She claimed she did not see any ice in that spot before she fell, although she could feel it when she was on the ground. Plaintiff also testified that, while there was ice all over the sidewalk from the spot where she fell to the door of the building, there was no ice in that area when she left the building earlier that evening. She acknowledged that the temperature had not gone above freezing, that it had “snowed quite a bit” earlier that day, and that other sections of sidewalk contained snow and ice when she left earlier that evening.

SECRET WARDLE NOTES:

Secret Wardle successfully defends the “black ice” premises liability claim arising from a tenant’s slip and fall on a common sidewalk within an apartment complex. In *Lowery*, the Court of Appeals held that a patch of “black ice” was open and obvious as a matter of law, and that it did not trigger a statutory duty under MCL 554.139(1)(a) because the sidewalk was “clearly fit for its intended purpose as a matter of law even though it was not in ideal condition because it contained ice and snow.”

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Although Plaintiff's claim involved "black ice," which by its nature is invisible or nearly invisible, the Court of Appeals concluded that it was open and obvious as a matter of law. The Court determined that other indicia of potentially hazardous conditions existed, which would have alerted a reasonable person of ordinary intelligence of the potential for a dangerous condition. In addition, even though Plaintiff claimed there was not much lighting, the Court concluded that her testimony provided that there was sufficient lighting for her to recognize that there was ice and snow on the sidewalk before she fell. The Court also found that no special aspects were present, as the condition was not unavoidable (Plaintiff could have used the front walkway to access her apartment) and did not pose a substantial risk of death or severe injury. The Court also explained that whether snow removal was engaged in over the weekend was not relevant because the condition was open and obvious, with no special aspects.

To circumvent application of the open and obvious doctrine, Plaintiff also argued that Defendants breached their MCL 554.139(1)(a) statutory duty to keep the premises and common areas fit for the use intended by the parties. Rejecting this argument, the Court of Appeals held that the sidewalk was fit for its intended use even though it was not in ideal condition, since it provided reasonable access to/from the parking lot to the apartment building. The Court found dispositive Plaintiff's testimony that every time she left and came back to her apartment throughout the duration of her tenancy, she was able to use the sidewalk without incident, except on this one occasion. The Court recognized that a duty under MCL 554.139(1)(a) may exist regarding accumulations of snow and ice on a common sidewalk, but concluded that such a duty would only be triggered under more exigent circumstances than those shown in this case, citing *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 430 (2008).

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

www.secrestwardle.com

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CONTRIBUTORS

Premises Liability Practice Group Chair

Mark F. Masters

Premises Liability Practice Group Co-Chair

Caroline Grech-Clapper

Editor

Bonny Craft

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