Michigan Court of Appeals Varies on Whether Snow and Ice is Open and Obvious

By Robert Marzano and Patrick Ryan

May 2005

Like the old adage about Michigan weather, if you are uncertain about where the state courts stand on the open and obvious doctrine relating to snow and ice, just wait a few minutes because their positions will likely change.

A number of recent appellate court decisions have continued to define how the open and obvious doctrine should be applied in snow and ice cases.

In the case of *Carey v Admiral Petroleum*, Docket No. 248449 (2005), the plaintiff was injured when she fell on snow and ice while walking to pay for gas she had just pumped at the defendant's gas station. The circuit court dismissed the plaintiff's case, finding that the danger posed by the snow and ice on the ground in the area where the plaintiff fell was open and obvious.

The plaintiff appealed the decision to the Michigan Court of Appeals, claiming that the Michigan Supreme Court, in *Quinlivan v Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244 (1975) ruled that the ice and snow hazards were not open and obvious to all and may give rise to liability. The plaintiff also argued that the condition at issue was not open and obvious. The court of appeals disagreed.

In affirming the lower court's decision, the Michigan Court of Appeals held that since the plaintiff had lived in Michigan her entire life, knew that it had recently snowed, and was able to see the snow and ice in the area where she fell, any danger posed by the snow and ice was open and obvious. The court also rejected the plaintiff's claim that the danger was effectively unavoidable because there was more than one route the plaintiff could have taken to the entrance/exit of the gas station.

The significance of this decision is that the Michigan Court of Appeals continues to find, in many circumstances, that the danger presented by snow and ice is open and obvious. **This decision also sets forth certain factors to establish in order to satisfy the open and obvious danger doctrine such as length of time the plaintiff lived in Michigan, knowledge of weather conditions prior to the incident, ability to see the danger even after the incident, as well as available alternatives to the plaintiff with respect to encountering the danger.**

Notably, one panel of the Michigan Court of Appeals has held that if snow covers ice, such a condition is not open and obvious. In *Kenny v Kaatz*, 264 Mich App 99; 689 NW2d 737 (October 24, 2004), the Michigan Court of Appeals held as a matter of law that ice under snow is not open and obvious but a question of fact for the jury.

In that case, the defendant performed snow removal duties during the day, which included salting the parking lot to prevent ice formation. Despite the defendant's efforts, the plaintiff slipped while in the parking lot on what she described as a thin layer of "black ice" covered by snow. The appellate court held that the "black ice" was not open and obvious and remanded the case to the trial court.
Since the *Kenny* decision, which is currently on appeal to the Michigan Supreme Court, the Michigan Court of Appeals has issued a number of unpublished opinions with conflicting holdings in cases with similar Kenny fact patterns.

For example, the court in *Rosario v 16481 Ten Mile Road, LLC*, et al., Docket No. 249919 (2004), held that the plaintiff's slip and fall claim was barred by the open and obvious doctrine. In that case, the plaintiff slipped on a snowy and icy sidewalk outside her apartment building. In affirming the lower court's decision to grant defendant summary disposition, the court stated:

> "Even if plaintiff did not see the ice beneath the snow, a reasonable person knowing that it had rained the night before, on a cold, Michigan December night, and that road conditions were unfit for driving that morning, would have foreseen the danger presented by the snow-covered sidewalk."

Most recently, however, the Michigan Court of Appeals in *D'Agostini v Clinton Grove Condominium*, Docket No. 250896 (2005), held that a question of fact exists regarding the open and obvious nature of ice concealed by a layer of snow. In that case, the plaintiff slipped on ice underneath snow while exiting his car. Even though the plaintiff had previously walked over the area two times before he fell, the court ruled that because the ice was only noticeable when the snow in the immediate area was displaced, it was not open and obvious.

Accordingly, whether or not ice and snow is open and obvious depends on the specific facts of the case. These recent Michigan Court of Appeals decisions illustrate that the parameters of the open and obvious doctrine are further defined with each decision.